

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CRP/HLV HIGHLANDS RANCH, LLC,)	
)	
Petitioner,)	
)	
vs.)	Case No. 10-0016
)	
ST. JOHNS RIVER WATER)	
MANAGEMENT DISTRICT,)	
)	
Respondent.)	
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RECOMMENDED ORDER

Pursuant to notice, this matter was heard before the Division of Administrative Hearings by its assigned Administrative Law Judge, D. R. Alexander, on March 10, 11, and 12, 2010, in Jacksonville, Florida.

APPEARANCES

For Petitioner:	Frank E. Matthews, Esquire Eric T. Olsen, Esquire Julie M. Murphy, Esquire Hopping, Green & Sams, P.A. 119 South Monroe Street Tallahassee, Florida 32301-1529
For Respondent:	Veronika Thiebach, Esquire Lisa Zima Bosch, Esquire St. Johns River Water Management District 4049 Reid Street Palatka, Florida 32177-2529

STATEMENT OF THE ISSUE

The issue is the number of potential mitigation bank credits that Respondent, St. Johns River Water Management

District (District), should award Petitioner, CRP/HLV Highlands Ranch, LLC (Highlands Ranch), based on the application of Chapter 373, Florida Statutes,¹ and the Uniform Mitigation Assessment Method (UMAM) contained in Florida Administrative Code Rule Chapter 62-345.²

PRELIMINARY STATEMENT

On January 5, 2009, Highlands Ranch filed an application for a mitigation bank permit to construct, implement, and perpetually manage a 1,575.5-acre wetland mitigation bank to be known as the Highlands Ranch Mitigation Bank. The project is located in Clay County, Florida (County). On November 19, 2009, the District issued an Individual Environmental Resource Permit Technical Staff Report (Report), which recommended that the application be approved and Permit Number 4-019-116094-2 issued subject to certain conditions. The Report further recommended that 204.91 total potential UMAM credits be assigned to the bank. A point of entry to contest the Report was also offered Highlands Ranch.

On November 25, 2009, Highlands Ranch timely filed a Petition for Formal Administrative Hearing with the District. In response to a Motion to Dismiss filed by the District, on December 18, 2009, Highlands Ranch filed a First Amended Petition for Formal Administrative Hearing (Amended Petition) alleging generally that the District had failed to correctly

calculate the number of mitigation credits that should be awarded, and that it should have been awarded 688.324 total credits, rather than 204.91. The Amended Petition was referred by the District to the Division of Administrative Hearings on January 5, 2010, with a request that a formal hearing be conducted by an administrative law judge. On February 18, 2010, the District issued a second Report proposing that the applicant be awarded 193.56 mitigation bank credits, rather than the 204.91 credits proposed in the first Report.

By Notice of Hearing dated January 13, 2010, a final hearing was scheduled on March 10-12, 2010, in Jacksonville, Florida. On March 5, 2010, the parties each filed a unilateral Pre-Hearing Stipulation (Stipulation). In its Stipulation, Highlands Ranch reduced the amount of mitigation bank credits that it contended should be awarded from 688.324 to 425.

At the final hearing, Petitioner presented the testimony of Timothy A. Hamilton, senior project manager with Environmental Services, Inc., and accepted as an expert; Michael J. Saylor, a certified planner and accepted as an expert; Dr. W. Michael Dennis, president and a senior scientist with Breedlove, Dennis & Associates, Inc., and accepted as an expert; Calvin Alvarez, Environmental Administrator, Mitigation Section, Office of Submerged Lands and Environmental Resource Permitting of the Department of Environmental Protection (DEP) and accepted as an

expert; Marc Majed El Hassan, a representative of the owner of the property; and John A. Banks, Jr., a professional engineer with Geosyntec Consultants and accepted as an expert. Also, it offered Petitioner's Exhibits 1g1, 1g2, 1g10, 1j, 1oo, 1pp, 1ss, 2-11, 13-18, 25, 26, 30, 32-34, and 36, which were received in evidence. By agreement of the parties, Petitioner's substituted Exhibits 18, 30, 32, and 33 were filed on April 27, 2010. The District presented the testimony of Michelle Reiber, District Mitigation Banking Technical Program Manager and accepted as an expert; Jeffrey T. Elledge, Director of the District's Department of Water Resources and accepted as an expert; Farley J. Grainger, an appraiser and president of Broom, Moody, Johnson & Grainger, Inc., and accepted as an expert; Dawn C. Sonneborn, a certified land planner with the Genesis Group and accepted as an expert; Joseph P. Loretta, a registered landscape architect with the Genesis Group and accepted as an expert; and Harry Clark Hull, Jr., Director of the Environmental Resource Program with the Southwest Florida Water Management District (SWFWMD) and accepted as an expert. Also, it offered District Exhibits 1 (consisting of a gopher tortoise relocation plan, hunt management plan, final figure 9, and final figure 21), 2-5, 8-10, 12, 13, 22, and 27-31, which were received in evidence. Finally, the undersigned granted the District's Motion for Official Recognition of the Applicant's Handbook: Management and

Storage of Surface Waters (Applicant's Handbook or A.H.), February 16, 2010; Rule Chapters 40C-4, 40C-42, 62-113, and 62-345; Parts I and IV, Chapter 373, Florida Statutes; the Clay County Land Development Code; and the Clay County Comprehensive Plan (Plan).

A Transcript of the hearing (three volumes) was filed on April 13, 2010. Proposed Findings of Fact and Conclusions of Law were filed by the parties on April 23, 2010, and they have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based upon all of the evidence, including the parties' Stipulations, the following findings of fact are determined:

A. The Parties

1. Highlands Ranch is a Delaware limited liability corporation registered with the State to do business in Florida. The application reflects that its offices are located at 9803 Old St. Augustine Road, Suite 1, Jacksonville, Florida.

2. The District is a special taxing district created by the Florida Water Resources Act of 1972, as codified in Chapter 373, Florida Statutes. It is charged with the duty to prevent harm to the water resources of the District, and to administer and enforce Chapter 373, Florida Statutes, and the rules promulgated thereunder. These rules include, among others, Rule Chapters 40C-4 and 40C-42, and the Applicant's

Handbook. In addition, the District is charged with implementing Chapter 373, Florida Statutes, in part through application of Rule Chapter 62-345, entitled Uniform Mitigation Assessment Method and commonly referred to as UMAM. It has Environmental Resource Permit (ERP) jurisdiction in this matter.

B. Background

3. On January 5, 2009, Highlands Ranch submitted to the District permit application 4-019-116094-2 for approval of a mitigation bank on its property located in the County.

4. On November 19, 2009, the District issued its notice of intent to approve the application and to award 204.91 potential UMAM credits.

