August 4, 2008

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RE: SFWMD ERP PERMITTING

Dear Chairman Buermann,

The issues discussed by the Governing Board and your staff during the Environmental Resource Permit (ERP) briefing at the July 9 Workshop are critical to the protection of the wetland and water resources of the South Florida ecosystem.

At times during that discussion various staff and board members offered what we believe is an overly limited view of the District's ability to protect wetlands under the governing laws. Because the District's wetland permitting decisions are a central part of the overall effort to protect the Everglades and other wetlands in south Florida, we have prepared a brief legal analysis for the Governing Board's consideration as it moves forward on all future applications for ERPs as well as the further refinement of the District's rules governing these permits. Our legal analysis is attached. First, however, we would like to comment on several key issues highlighted during the Governing Board's recent discussion, which frankly was the most probing and in depth discussion that we have heard policy makers have on this critical subject in many years. Board members asked excellent questions that went to the very heart of the debate about the effectiveness of the wetland permitting process.

1. The Intent of the State's Wetland Permitting Laws

During the workshop, board members asked about the intent of the state's wetland permitting laws. Our attached legal analysis includes a detailed discussion of this subject. However, in short, the clear intent of state law is to protect wetlands. To the extent that state law requires "balancing" between wetland protection and other interests, the legislative language specifically requires the District to balance other "vital state interests", "essential economic development" and the need for water – dependant uses against the destruction of wetlands. We feel that Staff's response to questions about legislative intent may not have adequately conveyed the importance of legislative intent. The intent of the state's permitting laws is not academic or somehow disconnected from daily regulatory implementation. It is the fundamental, first rule of interpreting and implementing any statute - the legislative intent of the statute is the primary consideration. See J.W. Hampton v. United States, 276 U.S. 394, 407 (1928). Legislative intent must be the overarching guiding principle behind the use of the agency's discretion in its regulatory and rulemaking responsibilities. See Florida

Audubon Society v. So. Fla. Water Mgmt. Dist., 2002 Fla. Div. Adm. Hear LEXIS 1661 (Nov. 15, 2002 Recommended Order) (District's imposition of certain flowage easements and special conditions in an ERP was justified because it "serv[ed] the legislative intent in protecting Florida's considerable investment in the implementation of CERP and achievement of the resulting improvements in water quality."); Orlando Central Park v. So. Fla. Water Mgmt. Dist., 1987 Fla. Tax LEXIS 623 (March 6, 1987, Final Order) (District properly relied on the legislative intent behind Chapter 373, Fla. Stat. to support proposed rule aimed at protecting isolated wetlands). In exercising its discretion under the law, agency staff should always refer to legislative intent in its final analysis of a given permit application.

2. The Impact of Private Property Rights on the District's Ability to Exercise its Discretion Under the Law.

During the Board's workshop, the suggestion was made that the District's discretion in implementing its ERP laws is significantly limited by the need to protect the private property rights of landowners. In our experience, private property rights law is among the most misinterpreted, misunderstood and misapplied bodies of law. We have found that this erroneous application of the law is in turn one of the most common reasons that policy makers fail to properly enforce wetlands protection laws. This is perhaps an understandable error, but it is an error nonetheless. Our attached legal analysis more specifically outlines the law. However, generally speaking, the first rule of regulatory property rights law is that a "taking" can only be decided on a fact-specific case-by-case basis. It is *rare* that a permit denial or very limited approval actually violates private property rights. Typically if the denial or limited approval still allows an owner to make an economically viable use of the property, or if the owner had prior knowledge of the existence of wetland regulations when the land was acquired, for example, the owner's private property rights laws have not been violated.

