

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA WILDLIFE FEDERATION,)
)
 Petitioner,)
)
 vs.) Case No. 12-3219
)
 CRP/HLV HIGHLANDS RANCH, LLC)
 AND DEPARTMENT OF ENVIRONMENTAL)
 PROTECTION,)
)
 Respondents.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on November 26-27, and 30, 2012, in Tallahassee, Florida, before E. Gary Early, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Thomas W. Reese, Esquire
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and

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For Respondent, CRP/HLV HighlandsRanch, LLC:

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For Respondent, Department of Environmental Protection:

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STATEMENT OF THE ISSUE

Whether the Florida Department of Environmental Protection's (Department) notice of intent to issue an environmental resource/mitigation bank permit, and notice of intent to grant a variance waiving the financial responsibility requirements for the construction and implementation activities of the mitigation bank to Respondent, CRP/HLV Highlands Ranch, LLC (Highlands Ranch) should be approved, and under what conditions.

PRELIMINARY STATEMENT

On August 4, 2010, the St. Johns River Water Management District (SJRWMD) issued Permit Number 4-019-116094-2 to Highlands Ranch to construct, implement, and perpetually manage the 1,575.5-acre Highlands Ranch Mitigation Bank (HRMB) in Clay

County, Florida (the SJRWMD Permit). The SJRWMD awarded 193.56 potential mitigation banking credits to Highlands Ranch.

On November 1, 2011, Highlands Ranch submitted an application for a modification of the SJRWMD Permit to the Department, which had assumed responsibility over the application for modification pursuant to a written Special Cases Agreement to the Operating Agreement between the SJRWMD and the Department. On November 22, 2011, Highlands Ranch submitted an application for a new permit, intended to substitute for the application for a modification of the SJRWMD Permit.

On July 16, 2012, Highlands Ranch submitted a petition for a variance to relieve it from the financial responsibility requirements of the Department's mitigation bank rule.

On August 17, 2012, the Department issued a notice of intent to issue environmental resource/mitigation bank permit number 10-308703-001 (DEP Permit) and variance number 12-1338 (Variance).

On September 10, 2012, Petitioner, Florida Wildlife Federation (Petitioner or FWF) timely filed a petition for administrative hearing challenging the issuance of the DEP Permit and the Variance. On September 26, 2012, the Department referred the petition to the Division of Administrative Hearings for assignment of an administrative law judge.

On September 28, 2012, Administrative Law Judge D. R. Alexander issued an Initial Order, and on that same day, the case was transferred to Administrative Law Judge Bram D. E. Canter. On October 2, 2012, the matter was transferred to the undersigned.

The final hearing was set for November 26-27, and 30, 2012, in Tallahassee, Florida.

Numerous motions were filed and disposed of by separately issued Orders. Those motions, and their disposition, may be determined by reference to the docket in this case. Highlands Ranch's Motion for Attorney's Fees and Costs, filed on November 29, 2012, remains outstanding, and is addressed below.

The final hearing was held as scheduled. At the final hearing, Highlands Ranch and the Department presented the testimony of Dr. W. Michael Dennis, who was accepted as an expert in biology, botany, ecology, wetland evaluation, mitigation banking and environmental resource permitting; and Jeffrey Littlejohn, the Department's deputy secretary and agency representative. Highland Ranch's Exhibits 1-2, 4, 7, 11-12, 14-20, 28-29, and 32-34 were received into evidence.

Petitioner presented the testimony of Constance Bersok, who was accepted as an expert in the ecology of wetlands and upland communities in Florida; Timothy Rach, program administrator for the Department's Submerged Lands and Environmental Resource

Coordination Program; Preston Robertson, Petitioner's vice-president and general counsel; Sarah Owen Gledhill, Petitioner's planning advocate in its Northeast Florida office; Jason Milton, who was accepted as an expert in wetland ecology, upland ecology as it relates to wetlands, UMAM implementation, and mitigation bank design and permitting; and H. Clark Hull, Jr., who was accepted as an expert in wetland and aquatic ecology, upland communities in Florida as they relate to water dependant species and water quality, water quality, mitigation bank design and permitting, UMAM implementation, and environmental resource permitting. Petitioner's Exhibits 1-3, 5, 15, 19(a) and (b), 20, 21(a)-(d), 22, and 28 were received into evidence. Petitioner's Exhibit 9 was proffered, but not received in evidence, and was not considered in the preparation of this Recommended Order.

On rebuttal, Highlands Ranch recalled Dr. Dennis and Mr. Robertson.

Official recognition was taken of all applicable statutes, rules, and decisional law, including the Recommended Order and Final Order in CRP/HLV Highlands Ranch, LLC v. SJRWMD, Case No. 10-0016 (Fla. DOAH May 26, 2010; SJRWMD July 16, 2010).

A five-volume Transcript of the proceedings was filed on December 21, 2012. By agreement of the parties, the length of the proposed recommended orders was set at a maximum of 50

pages. All parties timely submitted proposed orders, which have been duly considered in the preparation of this Recommended Order.

References to statutes are to Florida Statutes (2012) unless otherwise noted.

FINDINGS OF FACT

The Parties

1. Petitioner is a Florida not-for-profit corporation in good-standing, originally incorporated in 1946, with its corporate offices currently located at 2545 Blainstone Pines Drive, Tallahassee, Florida. Petitioner's corporate purposes include, among others, "the cause of natural resource conservation and environmental protection, to perpetuate and conserve the fish, wildlife, mineral, soil, water, clean air and natural resources of Florida."

2. The Department is an agency of the State of Florida having concurrent jurisdiction with the state's water management districts for permitting mitigation banks pursuant to chapter 373, Part IV, Florida Statutes.

3. Highlands Ranch is a Delaware limited-liability corporation registered with the State to do business in Florida, with its corporate offices located at 9803 Old St. Augustine Road, Suite 1, Jacksonville, Florida. Highlands Ranch was the

applicant for the SJRWMD Permit, and is the applicant for the DEP Permit and Variance that are at issue in this proceeding.

The Property

4. The property designated to become the HRMB (the Property) comprises approximately 1,575 acres, which includes 551.99 acres of wetlands, 990.90 acres of uplands, and 32.60 acres of miscellaneous holdings, including easements and a hunt camp. The Property is bounded by the Jennings State Forest on the eastern boundary, the conservation lands of Camp Blanding Joint Training Center on the southern boundary, and a titanium mine on the western boundary.

5. The upland communities consist of mesic and xeric pine plantations. The wetland communities consist of 260.30 acres of hydric pine flatwoods, 80.26 acres of bay and bottomland, and 211.43 acres of floodplain.

6. The wetland areas of the HRMB are generally associated with two creeks that traverse the property, Boggy Branch on the northern portion of the property, and Tiger Branch, which is a series of streams and branches in the southeastern and eastern portion of the property. Boggy Branch and Tiger Branch feed into the north fork of Flat Creek, some of which encroaches onto the eastern side of the property. In addition to Boggy Branch and Tiger Branch and their tributaries, there are isolated wetlands scattered throughout the HRMB property.

7. Most of the uplands, and much of the wetlands have been altered from their native plant communities by historic and on-going silvicultural activities. The uplands currently consist largely of pine plantation planted in slash pine of various ages and densities, with one small area planted in longleaf pine.

8. The property has an elevation gradient of approximately 90 feet, which extends generally from the higher xeric pine flatwoods, sloping down to the creek systems. A gradient of 90 feet over an area as small as the HRMB is a significant elevation change in Florida.

Mitigation Banks

9. A mitigation bank is "a project permitted under s. 373.4136 undertaken to provide for the withdrawal of mitigation credits to offset adverse impacts authorized" by an Environmental Resource Permit (ERP) issued under Part IV, chapter 373, Florida Statutes. § 373.403(19), Fla. Stat. A mitigation bank permit is a type of ERP. The Department and the water management districts are legislatively authorized to require permits to establish and use mitigation banks. § 373.4136(1), Fla. Stat.

10. Mitigation banks act as repositories for wetland mitigation credits that can be used to offset adverse impacts to wetlands that occur as the result of off-site ERP projects. Mitigation banks are intended to "emphasize the restoration and

enhancement of degraded ecosystems and the preservation of uplands and wetlands as intact ecosystems rather than alteration of landscapes to create wetlands. This is best accomplished through restoration of ecological communities that were historically present." They are designed to "enhance the certainty of mitigation and provide ecological value due to the improved likelihood of environmental success associated with their proper construction, maintenance, and management," often within larger, contiguous, and intact ecosystems.

§ 373.4135(1), Fla. Stat.

11. 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). Ecological value is defined 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.

Fla. Admin. Code R. 62-345.200(3).

12. When an ERP permit requires wetland mitigation to offset adverse impacts to wetlands, the permittee may purchase

wetland credits from a mitigation bank and apply them to meet the mitigation requirements. When the permittee has completed the agreement with the mitigation bank and paid for the credits, those mitigation credits are debited from the mitigation bank's ledger. Every mitigation bank has a ledger that reflects how many credits have been released for use, and how many have been sold for use as mitigation.

Uniform Mitigation Assessment Method Rule

13. A mitigation bank is to be awarded mitigation credits "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.

14. Section 373.414(18), Florida Statutes, provides, in pertinent part, that:

The department 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. The department shall adopt the uniform mitigation assessment method by rule no later than July 31, 2002. The rule shall provide an exclusive and consistent process for determining the amount of mitigation required to offset impacts to wetlands and other surface waters, and, once effective, shall supersede all rules, ordinances, and variance procedures from ordinances that determine the amount of mitigation needed to offset such impacts. Once the department adopts the uniform

mitigation assessment method by rule, the uniform mitigation assessment method shall be binding on the department, the water management districts, local governments, and any other governmental agencies and shall be the sole means to determine the amount of mitigation needed to offset adverse impacts to wetlands and other surface waters and to award and deduct mitigation bank credits It shall be recognized that any such method shall require the application of reasonable scientific judgment. 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 by fish and wildlife, location, uniqueness, and hydrologic connection, and, when applied to mitigation banks, the factors listed in s. 373.4136(4). The uniform mitigation assessment method shall also account for the expected time lag associated with offsetting impacts and the degree of risk associated with the proposed mitigation. The uniform mitigation assessment method shall account for different ecological communities in different areas of the state

15. In 2004, the Department adopted the Uniform Mitigation Assessment Method (UMAM) rule, Florida Administrative Code Chapter 62-345.