5. On November 25, 2009, Highlands Ranch timely filed its Petition challenging the proposed agency action. By an Amended Petition later filed on December 18, 2009, it requested a formal hearing to contest the District's proposal to award only 204.91 UMAM credits. Instead, it contended that 688.324 credits should be awarded. In Highland Ranch's Stipulation, however, it reduced the requested number of credits to 425. In a second Report issued on February 18, 2010, the District has likewise reduced the number of credits that it asserts should be awarded from 204.91 to 193.56.³ The sole issue in this case is the number of UMAM credits the District should award Highlands Ranch.

6. In its Amended Petition, Highlands Ranch generally contends that the District has misapplied UMAM in evaluating the application; that UMAM is a standardized procedure for determining mitigation; that the District's application incorrectly introduces other variables into the UMAM analysis not contemplated by the rule; and that the District's application of UMAM is different from the manner in which DEP, SWFWMD, and the South Florida Water Management District apply UMAM.

C. The Property

7. Highlands Ranch proposes to construct, implement, and operate a mitigation bank on 1,575.5 acres in the County. (The banking site is a part of a larger 1,800-acre tract purchased by the applicant for \$15 million.) The property is located in the west central part of the County around three miles south of County Road 218, southwest of the intersection of Louie Carter Road and Palmetto Road, and approximately two miles east of the Bradford County line. Jennings State Forest lies to the east, Camp Blanding Military Reservation (a Florida National Guard training facility) lies to the south, and a titanium mine abuts the property to the west. The property is within the District's jurisdictional territory.

8. The mitigation bank property consists of approximately 1023.50 acres of uplands and 552 acres of wetlands and is

located within the Northern St. Johns River and Northern Coastal Mitigation Drainage Basins.

9. The bank site lies at the confluence of the proposed Camp Blanding/Osceola Greenway and the proposed North Florida Timberlands and Watershed Reserve. These greenways are currently listed as desirable parcels for acquisition through the Florida Forever program, a conservation and recreation land acquisition program which is implemented by DEP, but acquisition and implementation of these greenways have not been completed. The acquisition of the Florida Forever parcels is intended to conserve natural resources, provide habitat to a number of listed species, and establish protected corridors between previously-acquired public lands. The property has also been identified as a Priority 1 category in the Century Commission's Critical Lands and Waters Identification Project (CLIP), a database of statewide conservation priorities which was developed to rank the relative importance of the Florida landscape in terms of biodiversity, landscape, and water resources.

10. At the present time, portions of the site are utilized for pine production, and have been for decades. Parts of the property have been subjected to typical pine plantation management activities including removal and suppression of native vegetation, application of herbicides and fertilizers,

installation of bedding and furrows, construction of trail roads and ditches, and fire suppression. Timber stands on the site vary in age from ten to twenty-five years, and the planted pines within parts of the property have been recently harvested.

11. Much of the community types present on the site have been altered from their native community type by the above-described historic and on-going silviculture activities. The existing communities present on the site include approximately 991 acres of mesic and xeric pine plantation, 224 acres of hydric pine plantation, 328 acres of isolated and contiguous wetlands, and 32.40 acres of trail roads, electric easements, and structures. Most of the onsite wetlands are associated with two named creek systems, Boggy Branch Creek and the Tiger Branch Creek, which are oriented in a west-to-east direction on the property. Boggy Branch Creek is located in the northern portion of the property, while Tiger Branch Creek is located in the southern part of the site. Both of these creek systems flow offsite to the east into the North Fork of Black Creek, which flows northward, ultimately reaching the St. Johns River.

12. The current County land use designation of the property is Agriculture. This designation allows the construction of one dwelling unit per twenty gross acres with a maximum cap of fifty residential building permits per site per year. The County's Future Land Use Map (FLUM) indicates that

there are approximately thirty-seven acres of Conservation Overlay on the property. The density of the overlay area is limited to one dwelling unit per hundred acres.

13. The current zoning on the property is also Agriculture (AG). This zoning category was established for the protection of agriculture as a major industry. This includes the prevention of encroachment on agriculture lands by incompatible uses and the protection of watersheds, water supplies, wilderness and scenic areas, and conservation and wildlife areas.

14. The AG zoning category provides for a range of acceptable permitted uses within that category, ranging from single-family dwellings with agricultural accessory uses to storage of heavy equipment and plant nurseries. There are also a range of conditional uses within the AG zoning category, which are allowable, subject to the satisfaction of additional criteria specified within the zoning regulations, after approval by the County. These include, among others, a Class III trench sanitary landfill, in which debris is buried and leveled at the ground surface.

15. In order to use the property for an above-ground Class I landfill, rezoning of the property by the County would be necessary. If it does not secure a desirable amount of mitigation credits, Highlands Ranch has indicated it will seek

to use the uplands part of the property as a Class I landfill. The County has issued a Request for Qualifications (RFQ) for entities interested in operating a Class I landfill in the County, but no site has been selected or rezoned as of this date. See Petitioner's Exhibits 15 and 16. Pursuant to the RFQ, and through its consultant, Highlands Ranch has performed a preliminary site suitability analysis for the property. See Petitioner's Exhibit 17. It has also received a "letter of interest" from Waste Management, Inc., concerning the placement of a landfill on the site. Whether Highlands Ranch's site would be selected by the County, whether a rezoning application would be successful, and whether a permit would then be issued by the appropriate regulatory authority, is speculative at this point. On the other hand, the District's experts opined that based upon a highest and best use analysis, silviculture is a more likely interim use of the property until market conditions change to increase the demand for large-lot, single-family developments.

D. Mitigation Bank Permits

16. A mitigation bank is defined in Section 373.403(19), Florida Statutes, as "a project permitted under s. 373.4136 undertaken to provide for the withdrawal of mitigation credits to offset adverse impacts authorized" by an ERP issued under Part IV, Chapter 373, Florida Statutes. (A mitigation bank permit is a type of ERP.) Section 373.4136(1), Florida

Statutes, authorizes the District to require a permit to establish, implement, and operate a mitigation bank. The bank then stores credits, and when a developer fills wetlands, and is legally required to replace them, he can purchase the banked wetland credits from the "banker" (in this case Highlands Ranch) and use them to meet the mitigation requirements. Mitigation banks are intended to "emphasize the restoration and enhancement of degraded ecosystems and the preservation of uplands and wetlands as intact ecosystems." § 373.4135(1), Fla. Stat., and § 12.4.1, A.H. When establishing a bank, the District's ERP rules specifically recognize preservation, enhancement, and restoration as separate forms of mitigation. See §§ 2.0(r), (pp), and (vv), A.H. Preservation as a form of mitigation "will most frequently be approved in combination with other mitigation measures." § 12.3.2.2., A.H.