3. The Limitations of Administrative Review

On a number of occasions over the years, environmental permitting staff of this and other permitting agencies have responded to criticism of permitting recommendations by pointing to the acceptance of their testimony by an Administrative Law Judge (ALJ) as affirmation of the correctness of the permitting decision. However, as a practical matter, when permits are challenged and proceed to administrative hearings, and the experts for the applicant and the "third party" express very different views, administrative law judges – who are lawyers and not scientists – naturally tend to defer to the testimony of the District's staff. See Rioz v. State Bd. of Professional Engineers, 979 So. 2d 979 (Fla. 3d DCA 2008) ("Agencies generally have more expertise in a specific area they are charged with overseeing. Thus, in deferring to an agency's interpretation, courts benefit from the agency's technical and/or practical experience in its field"). In fact, long-standing legal doctrine *requires* that they defer to the judgment of the agency with the responsibility to implement a specialized program, like wetland permitting. See Public Employees Relations Commission v. Dade County Police Benevolent Association, 467 So. 2d 987, 989 (Fla. 1985) ("A reviewing court must defer to an agency's interpretation

of an operable statute as long as the interpretation ***is consistent with legislative intent*** and is supported by substantial, competent evidence.")(emphasis added); Reedy Creek Imp. Dist. V. State Dept. of Environmental Regulation, 486 So. 2d 642, 648 (Fla. 1st DCA 1986). Also, the tendency of ALJs is to view agency staff as being more neutral than the experts for either the applicant or the opponent. This gives staff enormous influence in the face of scientific uncertainty or doubt (which is inherent in such matters), and the way staff chooses to come down in these debates is usually determinative of the outcome of the case. *Our observation, after many years of experience with these types of challenges, is that staff's judgment in the face of scientific uncertainty could usually come down on the side of the environment or of the applicant, and an administrative law judge would tend to uphold that judgment in either event.*

4. What Role Does the Law Define for Mitigation?

The use of mitigation to offset wetland impacts and approve permit applications was another important issue discussed at the workshop. As our legal analysis explains, the District is required to approve a mitigation plan only if the applicant demonstrates that it has explored practicable design modifications to eliminate or reduce wetland impacts. Moreover, the District is required only to "consider" the use of mitigation; it is not necessarily required to "approve" mitigation. Further, mitigation must actually offset the specific adverse impacts of the project. This is a particularly important requirement when impacts are proposed to rare or geographically significant wetlands. The law also recognizes that not all impacts can be mitigated and when that is the case, the impacts are not allowable under the law. This is perhaps the part of the permitting process where technical disagreements most often occur and therefore where the staff's approach to implementing its own discretion has the greatest consequence for natural systems.

5. The Nature of the Permitting Criteria

Over the years, various District have justified issuing a disputed permit by stating that the permit "meets our criteria" and thus must be approved. This seems to suggest that the criteria are some sort of black and white, numerically - stated absolute criteria, and thus that the agency's hands are somehow tied in a manner that precludes full protection of wetlands. But the public interest criteria and objectives of the District are expressed in more subjective terms, requiring the exercise of professional judgment by staff biologists and engineers that is in turn to be guided by the Legislative intent to protect wetlands as much as practicable. The criteria are to be weighed and balanced, and an adverse impact on a single criteria could be great enough to require denial of the requested permit.

In summary, we believe that the law supports and in fact requires strong protection of wetlands, and that the District can do a better job implementing these laws. The Governing Board has the authority and the responsibility to ensure that the agency is doing its best under the law to meet the legislative intent of wetland protection. We strongly urge the Governing Board to provide unambiguous direction to District staff to read broadly the wetland protection and public interest requirements of the law,

consistent with legislative intent, to give the benefit of the scientific or technical doubt to the natural system, and to maximize the use of state wetlands law as a tool for protecting the water resources of the South Florida ecosystem.

Thank you for your consideration of these points and the attached legal analysis. We hope to follow up with you in the next few weeks to discuss these issues further.

Sincerely,

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Jason Totoiu, Staff Counsel

cc: Michael Collins, Charles J. Dauray, Melissa Meeker, Jerry Montgomery, Shannon Estenoz, Patrick Rooney, Jr., Esq., Paul C. Huck, Jr., Robert Brown, Susan Martin, Esq.

LEGAL ANALYSIS

The laws that govern the decision-making of the District's Governing Board and staff under the ERP Program are described below.