16. In general terms, the UMAM is designed to assess impacts and wetland functions associated with projects that impact wetlands, along with necessary mitigation required to offset those impacts. As it pertains to this proceeding, the UMAM establishes the standards for evaluating mitigation banks and calculating the credits that may be awarded to a mitigation

bank, and provides a standardized wetland assessment methodology that may be applied across community types.

17. Permitting of a mitigation bank first involves a qualitative characterization of the property, known as a Part I evaluation. The Part I evaluation is conducted by dividing the subject parcel of property into assessment areas for wetlands and uplands. An assessment area is "all or part of a . . . mitigation site, that is sufficiently homogeneous in character . . . or mitigation benefits to be assessed as a single unit."

Fla. Admin. Code R. 62-345.200(1).

18. Each mitigation assessment area

must be described with sufficient detail to provide a frame of reference for the type of community being evaluated and to identify the functions that will be evaluated. When an assessment area is an upland proposed as mitigation, functions must be related to the benefits provided by that upland to fish and wildlife of associated wetlands or other surface waters. Information for each assessment area must be sufficient to identify the functions beneficial to fish and wildlife and their habitat that are characteristic of the assessment area's native community type . . .

Fla. Admin. Code R. 62-345.400.

19. After the assessment areas have been established, a Part II assessment is performed using the scoring criteria established in the UMAM "to determine the degree to which the assessment area provides the functions identified in Part I and

the amount of function lost or gained by the project." Under the Part II evaluation, each mitigation assessment area is evaluated under its current condition --or for areas subject to preservation mitigation, without mitigation -- and its "with mitigation" condition. The difference in those conditions represents the improvement of ecological value referred to as the "delta" or the "lift." Fla. Admin. Code R. 62-345.500.

20. The "delta" for an enhancement or restoration area is subject to modification by applying any applicable time lag factor and risk factor to arrive at the numeric relative functional gain (RFG). The RFG is multiplied by the number of acres of the assessment area to determine the number of mitigation bank credits to be awarded. Fla. Admin. Code R. 62-345.600.

Time Lag Factor

21. Section 373.414(18) provides, in pertinent part, that "[t]he uniform mitigation assessment method shall also account for the expected time lag associated with offsetting impacts"

22. Florida Administrative Code Rule 62-345.600(1) establishes the UMAM criteria for applying the time lag factor and provides, in pertinent part, that:

- (1) Time lag shall be incorporated into the gain in ecological value of the proposed mitigation as follows:

(a) The time lag associated with mitigation means the period of time between when the functions are lost at an impact site and when the site has achieved the outcome that was scored in Part II. In general, the time lag varies by the type and timing of mitigation in relation to the impacts. Wetland creation generally has a greater time lag to establish certain wetland functions than most enhancement activities. Forested systems typically require more time to establish characteristic structure and function than most herbaceous systems. Factors to consider when assigning time lag include biological, physical, and chemical processes associated with nutrient cycling, hydric soil development, and community development and succession. There is no time lag if the mitigation fully offsets the anticipated impacts prior to or at the time of impact.

* * *

(c) For the purposes of this rule, the time lag, in years, is related to a factor (T-factor) as established in Table 1 below, to reflect the additional mitigation needed to account for the deferred replacement of wetland or surface water functions.

(d) The "Year" column in Table 1 represents the number of years between the time the wetland impacts are anticipated to occur and the time when the mitigation is anticipated to fully offset the impacts, based on reasonable scientific judgment of the proposed mitigation activities and the site specific conditions.

TABLE 1.	
Year	T-factor
<or=1	1
2	1.03
3	1.07

4	1.10
5	1.14
6-10	1.25
11-15	1.46
16-20	1.68
21-25	1.92
26-30	2.18
31-35	2.45
36-40	2.73
41-45	3.03
46-50	3.34
51-55	3.65
>55	3.91

23. The time lag factor is a discounting process which adjusts the future value of the mitigation to a present value at the time credits are released, and is intended to account for the difference between the time that the impacts that the mitigation is to offset have occurred and the time that the final success upon which the credits are based is achieved. The application of the time lag factor is required when mitigation credits are released prior to the mitigation bank achieving the scored final "with-mitigation" condition.

Risk Factor

24. Section 373.414(18) provides, in pertinent part, that "[t]he uniform mitigation assessment method shall also account for the . . . degree of risk associated with the proposed mitigation."

25. Florida Administrative Code Rule 62-345.600(2) establishes the criteria for applying the time lag factor and provides, in pertinent part, that:

(2) Mitigation risk shall be evaluated to account for the degree of uncertainty that the proposed conditions will be achieved, resulting in a reduction in the ecological value of the mitigation assessment area. In general, mitigation projects which require longer periods of time to replace lost functions or to recover from potential perturbations will be considered to have higher risk than those which require shorter periods of time. The assessment area shall be scored on a scale from 1 (for no or *de minimus* risk) to 3 (high risk), on quarter-point (0.25) increments. A score of one would most often be applied to mitigation conducted in an ecologically viable landscape and deemed successful or clearly trending towards success prior to impacts, whereas a score of three would indicate an extremely low likelihood of success based on the ecological factors below. A single risk score shall be assigned, considering the applicability and relative significance of the factors below, based upon consideration of the likelihood and the potential severity of reduction in ecological value due to these factors.

26. As with the time lag factor, the risk factor is a discounting process which is designed to account for the possibility that there may be occurrences that interfere with the ability of the mitigation bank to replace the ecological functions and values lost when wetland impacts are permitted prior to the final success or evidence that the mitigation bank is clearly trending towards success.

DEP/SJRWMD Operating Agreement

27. Sections 373.4135 and 373.4136 establish that the mitigation banking program was created to be jointly administered by the Department and the water management districts. In order to facilitate that joint administration, and to "further streamline environmental permitting, while protecting the environment," the Department and the SJRWMD have entered into a written Operating Agreement to "divide[] responsibility between the DISTRICT and the DEPARTMENT for the exercise of their authority regarding permits . . . under Part IV, Chapter 373, F.S." By that Operating Agreement, the Department expressly delegated its "duties and responsibilities" under chapter 373 and Title 62, F.A.C. to the SJRWMD.

28. The Operating Agreement has been adopted by rule by the Department, in rules 62-113.100(3)(x) and 62-300.200(2)(b), and by the SJRWMD in rule 40C-4.091(1)(b). The Department and the SJRWMD are clearly in privity with one another for projects that are subject to the written Operating Agreement.

HRMB Permitting History

29. On January 5, 2009, Highlands Ranch submitted an application to the SJRWMD for approval of the HRMB to be located on a 1,575.5-acre parcel of property in Clay County, Florida, specifically in Sections 9, 10, 15, and 16, Township 5 South, Range 23 East (the Property). The application was appropriately

submitted to the SJRWMD pursuant to the terms of the Operating Agreement.

30. The Mitigation Service Area (MSA) for the proposed HRMB incorporated portions of Baker, Clay, St. Johns, Putnam, and Duval Counties.

31. The land area and MSA that was the subject of the SJRWMD Permit is identical to the Property encompassed by the proposed DEP Permit at issue in this proceeding.

32. As established in the proceeding that resulted in the issuance of the SJRWMD permit:

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

CRP/HLV Highlands Ranch, LLC v. SJRWMD, Case No. 10-0016, ¶20, (Fla. DOAH May 26, 2010; SJRWMD July 16, 2010). The general project description and phases were substantially identical to the phased proposal in the instant DEP Permit.

33. When Highlands Ranch made its 2009 application to the SJRWMD, 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 appropriate resources.

34. On November 19, 2009, the SJRWMD issued its notice of intent to approve the application, and to approve 204.91 mitigation credits for the HRMB. The credits were calculated by the SJRWMD by applying the UMAM rule.

35. Highlands Ranch filed a petition to challenge the number of credits with the SJRWMD, and requested a formal administrative hearing before the Division of Administrative Hearings.

36. By the time of the final hearing, Highlands Ranch had modified its request to 425 credits, and the SJRWMD had modified its proposed agency action to reduce the number of credits to 193.56.

37. A primary issue of contention in the SJRWMD permit hearing was whether the UMAM preservation adjustment factor (PAF) should be separately applied in areas proposed for enhancement activities in conjunction with preservation afforded by the conservation easement, or whether preservation should be considered as a subsumed element of the enhancement.

38. The PAF is a process that assigns a value to the preservation of the property, and is scored on a scale from zero (no preservation value) to one (optimal preservation value) on one-tenth increments. Fla. Admin. Code R. 62-345.500(3)(a). Thus, preservation at anything less than optimal preservation will result in a downward adjustment of the RFG upon which credits for the acres in an assessment area are ultimately calculated.

39. Under the "two-step" process, after the functional gain associated with the preservation of the wetland assessment areas is determined, the second step of scoring the functional gain that would be achieved from the enhancement activities, which includes consideration of time lag and risk associated therewith, is performed. The preservation and enhancement scores are considered as separate forms of mitigation, and are each applied as multiples of the delta to arrive at the RFG.

40. In contrast to the SJRWMD approach, Highlands Ranch used a "one-step approach," which scored any area that would be both preserved and enhanced/restored only as "with mitigation" under UMAM and did not conduct a separate analysis for preservation or apply a separate preservation factor multiple.

41. Neither the "two-step" PAF nor the "one-step" PAF is specifically described in the UMAM rule, and both are allowable interpretations of the rule.

42. After the formal hearing, the administrative law judge entered a recommended order in which he determined that the SJRWMD's application of the UMAM standards, including its application of the "two-step approach" was appropriate and correct, thus warranting an award of 193.56 mitigation credits for the HRMB.

43. Neither Highlands Ranch nor the SJRWMD filed exceptions to the recommended order. On July 14, 2010, the SJRWMD entered its final order, which adopted the recommended order "in its entirety as the final order of this agency." The final order was not appealed.

44. The SJRWMD permit, Permit Number 4-019-116094-2, was thereafter issued on August 4, 2010, and is currently valid.
Development of the June 15, 2011 DEP Guidance Memo

45. During the 2011 legislative session, a bill was proposed to amend the statutes governing mitigation banks. The legislation failed to pass.

46. After the conclusion of the 2011 legislative session on May 7, 2011,^{1/} more than nine months after the issuance of the SJRWMD permit, counsel for Highlands Ranch contacted Mr. Littlejohn, who had been hired in March, 2011 as the Department's Deputy Secretary for Regulatory Programs, to express Highlands Ranch's "frustration with . . . what they considered not an objective review at the [SJRWMD]."