17. Under Section 373.4136(4), Florida Statutes, a mitigation bank is to be awarded a number of mitigation credits by the permitting agency. A mitigation credit is a "standard unit of measure which represents the increase in ecological value resulting from restoration, enhancement, preservation, or creation activities." Fla. Admin. Code R. 62-345.200(8). The number of mitigation credits must be "based upon the degree of improvement in ecological value expected to result from the establishment and operation of the mitigation bank as determined

using a functional assessment methodology." § 373.4136(4), Fla. Stat. Ecological value is defined in Rule 62-345.200(3) as:

the value of functions performed by uplands, wetlands and other surface waters to the abundance, diversity, and habitats of fish, wildlife, and listed species. Included are functions such as providing cover and refuge; breeding, nesting, denning, and nursery areas; corridors for wildlife movement; food chain support; natural water storage, natural flow attenuation, and water quality improvement which enhances fish, wildlife, and listed species utilization.

The District has adopted a substantially similar provision in Section 12.4.5(b), Applicants Handbook.

18. After mitigation credits are awarded, a credit release schedule is set for the mitigation bank. See § 373.4136(5), Fla. Stat.

19. The statutory criteria for reviewing and acting on an application for a mitigation bank permit are set forth in Section 373.4136, Florida Statutes. The District has also adopted rules governing the establishment and operation of mitigation banks which are contained in Rule Chapter 40C-4 and Section 12.4 of the Applicant's Handbook.

E. The Application

20. Highlands Ranch is proposing to place a conservation easement over the mitigation bank property and to conduct enhancement activities in those areas of the property needing improvement as a result of current land uses. Generally, it

proposes to cease all pine production practices and cutting of cypress and hardwood trees after the permit is issued. It has also proposed to improve hydrologic conditions on the property by removing a trail road, installing four low water crossings, and removing pine bedding and furrows within all areas planted with pine on the property. Finally, supplemental plantings of appropriate canopy species will be conducted. The project will be implemented in three phases: Phase 1 (554.52 acres); Phase 2 (547.42 acres); and Phase 3 (473.55 acres).

21. The parties agree that Highlands Ranch has satisfied all requirements in the Applicant's Handbook relating to a conservation easement, District access to the property, a letter of credit, title insurance, a boundary survey, and mitigation bank activities.

22. The parties further agree that Highlands Ranch has provided reasonable assurance that all statutory and rule requirements have been met, and that it meets the requirements for the issuance of an ERP to establish and operate a mitigation bank. The only dispute is the number of credits that it should be awarded. The difference in the credits proposed by the parties is based upon how they interpret and apply the UMAM rule. Although conflicting evidence was presented by the parties on this issue, the more persuasive evidence supports a finding that the methodology used by the District is appropriate

under the facts presented herein, and that the number of credits that it proposes to award the applicant should be accepted.

F. The UMAM Process

23. When an applicant proposes to establish a mitigation bank, it must submit the necessary supporting information for the application of Rules 62-345.400, 62-345.500, and 62-345.600. This information generally includes the current site conditions, the mitigation plan, and how the applicant expects the mitigation plan to result in ecological gain.

24. Once an application is filed, the District's responsibility is to verify this information and apply the assessment method described in the UMAM rule to determine the potential amount of mitigation credits to be awarded. See Fla. Admin. Code R. 62-345.300(1). Here, before completing the UMAM sheets, the District performed a review of the application, conducted multiple site inspections, met with the applicant's consultants, submitted requests for additional information, and reviewed other resources such as the Natural Resources Conservation Service soil maps for the area, the UMAM Training Manual, aerial photographs, and the Florida Forever acquisition list.

25. Section 373.414(18), Florida Statutes, provides in part that DEP "and each water management district responsible for implementation of the environmental resource permitting

program shall develop a uniform mitigation assessment method for wetlands and other surface waters" that would provide "an exclusive and consistent process for determining the amount of mitigation needed." Once adopted, the method is "binding on the department, the water management districts, local governments, and any other governmental agencies." Id. In 2004, pursuant to the mandate of the statute, DEP adopted Rule Chapter 62-345, entitled UMAM. UMAM is the sole means for determining the amount of mitigation credits to award to mitigation banks receiving permits after 2004 and applies to Highlands Ranch's application. See §§ 373.414(18) and 373.4136(4), Fla. Stat.

26. Highlands Ranch argues that the use of the words "consistent" and "uniform" in Section 373.414(18), Florida Statutes, means that DEP's methodology for implementing the UMAM rule is the only acceptable method that can be used. However, the DEP Environmental Administrator in charge of policy and oversight for all rules relating to mitigation, including UMAM, stated that the District's method, while different in some respects from the method used by DEP, is still "allowable under the rule," given the rule's variables. Tr. 201. The DEP expert described UMAM as a "framework" in which a number of variables come into play, and that besides using biological and ecological data, the assessor must also use "reasonable scientific judgment and [his or her] best professional judgment" in performing the

assessment. Therefore, even though UMAM is a "standardized" or "uniform" procedure, it can be reasonably inferred that within the rule's broad framework, an assessor, using reasonable scientific judgment and his or her best professional judgment, has some leeway in applying the rule, and as is the case here, two assessors can obtain two different results on the same property. Notably, the SWFWMD also interprets the rule in the same manner as the District. The method used by the District in this case and by SWFWMD, although different from DEP, has never been questioned by DEP, and DEP has never advised either agency to modify or change its approach. Further, there are no DEP final orders or other precedent approving or disapproving either methodology proposed by the parties. Finally, Highlands Ranch's expert, Dr. Dennis, agreed, with certain limitations, that there is "some flexibility" in the UMAM rules in terms of using "reasonable scientific judgment."

27. In general terms, the UMAM is designed to assess any type of impact and mitigation of wetlands and wetlands functions, including the evaluation of mitigation banks, and it provides a framework for statewide standardized wetland assessment across community type. A qualitative characterization of the property (known as a Part I evaluation) is first conducted by the assessor by dividing the property into assessment areas for wetlands and uplands and completing a Part

I evaluation and score sheet for each assessment area. See Fla. Admin. Code R. 62-345.200(1) ("'[a]ssessment area' means all or part of a wetland or surface water impact site, or a mitigation site, that is sufficiently homogeneous in character, impact, or mitigation benefits to be assessed as a single unit"). Under Part I, the assessment areas must be described in sufficient detail to provide a frame of reference for the type of community being evaluated and to identify the functions that will be evaluated. See Fla. Admin. Code R. 62-345.400. Each area description must include the size of the area, its native community type, and the functions it could optimally provide to fish and wildlife and their habitat. Id. This Part must be completed before scoring the assessment area in Part II, since the frame of reference will be used to determine the degree to which the assessment area provides those functions and the amount of function lost or gained by the project. A correct determination of the appropriate assessment areas is important as this affects the acreages that will be scored in the Part II evaluation, which in turn affects the determination of the number of credits to be awarded to the bank.