The Florida Constitution

The Florida Constitution of course under-pins all Florida statutes and administrative rules. It says:

> "It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made for the abatement of air and water pollution and of excessive and unnecessary noise." Art. II, Sect. 7, Fla. Const.

With respect to property rights, the Florida Constitution guarantees:

> "No private property shall be taken except for a public purpose and with full compensation." Art X., Sec. 6, Fla. Const.

The Legislative Intent of Florida's Wetlands Law

A question was raised during the workshop as to the intent and purpose of the wetland laws.

Current wetlands law in Florida, while it has been amended slightly over the past 20 years, is essentially the same as when it was originally enacted in 1984. The title to chapter 84-79, Laws of Florida, which created the "Warren S. Henderson Wetlands Protection Act of 1984,"Part VIII of chapter 403, Fla. Stat., now entitled "Permitting of Activities in Wetlands," reads as follows (emphases added):

> "WHEREAS, Florida's ***wetlands are a major component of the essential characteristics that make this state an attractive place to live***. They ***perform economic and recreational functions that would be costly to replace should their vital character be lost***, and
>
> WHEREAS, the economic, urban, and agricultural development of this state has necessitated the alteration, drainage, and development of wetlands. ***While state policy permitting the uncontrolled development of wetlands may have been appropriate in the past, the continued elimination or disturbance of wetlands in an uncontrolled manner will cause extensive damage to the economic and recreational values*** which Florida's remaining wetlands provide, and
>
> WHEREAS, it is the ***policy of this state to establish reasonable regulatory programs which provide for the preservation and protection of Florida's remaining wetlands to the greatest extent practicable, consistent with private property rights and the balancing of other vital state interests***, and

> WHEREAS, it is the policy of this state to ***consider the extent to which particular disturbances of wetlands are related to uses or projects which must be located within or in close proximity to the wetland and aquatic environment in order to perform their basic functions, and the extent to which particular disturbances of wetland benefit essential economic development***, ..." (as quoted in Florida Power Corp. v. State, Dept. of Environmental Regulation, 638 So.2d 545, 547-548 (Fla. 1st DCA 1994).

A few observations on this Legislative intent are important.

First, the clear intent of the law is to stop the previously "uncontrolled development of wetlands" and "the continued elimination or disturbance of wetlands in an uncontrolled manner…." As a result, the law is intended to "provide for the **preservation and protection of Florida's remaining wetlands**.…"

Next, the expressed policy to "consider the extent to which particular disturbances of wetlands are related to uses or projects which must be located within or in close proximity to the wetland or aquatic environment in order to perform their basic functions, and the extent to which particular disturbances of wetland benefit essential economic development ...," strongly suggests, in layman's terms, that it should be much more difficult to get a wetland permit for a residential or commercial development than for an essential public facility that, in order to serve its purpose, must be located in the wetland.

The wetlands law under which the District currently operates in found in Chapter 373, Fla. Stat. § 373.016, Fla. Stat., "Declaration of policy", says that:

> (1) The waters in the state are among its basic resources. Such waters have not heretofore been conserved or fully controlled so as to realize their full beneficial use.
>
> (2) The department and the governing board ***shall take into account cumulative impacts on water resources and manage those resources in a manner to ensure their sustainability.*** **(emphasis added)**

Next, § 373.6161, Fla. Stat., says that:

> **"**This chapter ***shall be construed liberally for effectuating the purposes described herein***…."

The intent of the law is to protect wetlands to a great degree, to ensure their "sustainability," and that whenever it is necessary to interpret the law and implementing rules, they should be read broadly ("liberally") so as to effectuate that intent. Any questions of interpretation are to be resolved in favor of protecting the environment, and not in favor of the applicant. This is particularly true considering that the law places the burden of proving entitlement to permits on the applicant. Save Anna Maria, Inc. v. Dep't of Transp., 700 So.2d 113, 116 (Fla. 2d DCA 1997).