Mr. Littlejohn understood that Highlands Ranch believed the SJRWMD review of the application that led to the issuance of the SJRWMD Permit "was not impartial."

47. After the telephone conversation, Mr. Littlejohn instructed Department staff to work with counsel for Highlands Ranch to develop guidance to interpret the UMAM rule. Counsel for Highlands Ranch prepared and provided drafts of a guidance document for the Department.

48. There was no evidence of any private individual, other than counsel for Highlands Ranch, being given an opportunity to provide input or otherwise participate in the development of the guidance document.

49. On June 15, 2011, the Department released its final "Guidance Memo on Interpreting and Applying the Uniform Mitigation Assessment Method" (Guidance Memo). The Guidance Memo was designed to establish "nuanced interpretations of the UMAM rule" in order to "provide a uniform method throughout the state." The Guidance Memo consisted of eight numbered paragraphs. According to Mr. Littlejohn, "some of these paragraphs are completely unaltered from the [failed 2011] legislation, but I believe that most of them probably had some minor alteration in the subsequent review by the Office of General Counsel and during our own review internally, but . . .

some form of Paragraphs 2 through 8 existed in . . . that legislation.”

50. It was the intent of the Department that the Guidance Memo would reflect the current Department interpretation and direction to others in the application of the UMAM. The Guidance Memo was provided to the program administrators for each of the Department’s six district offices, to the ERP program administrators for each of the water management districts, and to Broward County, which administered the only delegated local ERP program, with the intent that it be uniformly applied by each of them. The Guidance Memo is, and was intended to be, a Department-issued statement of general applicability that implements, interprets, or prescribes law or policy.

51. The practical effect of the Guidance Memo was to reject the “two-step” preservation adjustment factor (PAF) as applied by the SJRWMD, and establish the “one-step” PAF as the only interpretation and application allowed by the UMAM rule.

52. The development of the Guidance Memo would have made an appropriate subject for rulemaking, at which all affected stakeholders could have participated. Instead, the Department chose to limit participation to Highlands Ranch, offering no opportunity for other views, either in favor of or in opposition to the terms of the Guidance Memo. Notably, despite the

legislature's encouragement, if not requirement, of cooperation between the Department and the water management districts in the development and implementation of the UMAM, the Guidance Memo, which was designed to override the method by which UMAM standards were applied by at least two of the water management districts, was developed without water management district knowledge or participation.

SJRWMD Application for Modification

53. On September 14, 2011, Highlands Ranch submitted an application for a modification of the SJRWMD permit to the SJRWMD. The application requested that the SJRWMD reconsider the permitted mitigation bank plan in light of the DEP Guidance Memo and, based thereon, modify the number of mitigation credits awarded. No other changes were made to the mitigation bank as permitted. Based on the application of the Guidance Memo alone, Highlands Ranch calculated that 425 mitigation credits was the appropriate number for the development and implementation activities presented in the original SJRWMD permit application.

54. Highlands Ranch withdrew the application for a modification of the SJRWMD permit prior to November 2011.

DEP Application for Modification

55. On November 2, 2011, Highlands Ranch submitted an application to the Department for a modification of the SJRWMD Permit (the DEP modification application).

56. In addition to a request that the Guidance Memo be applied, the modification made changes to the plan permitted by the SJRWMD, including supplemental planting of seedling longleaf pine, modification to the prescribed burn schedules, and modification of the monitoring plans and "success criteria" for demonstrating ecological progress. The application proposed that 426.05 credits be awarded for the HRMB as modified.

57. The DEP modification application was assigned for permit review to Constance Bersok who was, at the time, the Environmental Administrator for the Wetlands Mitigation Program.

58. Ms. Bersok had been involved in the process of applying the UMAM since shortly after the 2000 legislative session, when she "was in charge of the Department's part of [the UMAM rule] development and coordination" along with the water management districts and other affected entities. Ms. Bersok was identified as the primary Department contact for "questions and other feedback" regarding the UMAM rule in the June 15, 2011 Guidance Memo. Ms. Bersok is knowledgeable and experienced regarding the interpretation and application of the UMAM rule. Thus, she was the appropriate staff person for primary oversight of the application.

Special Cases Agreement

59. The Department determined that it would process the modification application despite the assignment of such projects

to the SJRWMD under the Operating Agreement. In order to assume control over the permitting of the HRMB, the Department entered into a "Written Agreement Pursuant to the Special Cases Section of the Operating Agreement" with the SJRWMD (Special Cases Agreement). Section II, Part D. of the Operating Agreement provides that:

By written agreement between the DISTRICT and the DEPARTMENT, responsibilities may deviate from the responsibilities outlined in II. A., B., or C. above. Instances where this may occur include:

1. An extensive regulatory history by either the DISTRICT or the DEPARTMENT with a particular project that would make a deviation result in more efficient or effective permitting;
2. Simplification of the regulation of a project that crosses water management district boundaries;
3. The incorrect agency has begun processing an application or petition and transfer of the application or petition would be inefficient; or
4. Circumstances in which a deviation would result in the application being more efficiently or effectively processed.

The specific provisions of paragraphs 1-3 being inapplicable, the Department assumed control over the modification application by relying on the generic "catch-all" reason set forth in paragraph 4.

60. The basis for the Department's determination that it could "more efficiently or effectively process[]" the application -- despite the fact that the HRMB Property was literally in the SJRWMD's back yard, that the SJRWMD had a recent permitting history regarding the Property, and that the SJRWMD had extensive existing knowledge of the condition of the Property -- is not apparent and was not explained.

61. The Special Cases Agreement became effective on December 13, 2011, upon Mr. Littlejohn's signature.

DEP Permit Application

62. On November 22, 2011, Highlands Ranch submitted a second package to Ms. Bersok, which converted the HRMB application from one for a modification of the SJRWMD permit, to one for a new permit to be issued by the Department.

63. The permit application made certain changes to the terms and conditions for the development of the mitigation bank established in the SJRWMD Permit, but otherwise encompassed the same boundary and service area of the SJRWMD Permit.

64. Highlands Ranch proposed 426.05 mitigation credits as the appropriate number of credits for the activities in the DEP permit application.

65. There has been no other instance in which the Department accepted, processed, or issued a second mitigation bank permit when there was an existing and valid permit issued

by a water management district for the same property. Thus, this application is unique in that regard.

66. The Special Cases Agreement provided that it was designed to allow the Department to process the "[a]pplication for a modification of the Highlands Ranch Mitigation Bank wherein the applicant seeks to revise the mitigation plan." Despite its apparent limitation to a modification of the SJRWMD permit, the Special Cases Agreement cites to the application number of the DEP Permit that is the subject of this proceeding, and became effective after the submission of the new permit application. There is no evidence of the SJRWMD having objected to the Department's continued processing of the application. Thus, although irregular, the Special Cases Agreement was broad enough in its scope to encompass the conversion of the application for modification to a separate permit application.

67. In addition to the foregoing, the scope of the Special Cases Agreement is a matter between the Department and the SJRWMD. There is no question that both agencies have legislatively conferred authority with regard to permitting mitigation banks. The decision between those agencies as to which would have responsibility going forward with the HRMB is not one that affects the substantial interests of Petitioner.

Creation of the New "Performance-driven" Approach

68. On or about February 10, 2012, Ms. Bersok was advised by Mr. Littlejohn that the Department was going to implement a new and previously untried "performance-driven" approach to permitting the HRMB.

69. Mr. Littlejohn testified that this performance-driven approach is an interpretation of existing mitigation banking rules, and was to provide greater certainty in environmental performance, mitigation success, and provide for a more consistent, predictable, and repeatable permitting process.^{2/}

70. The more practical effect of the "performance-driven" approach, as stated by Mr. Littlejohn, is that "there may be some increase in credits upon not applying a risk or a time lag factor. Those are both discount factors which attach to the raw scoring. So there may be an increase in credits."

71. Mr. Littlejohn testified that under his "performance-driven" approach, the current condition of the Property and the final "success criteria" were the only relevant factors, not how the applicant chose to meet those criteria. Consistent with that approach, Ms. Bersok was instructed that there was no need to issue a request for additional information as to the details by which the performance goals would be met, as was the normal procedure for environmental resource permits, including mitigation bank permits.^{3/}

72. Under the performance-driven approach as applied to the HRMB, mitigation credits are subject to interim release and available for use upon the satisfaction of "success criteria" set forth in the permit. Pursuant to the credit release schedule set forth in the DEP Permit, credits may be released upon recording the conservation easement(s), posting the required financial responsibility instrument and providing site security, and thereafter upon meeting one of five "interim release" milestones.

73. The interim credit releases authorize the release of mitigation credits for use to offset wetland impacts well before the time when the site has achieved the outcome that was scored in the Part II assessment. Although Highlands Ranch will have performed the bulk of the active construction and implementation activities before being entitled to an interim release, the ecological benefit of the interim "success criteria" does not represent the achievement of the structure and function that will be necessary for final success, nor does it guarantee that that final structure and function will ultimately be achieved.

Complete Application

74. Though instructed not to request additional information, Ms. Bersok sent an e-mail to the agent for Highlands Ranch that contained a recitation of what she would have sent the applicant in a request for additional information.

75. On February 14, 2012, Highlands Ranch submitted supplemental information in support of the permit application to Ms. Bersok. The supplemental information contained some, though not all, of the information requested by Ms. Bersok.

76. The submittals of November 1, 2011; November 22, 2011; and February 14, 2012, along with the application check, constitute the application to DEP. There were no written submittals designed to supplement, alter, or amend the proposed activities to enhance or preserve the Property after February 14, 2012. Thus, those documents constituted the complete application.

77. The application contained Highlands Ranch's description of historic and existing vegetative communities. There was no suggestion that the description provided by Highlands Ranch was not accurate.

78. The goal of the HRMB as reflected in the DEP application was to convert a silviculture operation to the appropriate native target communities. Mitigation activities proposed in the complete application included restoring or enhancing longleaf pine/xeric oak sandhill, mesic flatwoods, hydric or wet flatwoods, baygall/bay swamp, floodplain swamp/stream or lake swamp and bottomland forest/wetland forest mixed communities, generally through reversal of the existing silvicultural impacts and implementing hydrologic enhancement

activities. Each phase of the HRMB would be subject to a conservation easement granted to the Department and the SJRWMD for preservation of the Property in its existing or enhanced condition.