28. Using the frame of reference established in Part I, the assessor is then required to score the amount of functional gain that will be achieved by implementation of the types of mitigation to be conducted on the property. See Fla. Admin.

Code R. 62-345.500(1). Under the **Part II evaluation**, wetland assessment areas are evaluated in three categories or indicators of function, scored numerically on a scale from 0 to 10 (where 10 indicates a minimally impaired system): location and landscape support; water environment; and community structure.⁴ See Fla. Admin. Code R. 62-345.500(6). Upland assessment areas are only scored for two indicators of function: location and landscape support and community structure. See Fla. Admin. Code R. 62-345.500(2). The rule then sets forth in a detailed manner how the assessor calculates the functional gain for each area to obtain the potential number of banking credits. The primary reasons for the credit award differences by the parties in this case are the District's use of a two-step approach, while Highlands Ranch used a one-step approach,⁵ and the fact that the District gave a much smaller amount of functional gain for the location and landscape support category for upland enhancement mitigation activities than did the applicant.

G. **The District's Assessment**

a. Part I Assessment

29. The District first identified eleven geographic areas on the property and grouped them into seven mitigation assessment areas. It then completed a Part I evaluation and score sheet for each assessment area. The District made the determination that each assessment area was sufficiently

homogeneous in character to be assessed as a single unit based on information received from the applicant during the review process, including historic aerial photographs and soil maps; observations during three, six-hour site visits in March and June 2009 and January 2010; a review of literature and information, including some related to community types; and designations of the site as a potential acquisition parcel through a program such as the Florida Forever program. All of the assessment areas on the property are mitigation sites since this is an application for a mitigation bank.

30. The seven assessment areas (and their target community and acreage) identified by the District for the Part I assessment are: Wetland Enhancement - Wetland Forested Mixed Wetlands 1 and 2 (W1 and W2 - 223.8 acres); Bay Swamp - Preservation with minor enhancement W3 and W4 (42.4 acres); Stream and Lake Swamp - Preservation with minor enhancements W5 and W6 (239.8 acres); Wetland Enhancement - Wetland Forested Mixed W7 and W8 (43.9 acres); Stream and Lake Swamp - Restoration W9 (0.5 acres); Upland 1 (U1) Pine Plantation to Longleaf Pine Xeric Oak (203.94 acres); and Upland 2 (U2) Pine Plantation to Upland Pine Forest/Pine Flatwoods (786.98 acres). The specific locations, native community type, and acreage for each area are found in District Exhibit 3. (In contrast, Highlands Ranch's expert, Dr. Dennis, identified eleven wetlands

and uplands areas grouped into the following six assessment areas: W1 and W2 (257.44 and 2.86 acres); W7 and W8 (45.17 and 5.24 acres); W3 and W4 (28.28 and 1.57 acres); W5, W6, and W9 (209.85, 1.81, and 0.58 acres); U1 (291.69 acres); and U2 (699.21 acres). See Petitioner's Exhibit 11.) Despite the differences in the size and characteristics of the parties' assessment areas, another Highlands Ranch consultant, Mr. Hamilton, agreed that the District's acreage and native community type for each area were correct. The District's site inspections were also attended by members of the Interagency Review Team (IRT), made up of representatives of the District (whose mitigation banking manager is co-chair), United States Army Corps of Engineers, United States Fish and Wildlife Service, National Marine Fisheries Service, and the United States Environmental Protection Agency. The record does not show that any IRT member objected to the District's identified assessment areas or designated native community types.

31. Dr. Dennis disagreed with the native community type identified by the District for several of the wetlands on site. For example, on the Wetland Enhancement - Wetland Forested Mixed W1 area, he identified the native community type of the wetlands lying adjacent to Boggy Branch and Tiger Creek as wet pine flatwoods, as opposed to the District's designation of Wetland Forested Mixed/Hydric Hammock, which is a combination of pine

and hardwoods. However, Dr. Dennis' identification is not consistent with the generally accepted description of a pine flatwoods community, which generally occurs on flat terrain. There is a 70-foot drop in elevation across the mitigation bank property, and the slope is particularly significant in the W1 areas. Also, the current silviculture conditions on this area are able to support hardwoods, and the natural vegetation occurring in the area is a hardwood type of vegetation.

32. Dr. Dennis further criticized the District's use of only a code number from the Florida Land Use and Cover Classification System (FLUCCS) to describe the target community on each area and contended that more detail was needed to comply with the rule. The difference in descriptions used by the parties can be found when comparing Petitioner's Exhibit 11 and District Exhibit 3. Specifically, besides using a FLUCCS code, Dr. Dennis also provided a more detailed description of the plant species, soils, and canopy in the Assessment Area Description section of the form. He also differed in his descriptions of the functions, historic use, uniqueness, and hydrologic connections of the property. While the District's expert agreed that the lengthier descriptions used by Dr. Dennis in his Part I assessment were "more helpful" to someone unfamiliar with the UMAM process, she established that it is not necessary to provide more detail here than a FLUCCS code and the

type of narrative used by the District on the Part I form. These codes, together with the District's more succinct assessment area descriptions, were sufficient information to enable the District, as the assessor, to properly evaluate and score the assessment area's functions, as required by the rule.

33. Dr. Dennis also identified different acreages for the upland assessment areas U1 and U2 based on the boundaries of the native community types. (Dr. Dennis determined the size of the U1 and U2 areas to be 291.69 and 699.21 acres, respectively, while the District determined the areas for U1 and U2 to be 203.94 and 786.98 acres, respectively.) However, community boundary lines in the environment are not distinct lines or boundaries as one would see on a map. Where the same plant species are found in two adjacent communities, and the soil types and characteristics are similar, it is not uncommon for two ecologists to have a different interpretation as to where community boundaries should be placed.

34. The evidence supports a finding that the District's characterization and acreage for each assessment area were reasonable, should be accepted, and provide a sufficient frame of reference to use in the Part II evaluation of the property.

b. Part II Assessment of Wetlands

35. Using the frame of reference established in Part I, the District was then required to score the amount of functional

gain that will be achieved by the implementation of the types of mitigation to be conducted on the property. For each wetland area identified under Part I, the District first evaluated the functional gain of preserving the wetland assessment area and then scored the additional functional gain that would result from the enhancement or restoration activities proposed for that assessment area. This type of process, which evaluates the functional gain associated with each type of mitigation, is referred to as a "two-step approach" under UMAM and is the primary focus of the controversy. Using this approach, the District prepared a Part II score sheet for both preservation and enhancement. In contrast, Highlands Ranch used a "one-step approach," which scored any area that would be both preserved and enhanced (restored) only as enhancement (restoration) under UMAM and did not apply or conduct the analysis for preservation. While the two-step process is not specifically described in the rule, given the variables in the rule, DEP's acknowledgement that the District's methodology is "allowable," and the leeway in the rule itself, the District's two-step methodology is found to be permissible and has been accepted.