The Public Interest Criteria

An applicant for an ERP must demonstrate that the project will not violate water quality standards and will meet the "public interest" test, which is quoted below:

> "§ 373.414, Fla. Stat. *Additional criteria for activities in surface waters and wetlands*
>
> (1) As part of an applicant's demonstration that an activity regulated under this part ***will not be harmful to the water resources or will not be inconsistent with the overall objectives of the district***, the governing board or the department shall require the applicant to provide reasonable assurance that state water quality standards applicable to waters as defined in s. 403.031(13) will not be violated and ***reasonable assurance that such activity*** in, on, or over surface waters or wetlands, as delineated in s. 373.421(1), ***is not contrary to the public interest***. However, if such an activity significantly degrades or is within an ***Outstanding Florida Water,*** as provided by department rule, the applicant must provide reasonable assurance that the **proposed activity will be clearly in the public interest.**
>
> (a) In determining whether an activity, which is in, on, or over surface waters or wetlands, as delineated in s. 373.421(1), and is regulated under this part, is not contrary to the public interest or is clearly in the public interest, the governing board or the department ***shall consider and balance the following criteria***:
>
> 1. Whether the activity will ***adversely affect the public health, safety, or welfare*** or the property of others;
> 2. Whether the activity will ***adversely affect the conservation of fish and wildlife***, including endangered or threatened species, ***or their habitats***;
> 3. Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;
> 4. Whether the activity will ***adversely affect the fishing or recreational values or marine productivity*** in the vicinity of the activity;
> 5. Whether the activity will be of a ***temporary or permanent*** nature;
> 6. Whether the activity will adversely affect or will enhance significant historical and archaeological resources under the provisions of s. 267.061; and
> 7. The ***current condition and relative value of functions*** being performed by areas affected by the proposed activity.

We would make the following observations about the public interest test:

- An applicant seeking permission to destroy wetlands must affirmatively prove that the project is in the public's interest based on specific criteria – It is not a private interest test giving rise to an entitlement to approval unless the agency proves there will be a problem.
- The criteria are decidedly **weighted towards environmental values.**
- It precludes the issuance of a permit that ***will "be harmful to the water resources or will not be inconsistent with the overall objectives of the district…"***

- "Reasonable assurances" contemplates that there is a substantial likelihood that the project will be successfully implemented." Metropolitan Dade County v. Coscan Florida, Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992) (emphasis added). This is particularly important regarding proposed mitigation.
- Section 373.414, Fla. Stat. "is prohibitory. It requires reasonable assurance before the project is started that water quality [and the public interest] will not be violated. It is not within the [District's] province to allow [an applicant] to proceed with a project…with no idea as to what the effect on water quality [and the public interest] will be." Metropolitan Dade County v. Coscan Florida, Inc., 609 So. 644, 648 (Fla. 3d DCA 1992).
- For projects in or impacting an ***Outstanding Florida Water*** (e.g. the Keys) it should be much more difficult to obtain a wetlands permit. The project must be "**clearly in the public interest." Simply "not [being] contrary to" the public interest isn't enough in an OFW.**
- Projects that result in the **"permanent" loss** of wetlands should be harder to permit than those that require only "temporary" impacts.
- Consideration of the "***current condition and relative value of functions*** being performed by areas affected by the proposed activity" means that the greater the previous loss of a wetland type or ecosystem, and thus its current scarcity, the harder it should be to get a permit to destroy even more. The short hydroperiod freshwater wetlands that were once found throughout the Everglades, and are now viturally non-existent, would be one example.

In addition to these observations, over the years, various District have justified issuing a disputed permit by stating that the permit "meets our criteria" it thus must be approved. This seems to suggest that the criteria are some sort of black and white, numerically stated absolute criteria, and thus that the agency's hands are somehow tied in a manner that precludes full protection of wetlands. But the public interest criteria and objectives of the District are expressed in more subjective terms requiring the exercise of professional judgment by staff biologists and engineers that is, in turn, to be guided by the Legislative intent to protect wetlands as much as practicable. The criteria are to be weighed and balanced, and an adverse impact on a single criteria could be significant enough to require denial of the requested permit. Higgins, et. al v. Roberts, et. al and Department of Environmental Regulation, 9 FALR 5045, 5047-5048 (DER 1987) (applying the test to a proposal that would adversely impact the habitat of endangered and threatened wildlife species).