79. The complete application provided that enhancement and restoration would be accomplished through canopy thinning in existing upland and wetland pine plantation areas; control of nuisance and invasive exotic vegetative species; vegetative enhancement, including replanting thinned pine areas with appropriate species where necessary, and supplemental planting of historic native trees and ground cover; prescribed fire; and hydrologic enhancements. Ongoing management of the HRMB site would primarily involve monitoring; prescribed fire; and control of nuisance and invasive exotic vegetative species.

Draft Permits

80. As information regarding the application was submitted by Highlands Ranch, Ms. Bersok undertook to calculate the number of mitigation credits warranted by the complete application. She performed several calculations between December 8, 2011 and February 22, 2012.

81. On February 22, 2012, Ms. Bersok performed her final written analysis of the application using the information contained in the November 22, 2011, submittal, including the mitigation activities and target levels and methodologies

described by Highlands Ranch, and the information contained in the February 14, 2012, submittal. Thus, her assessment and review was based upon the complete application.

82. In addition to the information regarding site conditions from the permitting file, Ms. Bersok had "a couple of meetings" to discuss the application, made a site visit, and reviewed additional aerial images obtained on-line. Although her site visit was not comprehensive, Ms. Bersok felt that she had adequate information regarding the current condition for each of the different types of assessment areas that were on the site. Since her review was based in large measure on information and site descriptions regarding the current conditions provided by Highlands Ranch, her belief as to the sufficiency of the information regarding the assessment areas upon which she based her review is warranted and accepted.

83. The November 22, 2011, submittal included the following mitigation activities that differed from the conditions of the SJRWMD permit:

- All areas subjected to prescribed burning would be burned on a 2-8 year rotation.
- Two burns necessary to reach final success criteria.
- Communities defined by both FLUFCS classification and FNAI classification.

- Basal area targets of less than 60 square feet per acre in U1 and 80 square feet per acre in U2 (perpetual management only).
- A total of 426.05 credits proposed.
- No credit withholding by phase.
- Completion of Construction and Implementation tasks results in 20% of credit release.
- Target levels and methodologies to determine percent cover and composition of canopy, shrub, and groundcover.

84. The February 14, 2012, submittal included the following description of mitigation activities that differed from the conditions of the SJRWMD permit:

- The expected fire frequency for the hydric pine restoration areas to be a 1-3 year cycle, with actual burn frequency to be in the professional judgment of the burn manager and team ecologists.
- Further description of the low water crossings and structures.

85. Since Ms. Bersok utilized the November 22, 2011, submittal, along with the information provided by Highlands Ranch on February 14, 2012, her review and analysis necessarily included the above-listed mitigation activities and target conditions.

86. Ms. Bersok made assumptions designed to produce high quality outcomes that, at the time of her review, had not yet been incorporated as conditions to any proposed permit. Her assumptions/recommendations included the following:

- In those locations without sufficient pyrogenic groundcover, mechanical means of shrub reduction to carry a fire, and planting or seeding of the native ground cover to achieve and sustain the target community type.
- Planting of longleaf pine in the xeric (U1) and mesic (U2) communities, and similar mitigation in the hydric pine restoration (W1 and W2) assessment areas.

Ms. Bersok's assumptions were ultimately incorporated in the DEP draft permit.

87. Ms. Bersok's analysis included the "one-step" approach to application of the preservation factor, wherein preservation was included as an element of enhancement in restoration or enhancement assessment areas, rather than as a separate factor, consistent with the approach outlined in the June 15, 2011 Guidance Memo. Thus, for the assessment areas that were not exclusively bay or floodplain preservation, the "P-Factor" score was listed as "n/a."

88. Ms. Bersok utilized the "performance-driven" approach as instructed by Mr. Littlejohn. Therefore, her February 22,

2012, assessment assigned a score of 1.00 for both time lag and risk.

89. As a result of her calculations, Ms. Bersok arrived at a total of 280.33 mitigation credits for the HRMB.

90. Ms. Bersok's February 22, 2012, score of 280.33 credits incorporated all of the material changes to the SJRWMD permit that were proposed by Highlands Ranch in its complete application, and the material specific conditions that were ultimately included in the DEP proposed permit.

91. The only changes to the SJRWMD permit that were not explicitly part of Ms. Bersok's calculation, either as a proposal by the applicant or as an assumption, were:

- two consecutive burns within a period of 1-3 years in the xeric, mesic, and hydric pine restoration areas to demonstrate final success.
- monitoring and recording of shrub height to meet success criteria.
- control of oak species "to obtain the abundance appropriate to the sandhill community condition."

Those relatively minor changes are not significant in light of the overall information presented in the complete application and Ms. Bersok's accepted assumptions, and do not materially affect the final target conditions for the mitigation.

92. Several days prior to May 8, 2012, Ms. Bersok met with Mr. Rach and Mark Thomasson to discuss progress on the application and draft permits. At that time, she reviewed a UMAM assessment that assigned 333 mitigation credits to the HRMB. She was instructed "to look for some more credits, that [333 credits] wasn't enough." Ms. Bersok advised Mr. Rach and Mr. Thomasson that 333 mitigation credits was more than could be ecologically supported.^{4/}

93. On May 8, 2012, Mr. Rach presented Ms. Bersok with a draft pilot permit that called for the award of 424 mitigation credits for the HRMB. Mr. Rach was unable to identify who in the Department calculated the UMAM credits, but that "the credits which were the result of the UMAM were one of the last things filled in in the permit. So I'm not sure at that point in time who it was."

94. On May 9, 2012, Ms. Bersok prepared a "status memo" in which she expressed her opinion that she could not ecologically support the award of 424 mitigation credits for the HRMB, and expressed her "objection to the intended agency action and refusal to recommend this permit for issuance."

95. On May 11, 2012, Ms. Bersok was removed from further involvement in the review of the HRMB permit application.

Issuance of the DEP Permit and Variance

96. Over the course of the next three months, the Department and Highlands Ranch had several meetings in which they developed the performance standards and "success criteria" that would be applied to allow for the release of mitigation credits. The meetings included additional site visits. There was no evidence that the additional site visits revealed conditions of the site that were inconsistent with those set forth in the complete application.

97. During the course of the hearing, it was suggested that "additional activities [were] proposed" during the period when the permit application was being processed. There were, in this case, no requests for additional information, no written submittals memorializing any such additional activities, and no evidence of any alteration or amendment of the complete application. Those "additional activities" were not specified or described during the final hearing. To the extent that the Department or Highlands Ranch purports to rely on unspecified "additional activities" that are not contained in the application or the permitting file, or otherwise presented as evidence to support issuance of the permit, they may not be considered as part of the record of this proceeding.

98. On August 17, 2012, the Department issued its Notice of Intent to Issue Environmental Resource/Mitigation Bank Permit

and Variance (Notice) and draft permit that awarded 424.81 mitigation credits for the HRMB.

99. The number of credits awarded by the Department "was a collaborative effort with the Applicant over the course of several meetings," with Mr. Thomasson ultimately signing off and agreeing to the final scores.

100. The Notice provided that the UMAM assessment of the HRMB Property showed "a potential of 424.81 total freshwater credits: 207.31 Hydric Flatwoods/Wet Prairie credits and 217.50 Freshwater Forested wetlands credits." Thus, the credits awarded to the HRMB may be purchased and applied at impact sites in the MSA to offset 207.31 units of functional loss associated with hydric flatwoods and wet prairies, and 217.50 units of functional loss associated with freshwater forested wetlands.

101. The 426.05 credits proposed by Highlands Ranch in the November 22, 2011 application were derived by calculating 291.99 credits for restoration of the upland pine assessment areas, 73.78 credits for restoration of the hydric pine assessment areas (thus 365.77 credits for restoration of overall pine assessment areas), 15.40 total credits for enhancement and restoration of floodplain, bottomland, and bay assessment areas, and 37.65 credits for preservation of floodplain and bay assessment areas.

102. The 425.81 credits awarded by the Department were derived by calculating 317.64 credits for restoration of the upland pine assessment areas, 52.06 credits for restoration of the hydric pine assessment areas (thus 369.70 credits for restoration of overall pine assessment areas), 15.35 total credits for enhancement and restoration of floodplain, bottomland, and bay assessment areas, and 39.75 credits for preservation of floodplain and bay assessment areas.

103. The number of credits awarded by the Department is roughly identical to the number requested by Highlands Ranch in the 2010 SJRWMD proceeding (425 credits), the number requested by Highlands Ranch in the November 1, 2012, application for modification of the SJRWMD permit (426.05 credits), the number requested by Highlands Ranch in the November 22, 2011 DEP permit application (426.05 credits), and the number preliminarily calculated by the Department and provided to Ms. Bersok on May 8, 2012 (424 credits).

Credit Release Schedule

104. Section 373.4136(5) provides that:

(5) SCHEDULE FOR CREDIT RELEASE.— After awarding mitigation credits to a mitigation bank, the department or the water management district shall set forth a schedule for the release of those credits in the mitigation bank permit. A mitigation credit that has been released may be sold or used to offset adverse impacts from an activity regulated under this part.

(a) The department or the water management district shall allow a portion of the mitigation credits awarded to a mitigation bank to be released for sale or use prior to meeting all of the performance criteria specified in the mitigation bank permit. The department or the water management district shall allow release of all of a mitigation bank's awarded mitigation credits only after the bank meets the mitigation success criteria specified in the permit.

(b) The number of credits and schedule for release shall be determined by the department or water management district based upon the performance criteria for the mitigation bank and the success criteria for each mitigation activity. The release schedule for a specific mitigation bank or phase thereof shall be related to the actions required to implement the bank, such as site protection, site preparation, earthwork, removal of wastes, planting, removal or control of nuisance and exotic species, installation of structures, and annual monitoring and management requirements for success. In determining the specific release schedule for a bank, the department or water management district shall consider, at a minimum, the following factors:

1. Whether the mitigation consists solely of preservation or includes other types of mitigation.

2. The length of time anticipated to be required before a determination of success can be achieved.

3. The ecological value to be gained from each action required to implement the bank.

4. The financial expenditure required for each action to implement the bank.

(c) Notwithstanding the provisions of this subsection, no credit shall be released for freshwater wetland creation until the success criteria included in the mitigation bank permit are met.