36. For preservation, the District evaluated each wetland assessment area to be preserved under the "without preservation" condition and the "with mitigation" condition with regard to three indicators: location and landscape support; water

environment; and community structure. A "'with mitigation' assessment means the outcome at an assessment area assuming the proposed mitigation is successfully completed," while a "'without preservation assessment' means the reasonably anticipated outcome at an assessment area assuming the area is not preserved." Fla. Admin. Code R. 62-345.200(11) and (12).

37. When assessing preservation, the "without preservation" assessment evaluates an "assessment area's functions with regard to the three indicators, considering the extent and likelihood of what activities would occur if it were not preserved, the temporary or permanent effects of those activities, and the protection provided by existing easements, restrictive covenants or state, federal and local rules, ordinances and regulations." Fla. Admin. Code R. 62-345.500(3)(a). When assessing preservation, the "with mitigation" assessment is scored with regard to the indicators after considering "the potential of the assessment area to perform current functions in the long-term considering the protection mechanism proposed." Id. The gain in ecological value for each assessment area is determined by the mathematical difference between the Part II scores for the "without preservation" and the "with mitigation" conditions (referred to as the "delta") multiplied by a preservation adjustment factor (PAF). Id. For each of the three indicators, the District

evaluated the applicable considerations set forth in Rule 62-345.500(6)(a)-(c).

38. For areas proposed to be restored or enhanced, Highlands Ranch's one-step approach did not consider what would happen to the property if it were not preserved. Under the District's two-step approach, however, which considers preservation as a form of mitigation, the "without preservation" assessment considers "the extent and likelihood of what activities would occur if it were not preserved." Fla. Admin. Code R. 62-345.500(3)(a). On this issue, the evidence is sharply conflicting. The more persuasive evidence supports a finding that the property will more than likely continue to be managed for timber production, and the adjacent uplands outside of each wetland assessment area will in the long term more than likely be developed as low density residential development. The owner's contention that the most likely scenario for future use of the property is a Class I regional landfill has been rejected as being highly speculative at this point, given the difficult hurdles the applicant must overcome in order to secure zoning and permit approval for that type of activity.

39. Preserving the wetlands on the property will prevent silvicultural activities within each assessment area and, with the implementation of the proposed mitigation bank, each wetland assessment area will be adjacent to protected uplands, rather

than residential development that would likely otherwise occur. Therefore, the landscape support of each wetland assessment area will improve. The District recognized this improvement by awarding a one-point increase in the location and landscape support indicator for the preservation of wetland assessment areas W1 through W8.

40. The District also recognized improvements in the community structure that would occur as a result of a wetland assessment area's preservation by awarding a one-point and two-point increase in the community structure indicator for wetland assessment areas W1, W2, W5, W7, and W8, and for W3, W4, and W6, respectively.

41. The District did not award any increase in the score with regard to the water environment indicator for the preservation of wetland assessment areas W1 through W8. In areas W1 and W2, recording a conservation easement could improve some of the water environment through natural erosion and degradation of the silvicultural beds over a long period of time, which would eventually fill the furrows. The water environment would also be improved by successional vegetative processes. However, Highlands Ranch has proposed to speed up the lengthy natural process in these areas by vegetative thinning and flattening the silvicultural beds and furrows. Therefore, the District accounted for these improvements in the

water environment being implemented on a faster schedule when it scored these areas for enhancement. No water environment improvements will occur due to preservation of the remaining areas.

42. No preservation value was awarded for assessment area W9 (0.5 acres) since this is an existing road and gains in the ecological value will be achieved through the restoration activities proposed by Highlands Ranch.

43. After the scores for the preservation of areas W1 through W8 were prepared, the District determined the appropriate PAF for each assessment area. Fla. Admin. Code R. 62-345.500(3)(a). The PAF is scored on a scale from zero (no preservation value) to one (optimal preservation value) on one-tenth increments. Id. The PAF is essentially a way to value the preservation area. The District determined each PAF by weighing the relative significance of each of the five considerations set forth in Rule 62-345.500(3)(a)1.-5. These considerations are not given equal weight since they are weighed based on applicability and relative significance. Id. One of the considerations is "[t]he extent and likelihood of potential adverse impacts if the assessment area were not preserved." Fla. Admin. Code R. 62-345.500(3)(a)5. The District gave considerable attention to this criterion. In assessing the potential adverse impacts, the District retained expert land

planners and appraisers to evaluate the threat of development. Although Highlands Ranch pointed out that the District has never before retained such experts to review mitigation bank properties for this purpose, there is nothing in the rule that prevents the District from doing so when considering this criterion. The fact that land use considerations do not involve pure "scientific judgment" does not invalidate the analysis since an assessor must use not only "scientific judgment" in the UMAM process, but also "professional judgment." By assuming that a rural residential development was the most likely future use, the District applied a PAF of less than one to every assessment area except W9 (0.5 acres), an existing road and bridge, which reduced the number of credits.

44. After scoring the functional gain associated with the preservation of the wetland assessment areas, the District then scored the functional gain that would be achieved from the proposed enhancement activities in areas W1 through W8 and restoration activities in area W9.

45. To determine the functional gain associated with proposed enhancement or restoration activities, the District scored the "current condition" and the "with mitigation condition" with regard to the three indicators and then applied an appropriate time lag and risk factor to each assessment area. The District did not apply the PAF when it scored the functional

gain associated with the enhancement or restoration of an assessment area.

46. Time lag is a measure of how long it will take to achieve the scores given to the indicators in the "with mitigation" condition. The District determined the time lag after considering the activities proposed in a particular assessment area. Fla. Admin. Code R. 62-345.600(1)(d). For example, the time lag assigned to area W1 was 1.92 (which equates to 21 to 25 years) since the native community is Wetland Forested Mixed, and the applicant has proposed supplemental planting with hardwood trees that will need time to grow and develop a canopy and achieve the "with mitigation" conditions.

47. Risk is a measure of uncertainty that the proposed conditions for an assessment area are going to be achieved. This determination was made by the District in accordance with the six factors set forth in Rule 62-345.600(2)(a)-(f).