If a permit will have an adverse, unmitigated impact on wetland and water resources, it does not comply with the criteria, and should be denied. To the extent that applicants submit projected positive economic gains to the region from the proposed project, the District must also consider the Legislature's recognition that continued loss and impact "*will cause extensive damage to the economic and recreational values"* of wetlands. The District's decisions can and **must consider the complete and long-term economic impact of permitting new degradation of wetlands**. This analysis must include the negative harm on the public economy and health resulting from the reduced

relative value of Florida's sport and commercial fisheries, tourism industry, hunting grounds, recreational areas, potable water quality degradation, and loss of basic natural functions of the land water and air that make up the state and allow it to exist and function. In a region with shellfish harvesting areas permanently closed, fish consumption warnings and limits, fishery and boating limits resulting from previous impact levels, many water bodies not meeting their water quality standards or provided enough water to serve their full natural function, the focus of a District "objective" to protect and restore the Everglades, additional important wetland loss should perhaps be the rare, fully - mitigated exception, and not the rule.

Minimization and Avoidance

State ERP rules emphasize requiring a permit applicant to make all practicable modifications to the development proposal that would avoid or eliminate wetland impacts. See e.g. Rule 62-312.060, F.A.C.[1] Reasonable design modifications include alternating the size and location of structures proposed for construction within wetlands. Belanger et al. v. So. Fla. Water Mgmt. Dist., 2002 Fla. Div. Admin. Hear. LEXIS 953 at *8-9 (Fla. Div. Admin. Hearings July 24, 2002) (emphasis added).

These rule requirements to try to avoid wetland impacts altogether, and then to require full mitigation to offset unavoidable impacts is a policy decision to ensure the sustainability of wetland and water resources.

At the workshop, staff discussed with the Board a recent case from Captiva Island, with which our firm was involved, wherein an administrative law judge overturned staff issuance of a permit because of the failure to require the applicant to demonstrate that additional wetland impact reduction was not practicable. The ruling in that case is that the District must require applicants to prove, with actual data, their claims that they cannot further reduce impacts without compromising the economic viability of the project. Staff expressed concern that it does not possess the expertise to review financial data submitted by the applicant. Yet, the rules require that the applicant prove compliance with these rules, and if staff does not have the expertise to review the data, at a minimum, the submission of this information would make it available for the public to review. Ultimately, the point of this requirement is that an applicant must prove claims – which can tend to be exaggerated – that they cannot reduce impacts further. Instead of just having to take their word for it, the District and the public should be able to analyze actual proof of such claims.

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1 See, e.g., Orlando Central Park v. SFWMD, 9 F.A.L.R. 1305-A, 1319-20-A, 1330 – A (Fla. Div. Admin Hrgs. 1987) Dibbs v. DEP and Booker Preservation, Inc., 1995 WL 1052814 (Fla. Div. Admin Hrgs. 1995); VHQ Development, Inc. v. Department of Environmental Protection, DOAH Case No. 92-7456, 15 FALR 3407 (DEP Final Order, August 13, 1993), aff'd, 642 So. 2d. 755 (Fla. 2nd DCA 1994); County Line Coalition, Inc. v. Southwest Florida Management District. 1999 WL 1483750 (Fla. Div. Admin. Hrgs. 1999);