105. Florida Administrative Code Rule 62-342.470(3) allows for the release of credits prior to final success criteria having been met, and provides that:

(3) Some Mitigation Credits may be released for use prior to meeting all of the performance criteria specified in the Mitigation Bank Permit. The release of all mitigation credits awarded will only occur after the bank meets all of the success criteria specified in the permit. The number of credits and schedule for release shall be determined based upon the performance criteria for the Mitigation Bank, the success criteria for each mitigation activity, and a consideration of the factors listed in subsection 373.4136(5), F.S. However, no credits shall be released until the requirements of Rules 62-342.650 and 62.342.700, F.A.C., are met. Additionally, no credits awarded for freshwater creation shall be released until the success criteria included in the Mitigation Bank Permit are met.

106. Prior to achieving the final success criteria, Highlands Ranch will be eligible for interim credit releases when the "success criteria" for each phase as set forth in the permit are met.

107. The mitigation credits are scheduled for release as follows:

Conservation Easement/Financial Assurance/Security

Phase 1 - 23.45 credits
Phase 2 - 21.78 credits
Phase 3 - 18.49 credits

Interim Criteria I

Phase 1 - 39.09 credits
Phase 2 - 36.29 credits
Phase 3 - 30.82 credits

Interim Criteria II-A

Phase 1 - 9.38 credits
Phase 2 - 8.71 credits
Phase 3 - 7.40 credits

Interim Criteria II-B

Phase 1 - 3.13 credits
Phase 2 - 2.90 credits
Phase 3 - 2.47 credits

Interim Criteria III

Phase 1 - 32.83 credits
Phase 2 - 30.49 credits
Phase 3 - 25.89 credits

Interim Criteria IV

Phase 1 - 28.14 credits
Phase 2 - 26.13 credits
Phase 3 - 22.19 credits

Final Success Criteria by Phase

Phase 1 - 12.51 credits
Phase 2 - 11.61 credits
Phase 3 - 9.86 credits

Final Bank Success Criteria

- 21.25 credits

108. The tasks related to Phase 1 are targeted to commence upon permit issuance, with active management activities -- i.e., recording the conservation easement, providing title insurance, executing financial assurance mechanisms, and providing security; and enhancement activities, e.g., tree thinning,

crushing bedding rows, planting, and activities relating to trail roads and culverts -- to be completed within one year. The evidence indicates that some of the management activities, including tree thinning and crushing bedding rows were completed prior to the submission of the application for the DEP Permit.

109. The tasks related to Phase 2 and Phase 3 are targeted to commence upon "phase implementation," with active management and enhancement activities within one year of the implementation of each phase.

110. The application provides that the implementation date for Phase 2 and Phase 3 "will be based upon market demand for mitigation within the mitigation service area." Thus, the phases could be implemented immediately, or not at all, at the sole discretion of Highlands Ranch.

111. The HRMB mitigation milestones that allow for interim releases of mitigation credits prior to the final success of the target communities and measures for which the bank was scored under the Part II assessment do not materially differ from standards for interim releases applicable to all mitigation banks pursuant to section 373.4136(5) and Florida Administrative Code Rule 62-342.480(3).

112. In addition to the foregoing, though not dispositive of the issue, is the fact that the "success criteria" in the HRMB permit are, in many cases, vague and non-quantifiable.

Thus, in the absence of specific standards and comparators, the HRMB success criteria may allow for the release of credits to offset present wetland impacts without any specific or measurable ecological benefit.

Application of the Time Lag Factor

113. The Department calculated the credits for the HRMB using a time lag score of 1.00 for all assessment areas. Thus, in keeping with the UMAM, the Department necessarily made the decision that at the time of the interim releases, "the mitigation fully offsets the anticipated impacts prior to or at the time of impact."

114. Meeting the "success criteria" for an interim release of credits does not mean that the mitigation bank has met the success measures for which the bank was scored under the Part II assessment. Rather, meeting the "success criteria" serves only to recognize that the project is meeting interim goals that show general progress towards the target goals if continued and successful into the future.

115. In this case, there is a time difference between the achievement of the ecological benefits of the final target community, and the interim release of mitigation credits and their use to offset impacts at sites requiring mitigation.

116. There is little practical ecological difference between releasing credits before final target communities are

achieved based on "success criteria" that are the result of implementing described activities, and releasing credits based on the physical implementation of those described activities. The effect in both cases is that mitigation credits are to be released during the "time between when the functions are lost at an impact site and when the site has achieved the outcome that was scored in Part II."

117. There was testimony offered at the final hearing that the Department's time lag and risk scores of 1.00 were appropriate because the credit release schedule represents functional ecological improvement that must be achieved before credits are released. For the reasons set forth above, the undersigned finds that the functional ecological improvement represented by the "success criteria" is not materially dissimilar from the means by which the ecological value of interim release milestones has been calculated for previously permitted and implemented mitigation banks. Thus, testimony that the success criteria as proposed in the DEP Permit warrants time lag and risk scores of 1.00 is not credited.

118. Contrary to the evidence referenced in the preceding paragraph, Mr. Hull testified convincingly that there is a sizable percentage of credits released prior to the mitigation bank reaching the success proposed for many of the restoration assessment areas without time lag or risk.

119. An example of time lag that should be applicable to the HRMB is the fact that final success for all assessment areas includes, among other criteria, the requirement that all plants, except those targeted for control or eradication, be reproducing naturally. In the case of longleaf pine, which is to be planted throughout the Property, the period before the achievement of that outcome is approximately 30 years. Furthermore, Ms. Bersok testified credibly that when starting with a community that has few ecological functions, the time necessary to ultimately achieve a high community structure score can take much longer than 15 to 20 years. That period before final success should have been reflected as time lag in the UMAM assessment, but was not.

120. In accordance with the schedule proposed by Highlands Ranch, a significant number of the total credits awarded for the three phases may be released within one year of permit issuance. In that regard, the "CE/Financial Assurance/Security" interim release allows for a three-phase total of 63.72 credits to be released for that interim step, estimated to occur within 30 days of permit issuance or phase implementation, while Interim Criteria I allows for a three-phase total of 106.20 credits to be released for that interim step, estimated to occur within one year of permit issuance or phase implementation. Thus, 169.92 of 425.81 credits, or 40 percent of the total, are potentially

eligible for release within a short period, and years before any reasonable expectation of final target community success. It is that circumstance that squarely meets the standards for the application of the time lag factor.

121. Based on the testimony and evidence adduced at the final hearing, the calculation of credits for the HRMB without accounting for the time lag before final success produces an unreasonable result, regardless of the application of the "performance-driven" approach that was created for the HRMB by the Department.^{5/} Thus, the decision to assign a time lag score of 1.00 to each of the restoration assessment areas is contrary to the facts of this case, and the plain language of the UMAM rule and its requirements.

Application of the Risk Factor

122. The Department calculated the credits for the HRMB using a risk score of 1.00 for all assessment areas. Thus, pursuant to the UMAM, the Department made the decision that the mitigation projects require no significant "periods of time to replace lost functions or to recover from potential perturbations," and that the mitigation activities are being "conducted in an ecologically viable landscape and deemed successful or clearly trending towards success prior to impacts."

123. As set forth in preceding paragraphs, there is a sizable period of time between the interim release of credits - and their availability to replace lost functions at permitted impact sites -- and the time at which the mitigation has been established and monitored to the point at which it is "clearly trending towards success." Thus, a risk score of 1.00, meaning that there is essentially no risk, is not warranted.

124. The risk in this case is that associated with the fact that the "mitigation projects . . . require longer periods of time to replace lost functions or to recover from potential perturbations." Although there were concerns expressed that the proposed activities might have heightened risk inherent in the mitigation methods, the testimony on that issue was vague and non-specific, and is not accepted.

125. Based on the testimony and evidence adduced at the final hearing, the failure to account for the risk associated with the extended period of time expected before final restoration and enhancement success is not warranted, regardless of the application of the "performance-driven" approach. Thus, the decision to assign a risk score of 1.00 to each of the restoration assessment areas is contrary to the facts of this case, and the plain language of the UMAM rule and its requirements.

Application of the Preservation Adjustment Factor

126. The DEP Permit applied the preservation factor as a "one-step" process as described above. Under that method, the PAF was not separately applied in any restoration or enhancement assessment area. That method was applied by Ms. Bersok in her February 22, 2013, UMAM scoring of the HRMB complete application.

127. A PAF of 0.70 was applied to both of the preservation assessment areas. That score was also applied by Ms. Bersok in her February 22, 2013, UMAM scoring of the HRMB complete application.

128. The "one-step" application of the PAF was an allowable method under the UMAM rule. Petitioner failed to prove that the score of 0.70 for the preservation assessment areas was not warranted.

Variance from Construction and Implementation Financial Responsibility Requirement

129. Section 373.4136 provides that, in order to obtain a mitigation bank permit, an applicant must meet the financial responsibility requirements established by rule.

§ 373.4136(10), Fla. Stat.

130. As it relates to financial responsibility for the construction and implementation of a mitigation bank, Florida

Administrative Code Rule 62-342.700(4) provides, in pertinent part, that:

(4) Financial Responsibility for Construction and Implementation.

(a) No financial responsibility shall be required where the construction and implementation of the Mitigation Bank, or a phase thereof, is completed and successful prior to the withdrawal of any credits.

* * *

(c) . . . When the bank (or appropriate phase) has been completely constructed, implemented, and is trending toward success in compliance with the permit, the respective amount of financial responsibility shall be released.

(d) The financial responsibility mechanism shall become effective prior to the release of any mitigation credits.

131. Section 120.542(2) provides that:

(2) Variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, "substantial hardship" means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. For purposes of this section, "principles of fairness" are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

132. On July 16, 2012, Highlands Ranch filed a petition with the Department for a variance from the financial responsibility requirements of rule 62-342.700 for the construction and implementation activities of Highlands Ranch Mitigation Bank.^{6/}

133. In its "Petition for Variance from Rule Subsections 62-342.700(1)(a), (2), (3) and (4), F.A.C.", Highlands Ranch requested that the variance be granted on the basis that the application of the rule would create a substantial hardship. Highlands Ranch did not assert that the application of the financial responsibility rule would violate principles of fairness.

134. As indicated previously, the proposed permit authorizes a release of credits when Highlands Ranch records the conservation easement, provides title insurance, executes financial assurance mechanisms, and provides security. Thus, the proposed HRMB permit authorizes the release of mitigation credits prior to any construction being commenced, much less completed.

135. Although certain interim criteria must be met in order for additional mitigation credits to be released, those interim steps do not constitute success of the target conditions scored under the Part II Assessment or, without more,

demonstrate that the mitigation is "trending toward success" in meeting those final target conditions.