48. The total functional gain of all of the wetland preservation, enhancement, and restoration activities proposed for the property is 45.76 credits. See District Exhibit 29, p. 2. The number of credits (functional gain) associated with each area was derived by multiplying the relative functional gain for each area by the acreage of the assessment area. The summary table in District Exhibit 29 contains the scores for each of the three relevant indicators and factors (PAF, risk, and time lag)

and the functional gain and relative functional gain. These scores and values have been accepted as being the most persuasive on this issue.

c. The District's Part II Evaluation of Upland Areas

49. Under UMAM, upland mitigation assessment areas are scored using only two of the three indicators: location and landscape support and community structure. See Fla. Admin. Code R. 62-345.500(2). Scoring of these indicators must be based on "benefits provided to the fish and wildlife of the associated wetlands or other surface waters, considering the current or anticipated ecological value of those wetlands and other surface waters." Id.

50. Although there are two types of upland communities on the property, for the Part II evaluation of upland areas, the District combined the U1 and U2 assessment areas. The applicant did not combine its two upland areas and contended this action contravenes the UMAM rule. The areas were combined because the District views the primary consideration under the rule to be a determination as to how the uplands as a whole benefit the fish and wildlife of the associated wetlands. The combining of the two areas for assessment purposes was not shown to be unreasonable or inappropriate.

51. Given the configuration and characteristics of the property, the District determined that certain uplands on the

property provide greater benefits to the wildlife of the adjacent wetlands than others. Accordingly, the District determined that uplands located within 500 feet of the wetlands provided greater benefits to the fish and wildlife of the associated wetlands than those located more than 500 feet away. Therefore, a further subdivision of the upland areas was made by dividing the combined Part I upland areas (U1 and U2) into two Part II assessment areas, one encompassing the uplands located within 500 feet of the associated wetlands on the property and the second encompassing uplands located more than 500 feet from the associated wetlands on the property.

52. Highlands Ranch criticized this division of the upland areas, contending that a 500-foot division line is arbitrary and that the District has never made a similar division in prior mitigation bank cases. The decision to divide the uplands into areas within 500 feet of the wetlands and more than 500 feet from the wetlands is supported by guidance provided in the UMAM Training Manual. See Petitioner's Exhibit 18. The manual cites a number of studies, including one in neighboring St. Johns County, which indicates that of the approximately 200 wetland-dependent native wildlife species listed, only about 25 percent of the species have spatial habitat requirements that extend more than 500 feet from the wetlands. Id. at p. 89.⁶ The site's unique characteristics provide further support for the

District's decision to divide an upland assessment area in this manner. Approximately sixty percent of the property is uplands, with a greater majority of the uplands more than 500 feet from the adjoining wetlands. Finally, the approach recommended by Highlands Ranch (i.e., no division) would mean that the uplands closest to the wetlands provide the same amount of benefits as those located further away. This produces an unreasonable result, given that the majority of the uplands are more than 500 feet from the wetlands, and some are more than 1,000 feet away.

53. The District further subdivided each of the two Part II upland areas by determining the acreage of "total impact" and of "partial impact" based on the assumption that there would be a rural residential development on the property if the site was not preserved. This was done because the UMAM rule provides that the assessor must evaluate assessment areas that are to be preserved in a "without preservation" scenario. In the "without preservation" scenario, Rule 62-345.500(3)(a) provides that the District

shall evaluate the assessment area's functions considering the extent and likelihood of what activities would occur if it were not preserved, the temporary or permanent effects of those activities, and the protection provided by existing easements, restricted covenants or state, federal or local rules, ordinances and regulations.

54. In accordance with the rule, the District determined that a low-density residential equestrian development was the most likely harmful activity that would occur if the property were not preserved. This determination was based on the information provided by Highlands Ranch during the application review process, which included a representation by the applicant that one potential use of the property would be an equestrian type low-density development; a review of aerial photographs; observed activities in the area surrounding the property; review of local ordinances; the County Plan, including the FLUM, and zoning and density regulations; and information and analysis provided to the District by both its expert appraiser and planner.

55. The areas described as "total impact" refer to the acreage of the upland assessment areas that would become impervious surface and would have no functional value if the property were developed as a low-density residential equestrian development. The areas described as "partial impact" refer to the remaining areas of the low-density development where some impacts would occur because the areas would comprise portions of the residents' lots. However, these areas would not result in a complete functional loss and would still have some habitat value for the wildlife utilizing the wetlands on the property proposed for the mitigation bank.

56. To determine the acreage of total impact area, the District identified and reviewed several residential equestrian projects in northeast Florida that it had previously permitted. It then performed an analysis to determine an average acreage of impervious surface associated with these types of developments. Using this approach, it was determined that 35.4 acres of impervious surface would be associated with this type of development on the property if it were not preserved. This acreage was then used to determine the percentage of impervious surface in the 1023.50 acres of uplands would be 3.46 percent. This percentage was applied to the upland assessment areas.

57. The uplands without the proposed conservation easement are anticipated to become impervious surface were assigned a score of zero in the "without preservation" condition for the two indicators applicable to uplands. As impervious surface, these uplands will not provide any community structure functions. Under Rule 62-345.500(2)(a), "when the community structure is scored as 'zero', then the location and landscape support shall also be 'zero.'" In the "with mitigation" condition, these uplands would consist of preserved upland pine forest and long-leaf pine oak communities that have been subjected to pine-plantation silvicultural practices for many years. For this condition, the uplands located greater than 500 feet away from the wetlands were assigned a score of six for

community structure and five for location and landscape support. Likewise, the uplands located 500 feet or less away from the wetlands were assigned a score of six for community structure and nine for location and landscape support.

58. The uplands that would be partially impacted if they are not preserved were also scored with regard to the location and landscape support and the community structure indicators. In both the "with mitigation" and the "without preservation" conditions, the District scored the location and landscape support of those uplands located within 500 feet of the associated wetlands as nine and those uplands located greater than 500 feet from the associated wetlands as five. The community structure for those uplands was assigned a score of four in the "without preservation" condition and six in the "with mitigation" condition.

59. The District then scored the enhancement activities proposed for each of those areas and applied a time lag and risk factor to each enhancement area. It assigned the same score of nine in the "current condition" and in the "with mitigation" condition for the location and landscape support indicator for those uplands located within 500 feet or less of the wetlands and a score of five in those two conditions for those uplands located more than 500 feet from the wetlands. The District scored the community structure indicator as six in the "current

condition" and as nine in the "with mitigation" or enhanced condition. The "current condition" scores for enhancement of the uplands for both of these indicators reflect that these uplands will have been preserved before they are enhanced.