Mitigation Requirements to "Offset" Wetland Impacts

The ERP rules clearly state the "protection of wetlands and other surface waters is preferred to destruction and mitigation due to the temporal loss of ecological value and uncertainty regarding the ability to recreate certain functions associated with these features." Section 4.3, Basis of Review. Thus, mitigation can be approved only after the applicant has demonstrated that it has explored design modifications to reduce or eliminate adverse wetland impacts. Sections 4.3 and 4.2.1, Basis of Review. Moreover, the law requires the District to "***consider"*** mitigation proposals to offset projects that will have an adverse impact on water resources, not to issue all permits for which mitigation is proposed. §373.414(1)(b), §403.918(2)(b), Fla. Stat. Mitigation **must truly offset the specific adverse effects caused by the project**. Southwest Florida Water Management Dist. v. Charlotte County, 774 So.2d 903, 910-912 (Fla. 2nd DCA 2001); VHQ Development, Inc. v. Department of Environmental Protection, DOAH Case No. 92-7456, 15 FALR 3407 (DEP Final Order, August 13, 1993), aff'd., 642 So. 2d. 755 (Fla 2nd DCA 1994); County Line Coalition, Inc. v. Southwest Florida Management District. 1999 WL 1483750 (Fla. Div. Admin. Hrgs.1999); McCormick v. Jacksonville and DER, 12 FALR 960 (DEP 1990).

In Florida Power Corporation v. DER, 92 ER FALR 56 (DER Final Order April 1, 1992) the Department held that, "although there is no absolute "no net loss" standard for mitigation, **the avoidance or minimization of net loss is an important guiding principle of mitigation**." Since mitigation by preservation necessarily results in loss of jurisdictional wetlands, the Department generally accepts preservation mitigation only after on-site wetland creation and/or enhancement is shown to be not feasible or not sufficient to tip the public interest balancing test "scales" in favor of permit issuance. Id.

Yet, some wetlands cannot be mitigated because they are particularly unique or provide functions that cannot be re-created. As Section 4.3 of the District's Basis of Review makes clear:

> "In certain cases, mitigation cannot offset impacts sufficiently to yield a permittable project. Such cases often include activities which significantly degrade Outstanding Florida Waters, adversely impact habitat for listed species, or adversely impact those wetlands or other surface waters not likely to be successfully recreated." Id. See also Peace River/Manasota Regional Water Supply Authority v. IMC Phosphates and DEP, 2005 Fla. Div. Adm. Hear. LEXIS 736 (Recommended Order May 9, 2005); Charlotte County v. IMC Phosphates and DEP, 2003 Fla. ENV LEXIS 170 (Recommended Order August 1, 2003).

Thus, the District has the clear discretion to reject a mitigation plan and deny a permit that otherwise does not eliminate or reduce harm to wetlands. In view of the District's discretion and the fact that Florida's reliance on mitigation over the years has

contributed to substantial destruction of wildlife and habitat,[2] we submit that the District has the authority and in fact an obligation not to approve mitigation plans and permit projects where the applicant has failed to show from the onset that they cannot eliminate or reduce wetland impacts.

The UMAM Rule

Staff has discussed with the Board the Districts' UMAM Rule (Uniform Mitigation Assessment Method), which is designed to create a numeric formula by which the "benefit" of a mitigation proposal can be compared to the proposed permitted adverse impacts. We would make the following points about this rule:

- It applies only to assess mitigation. **In other words, it does not assess whether the proposed project meets other criteria for issuance of a permit, nor the extent that such impacts may be approved.** Rule 62-345.100 (2), F.A.C. (emphasis added).

- It does not apply to the assessment of impacts to or mitigation for **impacts to fishing or recreational values**, under the public interest test. Rule 62-345.100 (2), F.A.C. (3) (h)

- It requires the District, **"[w]hen assessing preservation [mitigation]**," to "**consider[] the extent and likelihood of what activities would occur if it were not preserved**, … and the **protection provided by existing easements, restrictive covenants, or state, federal, and local rules, ordinances and regulations**." Rule 62-345.500 **(3)(a)** (emphasis added)

When mitigation credit is given for agreeing to not impact even more wetlands, it cannot seriously be maintained that the adverse impacts are actually being *offset*. Before preservation credit is given, it should be clear from the facts that the applicant possesses development rights under previous approvals or existing entitlements and that all applicable local, state and federal rules would have allowed that wetland to be destroyed absent a binding agreement by the landowner otherwise.