136. Financial assurance is required for construction and implementation activities at all mitigation banks, and may not be released until the mitigation "is trending toward success in compliance with the permit." Highlands Ranch asserts that the unique "performance-driven" approach that has been applied to the HRMB warrants a deviation from the requirement that it financially guarantee the work. To the contrary, the financial responsibility required by rule provides assurance that the active construction and implementation is performed and, as would be the case with the "performance-driven" approach, may be released only when the expected outcomes are trending towards success.

137. Without question, any time a permittee is required to provide financial responsibility, it will have a financial effect on the permittee. However, the standard for a variance requires that the financial effect constitute a hardship to the person requesting the variance. In this case, Highlands Ranch failed to demonstrate that meeting the financial responsibility requirements applicable to all mitigation bank permittees would constitute an economic, technological, legal, or other type of hardship as applied to it.

138. Highlands Ranch did not request a variance on the basis that the application of the financial-responsibility rule would violate principles of fairness. Nonetheless, the Department determined that "principals of fairness" warranted its grant of the variance. For the reasons set forth herein, including the fact that the financial-responsibility instruments required of all permittees may be released only when the mitigation "is trending toward success in compliance with the permit," the undersigned finds that the financial-responsibility rule does not affect Highlands Ranch in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

139. Highlands Ranch failed to demonstrate that the application of Florida Administrative Code Rule 62-342.700(4) would create a substantial hardship or would violate principles of fairness as applied to Highlands Ranch and the HRMB.

Highlands Ranch's Motion for Attorney's Fees and Costs

140. Based on the evidence adduced in this proceeding, the undersigned finds that Petitioner did not participate in this proceeding for an improper purpose. In that regard, Petitioner is found to have prevailed on certain issues that substantially changed the outcome of the proposed agency action which is the subject of this proceeding regarding both the DEP Permit and the Variance. Furthermore, despite the evidence provided as to the

source of payment for certain of Petitioner's costs and attorney's fees, there was insufficient evidence to support a finding that Petitioner brought this action "primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of litigation, licensing, or securing the approval of an activity." § 120.595(1)(e)1., Fla. Stat.

Ultimate Findings of Fact

141. Based on the totality of the facts adduced at the final hearing, having weighed the evidence introduced by each of the parties, and having gauged the demeanor and credibility of the witnesses, the undersigned accepts the testimony of Ms. Bersok as constituting the most credible and reliable application of reasonable scientific judgment, resulting in an accurate calculation of the allowable credits (except as modified below) that may be awarded under the standards established by the UMAM rule. The competent and substantial evidence available to Ms. Bersok, including the complete application submitted by Highlands Ranch, and her assumptions that were ultimately incorporated in the DEP proposed permit, are found to have been sufficient to allow her to formulate reasoned opinions and conclusions regarding the number of mitigation credits that could be ecologically justified in this case. Therefore, the undersigned finds that the application of

the UMAM standards to the HRMB property and the restoration, enhancement, and preservation activities to take place thereon, warrants an award of a maximum of 280.33 mitigation credits.

142. Based on the testimony and evidence adduced at the final hearing, and as set forth herein, the undersigned finds that the facts of this case, including the "performance-driven" approach that was developed for and applied to the HRMB application, do not warrant a determination that there is no time difference between the time wetland impacts being mitigated by released mitigation credits are anticipated to occur and the time when the mitigation is anticipated to fully offset the impacts. Based thereon, the application of a time lag score of 1.00 in the UMAM assessment was in error. Thus, the 280.33 mitigation credits that reflect the maximum allowable number should be revised by applying an appropriate time lag modifier to the "delta" for each restoration and enhancement assessment area as calculated by Ms. Bersok, with the RFG and final credits calculated based thereon.

143. Based on the testimony and evidence adduced at the final hearing, and as set forth herein, the undersigned finds that the facts of this case do not warrant a determination that there is no uncertainty that there may be a reduction in the ecological value of the mitigation assessment area. That finding is based on the length of time expected before final

success, rather than any inherent vulnerability of the target communities. Based thereon, the application of a risk score of 1.00 in the UMAM assessment was error. Thus, the 280.33 mitigation credits that reflect the maximum allowable number should be revised by applying an appropriate risk modifier to the "delta" for each restoration and enhancement assessment area as calculated by Ms. Bersok, with the RFG and final credits calculated based thereon.

144. For the reasons set forth herein, Highlands Ranch failed to demonstrate that it was entitled to a variance from the financial responsibility requirements of Florida Administrative Code Rule 62-342.700.

CONCLUSIONS OF LAW

Jurisdiction

145. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat.

Standing

146. As the entity asserting party status, Petitioner has the burden of demonstrating the requisite standing to initiate and maintain this proceeding. Palm Beach Cnty. Env'tl. Coal. v. Fla. Dep't of Env'tl. Prot., 14 So. 3d 1076, 1078 (Fla. 4th DCA 2009); Agrico Chem. Co. v. Dep't of Env'tl. Reg., 406 So. 2d 478, 482 (Fla. 2nd DCA 1981).

147. Petitioner has alleged standing on two grounds, those being standing under the Environmental Protection Act of 1971, as amended, section 403.412, Florida Statutes, and standing under chapter 120, Florida Statutes, as a party whose substantial interests are affected by the decision of the DEP.

Standing Under Section 403.412(6)

148. Section 413.412(6) provides that:

(6) Any Florida corporation not for profit which has at least 25 current members residing within the county where the activity is proposed, and which was formed for the purpose of the protection of the environment, fish and wildlife resources, and protection of air and water quality, may initiate a hearing pursuant to s. 120.569 or s. 120.57, provided that the Florida corporation not for profit was formed at least 1 year prior to the date of the filing of the application for a permit, license, or authorization that is the subject of the notice of proposed agency action.

149. The parties to this proceeding stipulated that Petitioner has more than 25 members residing in Clay County, Florida; that Petitioner was formed for the purpose of the protection of the environment, fish and wildlife resources, and protection of air and water quality; and that Petitioner was formed more than one year prior to the date of the application for the HRMB permit.

150. The Department's final order granting the petition for variance is an authorization as that term is used in section 403.412(6).

151. Petitioner has standing to challenge the issuance of the HRMB permit and variance pursuant to section 403.412(6).

Standing Under Chapter 120

152. Standing under chapter 120 is guided by the two-pronged test established in the seminal case of Agrico Chemical Corp. v. Dep't of Env'tl. Reg., 406 So. 2d 478 (Fla. 2d DCA 1981). In that case, the Court held that:

We believe that before one can be considered to have a substantial interest in the outcome of the proceeding, he must show 1) that he will suffer an injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury.

Id. at 482.

153. Agrico was not intended as a barrier to the participation in proceedings under chapter 120 by persons who are affected by the potential and foreseeable results of agency action. Rather, "[t]he intent of Agrico was to preclude parties from intervening in a proceeding where those parties' substantial interests are totally unrelated to the issues that are to be resolved in the administrative proceedings. (emphasis

added). Mid-Chattahoochee River Users v. Fla. Dep't of Env'tl. Prot., 948 So. 2d 794, 797 (Fla. 1st DCA 2006) (citing Gregory v. Indian River Cnty., 610 So. 2d 547, 554 (Fla. 1st DCA 1992)).

154. The standing requirement established by Agrico has been refined, and now stands for the proposition that standing to initiate an administrative proceeding is not dependent on proving that the proposed agency action would violate applicable law. Instead, standing requires proof that the petitioner has a substantial interest and that the interest reasonably could be affected by the proposed agency action. Whether the effect would constitute a violation of applicable law is a separate question.

Standing is "a forward-looking concept" and "cannot 'disappear' based on the ultimate outcome of the proceeding." . . . When standing is challenged during an administrative hearing, the petitioner must offer proof of the elements of standing, and it is sufficient that the petitioner demonstrate by such proof that his substantial interests "could reasonably be affected by . . . [the] proposed activities."

Palm Beach Cnty. Env'tl. Coal. v. Fla. Dep't of Env'tl. Prot., 14 So. 3d at 1078 (citing Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co., 18 So. 3d 1079, 1083 (Fla. 2nd DCA 2009) and Hamilton County Bd. of Cnty. Comm'rs v. State, Dep't of Env'tl. Regulation, 587 So. 2d 1378 (Fla. 1st DCA 1991)); see also St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt.

Dist., 54 So. 3d 1051, 1055 (Fla. 5th DCA 2011) ("Ultimately, the ALJ's conclusion adopted by the Governing Board that there was no proof of harm or that the harm would be offset went to the merits of the challenge, not to standing.").

155. Petitioner has alleged standing as an association acting on behalf of the interests of its members. It is well established that:

for an association to establish standing under section 120.57(1) when acting solely as a representative of its members, it must demonstrate that "a substantial number of its members, although not necessarily a majority, are substantially affected by the challenged rule," that "the subject matter of the challenged rule is within the association's general scope of interest and activity," and that "the relief requested is of a type appropriate for a trade association to receive on behalf of its members."

St. John's Riverkeeper, Inc. v. St. Johns River Water Mgmt.

Dist., 54 So. 3d at 1054, (citing Farmworker Rights Org., Inc. v. Dep't of HRS, 417 So.2d 753 (Fla. 1st DCA 1982)); see also Florida Home Builders Ass'n v. Dept. of Labor & Emp. Sec., 412 So. 2d 351 (Fla. 1982).

156. Although St. John's Riverkeeper, Inc. involved a rule challenge proceeding, its identification of the factors necessary for an association to demonstrate standing apply with equal force in a licensing proceeding. See Friends of the Everglades, Inc. v. Bd. of Trs. of the Int. Imp. Trust Fund,

595 So. 2d 186, 188 (Fla. 1st DCA 1992) ("To meet the requirements of standing under the APA, an association must demonstrate that a substantial number of its members would have standing.").

157. Petitioner has roughly 12,000 members. Although the parties have stipulated that Petitioner has at least 25 members residing in Clay County, the record contains no quantification of the number of Petitioner's members that reside in the vicinity of the HRMB, or that use lands or waters that might reasonably be expected to be affected by the proposed activities authorized by the HRMB permit.

158. Petitioner submitted the results of an informal survey of members performed by Ms. Gledhill, in which Ms. Gledhill recounts statements made to her by others. The statements in the survey are hearsay. Ms. Gledhill is an employee of Petitioner, but is not an officer, director, or member of Petitioner, and is not Petitioner's records custodian. The survey is not a business record of Petitioner, and does not fall under any other exception to the hearsay rule established in section 90.803. Thus, neither the survey nor Ms. Gledhill's description of the survey can form the basis for any finding as to how the substantial interests of those surveyed members might be affected by the permit.