60. Finally, the District determined that the functional gain of the upland assessment areas associated with the preservation and enhancement activities proposed by Highlands Ranch is 147.80 credits, or 0.15 credit per acre. (In contrast, Highlands Ranch's expert calculated 291.99 credits, or 0.29 credit per acre, for the U1 and U2 areas, almost twice as many as the District.) The scores, including the relevant adjustment factors (PAF, time lag, and risk) are set forth in District Exhibit 29 and are hereby accepted.

61. Highlands Ranch criticized the District's decision to not award any increase in score in the location and landscape support indicator for preservation of the uplands that would be partially impacted in the "without preservation" condition, and the enhancement of the upland assessment areas. Of the eight subdivided upland areas, six had the same score for the without mitigation/without preservation condition and with mitigation condition for the location and landscape support indicator. This resulted in the District awarding zero "lift" (improvement in ecological function provided by the proposed mitigation activities) for improvements in location and landscape support

for approximately sixty percent (956.81 acres) of the site. In contrast, Dr. Dennis awarded lift to the uplands primarily because the site is located within the priority one parcel category in the CLIP.

62. The District's determination not to increase the score for the upland assessment areas was appropriate because the focus of the evaluation of uplands under UMAM is the benefits that they provide to the fish and wildlife of the associated wetlands. The preservation of these uplands through a conservation easement and their enhancement will not change the level of protection of wetland functions that they provide due to their location in the landscape. The District considered this level of protection to be significant for uplands located within 500 feet of the wetlands and moderate for uplands located more than 500 feet away from the wetlands, both in the "without preservation" and the "with mitigation" condition. On the other hand, the District recognized that the easement and enhancement activities will result in improvements in community structure and gave credit for these improvements when it scored that indicator for the uplands in the "with mitigation" condition for preservation and then in the "with mitigation" condition for their enhancement.

63. Highlands Ranch's Part II assessment generated more than two-thirds (291.99) of its total requested bank credits

(425) from enhancement activities proposed in the uplands. If this assessment were accepted, the amount of credits generated from uplands would be sufficient to offset the destruction of 85 percent (496.2 acres) of the wetlands, including all of the wetlands associated with Boggy Branch Creek and Tiger Branch Creek. Because most of the value of this site comes from the wetlands, with the uplands providing supplemental value, preservation of the uplands cannot be worth more than the wetlands they are protecting. In other words, uplands cannot provide or replace all of the functions that wetlands provide to fish and wildlife. For this reason, the applicant's assessment of uplands is found to produce an unreasonable result.

64. Another significant difference between the parties' scoring is found in the community structure indicator for the upland areas. In its analysis, Highlands Ranch gave a score of three for the community structure indicator of the areas designated as U1. This would mean that the level of function provided by the existing vegetative community to benefit fish and wildlife in the associated wetlands is currently only thirty percent of that provided by the optimal level. (A score of ten is an optimal level of function.) To justify a score as low as four for this indicator, or one point higher than the score assigned by the applicant, the U1 area should have a predominance of the following characteristics: the majority of

plant cover is by inappropriate, undesirable plant species, invasive exotic plant species, or other invasive plant species; minimal evidence of regeneration or natural recruitment; atypical age and size distribution of the system; coarse woody debris and the like; poor plant condition; alteration of natural structures or introduction of artificial features; reduction in extent of topographic features; a moderate degree of siltation or algal growth in submerged aquatic plant communities; and only a "moderate" level of support for fish and wildlife. See Fla. Admin. Code R. 62-345.500(6)(c)1.c.I-X. Therefore, under UMAM, a score of four would mean at least a minimal level of support of wetland/surface water functions, while a three would logically mean less than minimal. In scoring the combined U1 and U2 areas for this indicator, the District assigned higher scores, depending on whether the uplands were identified as total or partial impact, and more or less than 500 feet from the wetlands. See District Exhibit 3, pp. 27-32. The greater weight of evidence supports a finding that the current level of support for fish and wildlife is at least minimal, and probably closer to moderate, as reflected in the District's assessment. See, e.g., District Exhibit 4, p. 53. Therefore, the District's assessment on this issue has been accepted.

65. The other contentions raised by Highlands Ranch have been considered and rejected.

c. Summary

66. The preponderance of the evidence supports a finding that the UMAM assessment used by the District, rather than the assessment presented by the applicant, should be used for awarding potential banking credits. When the credits for upland assessment areas (147.80) are added to the functional gain credits for the wetlands assessment areas (45.76), the total number of mitigation banking credits to be awarded Highlands Ranch is 193.56.

CONCLUSIONS OF LAW

67. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

68. As the applicant, Highlands Ranch has the burden of establishing by a preponderance of the evidence that 425 credits is the appropriate amount to be awarded rather than the District's intended action of issuing a mitigation bank permit with 193.56 potential mitigation bank credits.

69. Section 373.4136(1), Florida Statutes, authorizes the District to require a permit to establish, implement, and operate a mitigation bank. A mitigation bank is defined by Section 373.403(19), Florida Statutes, as "a project permitted under s. 373.4136 undertaken to provide for the withdrawal of mitigation credits to offset adverse impacts authorized" by an

ERP issued under the authority of Part IV, Chapter 373, Florida Statutes.

70. A mitigation bank implements various forms of mitigation recognized by the District's rules. The rules specifically recognize preservation, enhancement, and restoration as separate and distinct forms of mitigation. See §§ 2.0(r), (pp), and (vv), A.H. Because of the "values" that uplands provide to wetlands, "the preservation of certain uplands may be appropriate for full or partial mitigation of wetland impacts." § 12.3.2.2.(d), A.H. It follows that preservation and enhancement of uplands are acceptable forms of mitigation. The UMAM rule does not supersede or modify these ERP rules. See Fla. Admin. Code R. 62-345.100(4)("[t]his method is not intended to . . . determine the appropriateness of the type of mitigation proposed").

71. The statutory criteria for reviewing and acting on an application for a mitigation bank permit are set forth in Section 373.4136, Florida Statutes. The District has also adopted rules governing the establishment and operation of a mitigation bank, which are found in Rule Chapter 40C-4 and section 12.4 of the Applicant's Handbook. Except for the number of mitigation credits that it should be awarded, Highlands Ranch has satisfied all other applicable criteria for an ERP.

72. In determining the number of credits to be awarded, Section 373.414(18), Florida Statutes, provides the following guidance:

The uniform mitigation assessment method must determine the value of functions provided by wetlands and other surface waters considering the current conditions of these areas, utilization of fish and wildlife, location, uniqueness and hydrologic connection and when applied to mitigation banks, the factors listed in s. 373.4136(4).