159. Even if the informal survey results were admissible, the survey identifies 19 persons who are purportedly members of Petitioner. The 19 members are not a "substantial number" of members in the context of Petitioner's total membership of 12,000.

160. Furthermore, most of the ten surveyed members and the nine members for which Ms. Gledhill had some personal knowledge resided near or used the waters of the St. Johns River in the vicinity of Palatka, Lake George, and Jacksonville and its suburbs. Other than very general statements of their use of the St. Johns River and its tributaries, which were an indeterminate distance from the HRMB permit site, there was no proof that any of the surveyed members would be substantially affected by the proposed HRMB permit. Furthermore, to the extent that the members used waters within the MSA of the HRMB, the effect of any future project that may affect wetlands in the MSA on their substantial interests is far too remote and speculative to establish standing in this proceeding.

161. For the reasons set forth herein, Petitioner's associational standing under section 120.57(1) to challenge the HRMB permit and variance was not established.^{7/}

Burden of Proof

162. Petitioner has challenged the issuance of a mitigation bank permit issued under section 373.4136, and a

variance from the requirements of financial responsibility rules that implement provisions of section 373.4136. Section 120.569(2) (p) provides that:

For any proceeding arising under chapter 373, chapter 378, or chapter 403, if a nonapplicant petitions as a third party to challenge an agency's issuance of a license, permit, or conceptual approval, the order of presentation in the proceeding is for the permit applicant to present a prima facie case demonstrating entitlement to the license, permit, or conceptual approval, followed by the agency. This demonstration may be made by entering into evidence the application and relevant material submitted to the agency in support of the application, and the agency's staff report or notice of intent to approve the permit, license, or conceptual approval. Subsequent to the presentation of the applicant's prima facie case and any direct evidence submitted by the agency, the petitioner initiating the action challenging the issuance of the permit, license, or conceptual approval has the burden of ultimate persuasion and has the burden of going forward to prove the case in opposition to the license, permit, or conceptual approval through the presentation of competent and substantial evidence.

163. Highland Ranch made its prima facie case of entitlement to the HRMB permit and, therefore, the burden of ultimate persuasion is on Petitioner to prove its case in opposition to the permit by a preponderance of the competent and substantial evidence.

164. A variance is not a "license, permit, or conceptual approval." Therefore, the modified burden of proof established

in section 120.569(2) (p) does not apply to the request for variance. Thus, Highlands Ranch bears the burden of demonstrating, by a preponderance of the evidence, entitlement to the requested variance. Fla. Dep't of Transp. v. J. W. C. Co., 396 So. 2d 778, 788 (Fla. 1st DCA 1981).

165. This is a de novo proceeding, intended to formulate final agency action and not to review action taken earlier and preliminarily. Young v. Dep't of Cmty. Aff., 625 So. 2d 831, 833 (Fla. 1993); Hamilton Cnty. Bd. of Cnty. Comm'rs v. Dep't of Env'tl. Reg., 587 So. 2d 1378, 1387 (Fla. 1st DCA 1991); McDonald v. Dep't of Banking & Fin., 346 So. 2d 569, 584 (Fla. 1st DCA 1977).

Reasonable Assurance

166. Issuance of the HRMB permit is dependent upon there being reasonable assurance that the mitigation bank will meet applicable statutory and regulatory standards. § 373.4136(1), Fla. Stat.

167. Reasonable assurance means "a substantial likelihood that the project will be successfully implemented." See Metropolitan Dade Co. v. Coscan Fla., Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992). Reasonable assurance does not require absolute guarantees that the applicable conditions for issuance of a permit have been satisfied. Furthermore, speculation or subjective beliefs are not sufficient to carry the burden of

presenting contrary evidence or proving a lack of reasonable assurance necessary to demonstrate that a permit should not be issued. FINR II, Inc. v. CF Industries, Inc. and Dep't of Env'tl. Prot., Case No. 11-6495 (Fla. DOAH Apr. 30, 2012; DEP June 8, 2012), see also Menorah Manor, Inc. v. Ag. for Health Care Admin., 908 So. 2d 1100, 1104 (Fla. 1st DCA 2005).

Unadopted Rule

168. Section 120.54(1)(a) provides, in pertinent part, that "[r]ulemaking is not a matter of agency discretion. Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable."

169. Section 120.52(16) defines a rule, in pertinent part, as:

. . . each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule.

170. An agency statement is "generally applicable" if it is intended by its own effect to create rights, or to require compliance, or otherwise have the direct and consistent effect of law. Coventry First, LLC v. Ofc. of Ins. Reg., 38 So. 3d 200

(Fla. 1st DCA 2010) (quoting McDonald v. Dep't of Banking & Fin., 346 So. 2d 569, 581 (Fla. 1st DCA 1977)). Furthermore:

"[a]n agency statement that either requires compliance, creates certain rights while adversely affecting others, or otherwise has the direct and consistent effect of law is a rule." Vanjaria, 675 So. 2d at 255. When deciding whether a challenged action constitutes a rule, a court analyzes the action's general applicability, requirement of compliance, or direct and consistent effect of law. Volusia Cnty. Sch. Bd. v. Volusia Home Builders Ass'n, Inc., 946 So. 2d 1084, 1089 (Fla. 5th DCA 2006).

Fla. Dep't of Fin. Servs. v. Cap. Collateral Reg'l Counsel-Middle Region, 969 So. 2d 527, 530 (Fla. 1st DCA 2007).

171. An agency statement that comes within the definition of a rule must be adopted according to rulemaking procedures. Envtl. Trust, Inc. v. Dep't of Env'tl. Prot., 714 So. 2d 493 (Fla. 1st DCA 1998); Christo v. Dep't of Banking & Fin., 649 So. 2d 318 (Fla. 1st DCA 1995).

June 15, 2011 Guidance Memo

172. The June 15, 2011, Guidance Memo on Interpreting and Applying the Uniform Mitigation Assessment Method, is an unadopted rule. Mr. Littlejohn made it abundantly clear that the memorandum was expressly developed to "reflect the current department interpretation and direction to others in the application of UMAM." (emphasis added). The agency statement was reduced to writing, and issued to each entity exercising

regulatory authority over mitigation banks to rein in whatever discretion might be inherent in the application of the UMAM. The memorandum interprets and prescribes law or policy, and was designed -- as evidenced by testimony that the SJRWMD has modified its application of the UMAM rule -- to require compliance and to have direct and consistent effect of law.

173. Section 120.57(1)(e)1., Florida Statutes, provides:

An agency or an administrative law judge may not base agency action that determines the substantial interests of a party on an unadopted rule. The administrative law judge shall determine whether an agency statement constitutes an unadopted rule. This subparagraph does not preclude application of adopted rules and applicable provisions of law to the facts.

174. For the reasons set forth herein, the Guidance Memo, having the purpose and effect of a rule, is an unadopted rule and will not be given effect in this proceeding.

175. The fact that the Guidance Memo is an unadopted rule does not necessarily preclude the application of the standards described therein.

176. Many of the concepts expressed in the Guidance Document restate standards that are consistent with the UMAM rule, including that regarding the application of the preservation factor. In that regard, the undersigned finds the testimony of Ms. Bersock to be the most credible and reliable in determining the scope of the Guidance Memo in comparison with

the UMAM rule. Thus, the only provision that establishes standards that are contrary to the UMAM rule is that concerning altered wetlands in paragraph 4 of the Guidance Memo. That provision does not apply to the HRMB site.

177. The testimony elicited at the hearing is persuasive that the UMAM rule is capable of being construed to authorize either the "one-step" or the "two-step" PAF. As stated by Mr. Hull, the rule is not specific, making the application of one method over the other a matter of preference. The Department and several of the water management districts have used the "one-step" process. The SJRWMD used the "two-step" process. A primary change in the application of the UMAM rule in the DEP Permit from the application in the SJRWMD permit was the change from a "two-step" to a "one-step" PAF.

178. One of the two methods of applying the preservation factor must be implemented in calculating the allowable mitigation credits under the UMAM. The identification of one of the two methods in a document that has the effect of an unadopted rule does not mean that the other method becomes the only allowable method by default.

179. The "one-step" method, being a permissible -- even if not uniformly applied -- interpretation of the UMAM rule, may be applied to the subject permit application, subject to proof

independent of the Guidance Memo. In that regard, it is well established that:

When an agency seeks to validate agency action based upon a policy that is not recorded in rules or discoverable precedents, that policy must be established by expert testimony, documentary opinions, or other evidence appropriate to the nature of the issues involved and the agency must expose and elucidate its reasons for its discretionary action The agency may apply incipient or developing policy in a section 120.57 administrative hearing, provided the agency explicates, supports and defends such policy with competent, substantial evidence on the record in such proceedings. (citations omitted).

Beverly Enterprises-Florida, Inc. v. Dep't of HRS, 573 So. 2d 19 (Fla. 1st DCA 1990); see also Envtl. Trust, Inc. v. Dep't of Env'tl. Prot., 714 So. 2d at 499.

180. Although the "one-step" process was set forth as the approved method in paragraphs 6 and 8 of the Guidance Memo, the Department did not rely exclusively on the Guidance Memo to support its application in this case. Rather, the Department established and explained its reasoning with competent, substantial evidence at the final hearing.

181. Sufficient independent proof of the basis for the interpretation of the UMAM rule to allow the application of the "one-step" PAF having been elicited at the final hearing, that application is accepted.

Collateral Estoppel & Administrative Finality

182. The principle of res judicata applies, though with great caution, to administrative proceedings, Thomson v. Dep't of Env'tl. Reg'n, 511 So. 2d 989 (Fla. 1987). The doctrine of res judicata provides that final action entered by an entity having jurisdiction over the subject of an action, is conclusive of the rights of the parties and their privies, and constitutes a bar to a subsequent action or suit involving the same cause of action or subject matter.

183. "In the field of administrative law, the counterpart to res judicata is administrative finality . . . Florida courts do not apply the doctrine of administrative finality when there has been a significant change of circumstances or there is a demonstrated public interest." (internal citations omitted). Delray Med. Ctr., Inc. v. Ag. for Health Care Admin., 5 So. 3d 26, 29 (Fla. 4th DCA 2009). Administrative finality is the policy that there must be a "terminal point in every proceeding both administrative and judicial, at which the parties and the public may rely on a decision as being final and dispositive of the rights and issues involved therein." Fla. Power Corp. v. Garcia, 780 So. 2d 34, 44 (Fla. 2001).

184. Res judicata, or its administrative counterpart of administrative finality, requires mutuality and identity of

parties or their privies. As stated by the First District Court of Appeal:

As to the identity of the parties, we conclude that there is an identity of the parties here because appellees are privies of the Florida Department of Transportation. The Florida Supreme Court has explained that "[a] judgment on the merits rendered in a former suit between the same parties or their privies, upon the same cause of action, by a court of competent jurisdiction, is conclusive" "A privy is one who is identified with the litigant in interest." Progressive Am. Ins. Co. v. McKinnie, 513 So. 2d 748, 749 (Fla. 4th DCA 1987). "Privity is a mutuality of interest, an identification of interest of one person with another, and includes privity of contract, the connection or relationship which exists between contracting parties." . . . Further, identity of parties exists if the third parties [PTG & Parsons], as here, had indemnity obligations to the Department of Transportation. (emphasis in original) (citations omitted).

AMEC Civil, LLC v. PTG Constr. Servs. Co., 106 So. 3d 455 (Fla. 1st DCA 2012); see also Massey v. David, 831 So. 2d 226 (Fla. 1st DCA 2002).

185. As a result of the joint permitting jurisdiction over mitigation banks set forth in section 373.4135, and the entry of the Operating Agreement that, by agreement of the Department and the SJRWMD "divides responsibility . . . for the exercise of their authority regarding permits . . .", the Department and the SJRWMD were in privity regarding the SJRWMD permit.^{8/}

186. The facts of this case present a difficult issue. This case involves a mitigation bank that was permitted by an agency with co-equal powers and duties as the Department, pursuant to a valid and current Operating Agreement. The procedure by which the Department assumed control of the second permit application was unique, and implemented without explanation. The most significant changes offered to justify the re-permitting of the HRMB were regulatory standards and procedures developed by the Department and Highlands Ranch, without opportunity for public participation or input. There were no changes to the existing conditions of the Property, and no significant changes to the value of the Property after mitigation, though there were changes to the means by which those enhanced ecological values would be achieved. Had this matter proceeded, as it should have, as a modification to the existing permit, a simple revision of the SJRWMD's UMAM assessment to incorporate the "one-step" PAF and the effect of the "performance-driven" approach would have sufficed to accomplish the agency action. However, the decision was made, with little rationale, to disregard the previous action and start anew.

187. Although the undersigned can discern no public interest advanced by the manner in which this permitting action occurred, there were changes made to the application for and

conditions of the permit constituting a "change of circumstances." Although the DBPR Permit did not substantially change the basic enhancement, restoration, and preservation activities that were to occur on the Property from those approved in the SJRWMD Permit, or the ecological effect of those activities, the undersigned accepts the fact that the changes, such as they were, were sufficient to meet the standard established in Thomson and Delray Medical Center.

188. For the foregoing reasons, the undersigned concludes that the instant permitting proceeding is not foreclosed by the application of the doctrines of res judicata and administrative finality.

Mitigation Bank Standards

189. Section 373.4136(1), which authorizes the permitting of mitigation banks, provides, in pertinent part, that:

To obtain a mitigation bank permit, the applicant must provide reasonable assurance that:

- (a) The proposed mitigation bank will improve ecological conditions of the regional watershed;
- (b) The proposed mitigation bank will provide viable and sustainable ecological and hydrological functions for the proposed mitigation service area;
- (c) The proposed mitigation bank will be effectively managed in perpetuity;

(d) The proposed mitigation bank will not destroy areas with high ecological value;

(e) The proposed mitigation bank will achieve mitigation success;

(f) The proposed mitigation bank will be adjacent to lands that will not adversely affect the perpetual viability of the mitigation bank due to unsuitable land uses or conditions;

(g) Any surface water management system to be constructed, altered, operated, maintained, abandoned, or removed within the mitigation bank will meet the requirements of this part and the rules adopted thereunder;

(h) It has sufficient legal or equitable interest in the property to ensure perpetual protection and management of the land within a mitigation bank; and

(i) It can meet the financial responsibility requirements prescribed for mitigation banks.

190. Florida Administrative Code Rule 62-342.400 incorporates the standards set forth in section 373.4136(1).

191. Section 373.4136(4), Florida Statutes, enumerates the factors that must be evaluated in determining the degree of improvement in ecological value provided by a mitigation bank to warrant the application of credits to environmental impacts, and provides, in pertinent part, that:

The number of credits awarded shall be based on 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. In determining the degree of improvement in ecological value, each of the following factors, at a minimum, shall be evaluated:

(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.

Ultimate Conclusions of Law

192. The evidence in this case demonstrates that, except for the number of mitigation credits that should be awarded, Highlands Ranch has satisfied the applicable criteria for establishing a mitigation bank as set forth in section 373.4136(1), section 373.4136(4), and Florida Administrative Code Rule 62-342.400.

193. Based on the totality of the facts adduced at the final hearing, weighing the evidence introduced by each of the parties, and gauging the demeanor and credibility of the witnesses, the undersigned concludes that Ms. Bersok correctly applied the UMAM rule, Florida Administrative Code Rule 62-345, and that her application of the rule to determine the value of functions provided by the assessment areas and activities thereon constitutes the most accurate analysis, assessment, and calculation of the number of mitigation credits allowable for the HRMB under the UMAM.

194. Ms. Bersok's calculations, which applied each of the policies that were established by the Department in evaluating the HRMB application, including the "one-step" preservation

factor and the "performance-driven" success criteria, constitute the most persuasive evidence of the correct number of mitigation credits in this case. Therefore, except for her failure to apply time lag and risk factors as required by the application of the UMAM rule to the facts of this case, the preponderance of the competent and substantial evidence in this case demonstrates that the HRMB is entitled to an award of no more than 280.33 mitigation credits.

195. Ms. Bersok's opinions were based on competent and substantial evidence, including the complete application and sufficient knowledge of the conditions of the Property, both as they currently exist and as they are proposed upon completion of all enhancement, restoration, and preservation activities.

196. Ms. Bersok's testimony is not discounted based on her disagreement with higher proposed mitigation credit scores, or by her May 11, 2013, removal from further official review of the application. Taken as a whole, her testimony on the foregoing matters was more persuasive than that of the other witnesses providing testimony regarding the issues.

197. In her calculation of the mitigation credits to be awarded, Ms. Bersok applied time lag and risk factors of 1.00 to each of the restoration and enhancement areas. Those scores were applied not as a reflection of her opinion of the appropriate standard, but to comply with Mr. Littlejohn's

instructions. For the reasons expressed in the findings of fact, the Department's failure to apply a time lag factor of greater than 1.00 to recognize the difference in the time wetland impacts being mitigated by released mitigation credits are anticipated to occur and the time when the mitigation is anticipated to fully offset the impacts, and the failure to apply a risk factor of greater than 1.00 to recognize the uncertainty in the achieving ecological values of the assessment areas based on the length of time expected before final success, was in error.

198. Although Petitioner met its burden of proving that the application of time lag and risk factors of 1.00 was not supported by the evidence, it did not offer evidence that would allow the undersigned to calculate the correct time lag factor for each assessment area. Thus, that calculation is not provided herein.

199. For the reasons set forth herein, the undersigned concludes that the establishment of performance-driven success criteria for interim releases of mitigation credits is sufficient to meet the interim release standards in section 373.4136(5) and Florida Administrative Code Rule 62-342.470(3). However, that conclusion is dependent and conditioned upon the revision of the schedule to reflect the correct number of mitigation credits to be awarded, based on the maximum of 280.33

mitigation credits as modified by the application of reasonable and appropriate time lag and risk factors.

Variance from Financial Responsibility Requirements

200. Based on the findings of fact set forth herein, and pursuant to the standards in section 120.542, the undersigned concludes that Highlands Ranch failed to establish that it is entitled to a variance from the financial responsibility requirements in Florida Administrative Code Rule 62-342.700.

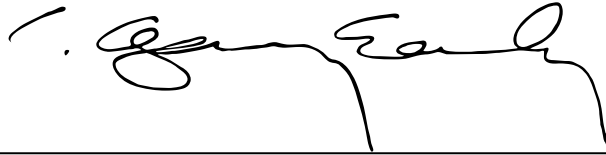
Motion for Attorney's Fees and Costs

201. Based on the findings of fact set forth herein, Highlands Ranch's Motion for Attorney's Fees and Costs, brought pursuant to section 120.569(2)(e) and section 120.595 is DENIED.

RECOMMENDATION

Based on the findings of fact and conclusions of law, it is RECOMMENDED that the Department of Environmental Protection enter a final order consistent with the findings of fact and conclusions of law set forth herein.

DONE AND ENTERED this 11th day of April, 2013, in
Tallahassee, Leon County, Florida.



E. GARY EARLY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of April, 2013.

ENDNOTES

^{1/} The undersigned has taken official recognition of the date of the conclusion of the 2011 regular legislative session.

^{2/} Mr. Littlejohn stated that the term "pilot" should not have been used in the HRMB draft permit because his intent was that the approach could be applied, at the option of an applicant, to future mitigation bank applications. To the contrary, the "performance-driven" approach, having never before been used in an analogous permitting program, clearly meets the definition of a pilot program. However, the name ascribed to the approach has no bearing on any material issue in this proceeding.

^{3/} A request for additional information is recognized as the means for obtaining information in support of an application for a license pursuant to section 120.60(1).

^{4/} Neither Mr. Rach nor Mr. Thomasson performs UMAM scoring as part of their normal duties, nor did either of them score the subject HRMB permit application.

^{5/} A score of 1.00 for time lag is warranted for preservation assessment areas, since those areas will meet their final ecological targets upon recording of the conservation easement.

^{6/} The petition indicated that Highlands Ranch intended to meet the financial responsibility requirements for the perpetual management of the HRMB.

^{7/} The failure of Petitioner to establish its standing under section 120.57(1) as a representative of its members does not affect its standing to proceed under section 403.412(6).

^{8/} Highlands Ranch cites authority that stands for the proposition that "res judicata and collateral estoppel do not apply where 'two separate and distinct governmental units independently considered similar factual allegation, but for different purposes.'" e.g., Newberry v. Fla. Dept. of Law Enf., 585 So. 2d 500, 500 (Fla. 3rd DCA 1991). Those cases have been considered, but found to be inapplicable due both to the relationship between the Department and the SJRWMD established by the Operating Agreement, and the fact that the actions taken by the Department and the SJRWMD were for identical purposes.

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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.