73. Section 373.4136(4), Florida Statutes, enumerates the following factors that must be evaluated in determining the degree of improvement in ecological value:

- (a) The extent to which target hydrologic regimes can be achieved and maintained.
- (b) The extent to which management activities promote natural ecological conditions such as natural fire patterns.
- (c) The proximity of the mitigation bank to areas with regionally significant ecological resources or habitats such as national or state parks, Outstanding Natural Resource Waters and associated water sheds, Outstanding Florida Waters and associated water sheds and lands acquired through government or non-profit land acquisition programs for environmental conservation; and the extent to which the mitigation bank establishes corridors for fish, wildlife or listed species to those resources or habitats.
- (d) The quality and quantity of wetland or upland restoration enhancement preservation or creation.
- (e) The ecological and hydrologic relationship between wetland and uplands in the mitigation bank.

(f) The extent to which the mitigation bank provides habitat for fish and wildlife, especially habitat for species listed as threatened, endangered, or of special concern or provides habitats that are unique for that mitigation service area.

(g) The extent to which the lands are to be preserved are already protected by existing state, local or federal regulations or land use restrictions.

(h) The extent to which lands to be preserved would be adversely affected if they were not preserved.

(i) Any special designation or classification of the affected waters and lands.

74. Factors (g) and (h) are specifically addressed in Rule 62-345.500(3)(a), which sets forth the analysis to be conducted under UMAM for areas to be preserved, and in Rule 62-345.500(3)(a)5., which identifies "[t]he extent and likelihood of potential adverse impacts if the assessment area were not preserved," as one of the factors to be weighed in determining the PAF. The rule affords the District considerable discretion in determining the "applicability and relative significance" of these factors when assessing preservation. For the reasons previously found, the fact that DEP does not separately evaluate factors (g) and (h) when performing its analysis of assessment areas that are proposed to be restored or enhanced does not invalidate the District's two-step approach. When performing a UMAM evaluation of a mitigation bank, the District (and SWFWMD) has opted to evaluate each assessment area's preservation value

under the rule, and if proposed to be enhanced or restored, to then evaluate the enhancement value of the assessment area.

Under the evidence presented here, this interpretation of the rule was reasonable. Therefore, the District's analysis used in this case is not inconsistent with the statute or rule.

75. Highlands Ranch contends, however, that its analysis using a one-step approach is mandated by the language in Rule 62-345.500(1)(a), providing that each mitigation assessment area must be assessed under Part II of UMAM under only two conditions: (1) current condition, or, in the case of preservation mitigation, without preservation, and (2) with mitigation or with impact. However, sections (1) and (9) of Rule 62-345.200 provide further support for the District's two-step methodology by defining an assessment area as "a mitigation site" and further defining the term "mitigation site" as "wetlands and other surface waters . . . or uplands that are proposed to be created, restored, enhanced or preserved by the mitigation project." Like the District's ERP rules, UMAM recognizes the different types of mitigation, and its broad framework arguably permits an assessment of each form of mitigation for each area in which that type of mitigation is proposed. When more than one type of mitigation is proposed in the same assessment area, it is a reasonable interpretation of

the rule, as suggested by the District, that each type should be scored under the appropriate conditions set forth in UMAM.

76. Highlands Ranch also argues that the District is incorrect as a matter of law in treating a conservation easement as a form of preservation when in fact it is a statutory and regulatory requirement without which the permit would be denied. See § 373.4136(1)(c), Fla. Stat.; § 12.4.3(a)(3), A.H. It goes on to argue that by treating it as a mitigation proposal, the District erroneously required every assessment area to be separately assessed for preservation. However, the legal requirement that a mitigation bank property be preserved by one of the means identified in the District's rules before credits may be released does not provide a basis for the District to ignore Rule 62-345.500(3)(a) when an assessment area will be enhanced and preserved. The legal requirement simply means that before any credits can be released, the property must first be preserved and that additional forms of mitigation will then be implemented. A permissible interpretation of UMAM is that the "current condition" for any enhancement activities is the condition achieved by preservation of the property, and the "with mitigation" is the assessment area's condition achieved by successful implementation of the enhancement activities. See Fla. Admin. Code R. 62-345.500(1)(b). Within this framework, the District first evaluated the ecological gain associated with

preservation and then, using the preserved condition as a starting point for its analysis, evaluated the additional ecological gain associated with other forms of mitigation. This was not shown to be inappropriate or unreasonable under the facts presented here.

77. The District's ore tenus motion to strike certain opinion testimony offered by Mr. Hamilton is denied. However, the testimony has been deemed to be unpersuasive.

78. To summarize, while the District's two-step approach is not identical to the one-step approach described by the DEP witness (but is essentially the same as the methodology used by the SWFWMD), its interpretation and application of the applicable rules and statutes are supported by the evidence, are reasonable under the circumstances presented here, and have been accepted.

RECOMMENDATION

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

RECOMMENDED that the St. Johns River Water Management District enter a final order granting Highlands Ranch's Permit Application No. 4-019-116094-2 authorizing it to construct, implement, and operate a mitigation bank in Clay County and awarding the applicant 193.56 potential mitigation banking credits.

DONE AND ENTERED this 26th day of May, 2010, in
Tallahassee, Leon County, Florida.



D. R. ALEXANDER
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Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of May, 2010.

ENDNOTES

- 1/ All statutory references are to the 2009 version of the Florida Statutes.
- 2/ All rule references are to the current version of the Florida Administrative Code.
- 3 The reason for reducing the number of credits in the second Report was due primarily to additional information received by the District staff after the first Report was issued.
- 4/ The location and landscape indicator focuses on the ecological relationship between the assessment area and the surrounding landscape; the water environment indicator examines hydrology and water quality; and the community structure indicator examines the vegetation and structural habitat for areas with plant cover and the benthic and sessile communities for areas with a submerged benthic community. Fla. Admin. Code R. 62-345.500(6)(a), (b), and (c).
- 5/ As noted in Finding of Fact 35, infra, under the "two-step approach," the District first evaluated the functional gain of preserving the wetland assessment area and then scored the additional functional gain that would result from the enhancement or restoration activities proposed for that area. Likewise, the

SWFWMD assesses the preservation gain first, and then it separately assesses the enhancement gain. Tr. 574. In contrast, DEP does not use a "two-step approach," that is, it does not separately evaluate enhancement assessment areas for preservation. Highlands Ranch also used a one-step approach in determining the number of potential mitigation credits. It should be noted that in response to the applicant's criticisms, the District also performed a "one-step" assessment, which resulted in an award of 125.41 credits. This suggests that under either approach, the outcome can be largely dictated by the assumptions and judgment used by the assessor.

6/ During his rebuttal testimony, Dr. Dennis contended that the St. Johns study was "discredited" as far as the buffer rule is concerned (presumably referring to the 500-foot division for wetlands), but provided no other evidence to support this contention.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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