Cumulative Impact Analysis

The District must consider the cumulative impacts of each permitting decisions, based on the previous level of impact to the wetlands, and the potential for similarly zoned/ planned neighboring owners to request a similar permit. Sierra Club v. St. Johns River Water Mgmt., 816 So. 2d 687, 688 (Fla.1st DCA 2002). The text of the statute is below:

Section 373.414, (8)(a) Fla. Stat.: […]

2 See John C. Tucker, Biodiversity Protection and Ecosystem Management in Florida: Obstacles and Opportunities, 13 Fordham Envtl. L. J. 1 (2004) (citing FLA. DEP'T. OF ENVTL. REGULATION, REPORT ON THE EFFECTIVENESS OF PERMITTED MITIGATION 3-4 (1991)).

> "The governing board or the department, in deciding whether to grant or deny a permit … **shall consider** the **cumulative impacts** upon surface water and wetlands, …, **within the same drainage basin**…, of:
>
> 1. The activity for which **the permit** is sought.
>
> 2. **Projects which are existing** or … are **under construction** or projects **for which permits** or determinations … have **been sought.**
>
> 3. Activities which are **under review, approved, or vested** …, or other activities … **which may reasonably be expected** to be located within surface waters or wetlands, …, in the same drainage basin …, **based upon the comprehensive plans**, …, **of the local governments having jurisdiction** over the activities, or applicable land use restrictions and regulations. (emphasis added).

These rules are designed to "prevent piecemeal destruction of the environment." "[W]ithout the ability to consider the long term impacts of a project in combination with past and reasonably likely similar projects in the area, the … agency would be helpless to prevent the gradual elimination of environmental resources …." McCormick v. City of Jacksonville, 12 FALR 960 (FLWAC Jan. 22, 1990).[3]

Private Property Rights

A landowner bringing a "takings" claim as a result of a wetland permit denial or limited approval must show that he or she has been denied all economically viable use of the property as a whole, Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), not just a "particular type of use that a property owner considers to be the most desirable or profitable." Key Haven Assoc'd Enterprises, Inc. v. Bd. of Trustees of Internal Improvement Trust Fund, 427 So. 2d 153, 159-60 (Fla. 1983); accord, Fla. Dep't Envtl. Protection v. Burgess, 772 So.2d 540 (Fla. 1st DCA 2000); State Dep't of Envtl. Reg. v. McKay, 544 So. 2d 1065 (Fla. 3d DCA 1989).

In the specific context of wetland permits, the Florida Supreme ruled, in Graham v. Estuary Properties, Inc. 399 So. 2d 1374 (Fla. 1981) that a landowner does not possess an inherent property right to substantially change the essential natural character of land and put it to a use for which it is not inherently suitable:

> "An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injuries the rights of others."

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3 See also Florida Power Corp. v. D.E.R**,** 638 So. 2d 545, 561 (Fla. 1st DCA 1994), rev. denied, 650 So. 2d 989 (Fla. 1994) ("a *de minimis* exception [to the cumulative impact analysis requirement] "would completely undercut the purpose of the cumulative impact analysis…."

There is a taking only when "the property as a whole" had no remaining economic uses with out the permit. McKay, 544 So. 2d at 1066. In State, Dept. of Environmental Regulation v. Schindler, 604 So.2d 568(Fla. 2d DCA 1992) a takings claim was rejected where the owners 1.65 acres of uplands could be built upon even without a permit for the 1.85 acres of wetlands. Similarly, the Court in Fla. Game & Fresh Water Fish Comm'n. v. Flotilla Inc., 636 So. 2d 761 (Fla. 2d DCA 1994) found the restriction on development of 48 acres of a 173 acre parcel to protect bald eagle nesting sites did not deprive the developer of most or all of its interests in the property.

Takings claims will probably also be rejected when the landowner knew at the time of acquisition that the property was wetlands that could not be filled without a state permit. See Namon v. Dep't of Envtl. Regulation, 558 So. 2d 504, 505 (Fla. 3d DCA 1990) rev. denied, 564 So. 2d 1086 (Fla. 1990).

Thus, as Florida Courts have recognized over the years, it is rare that a permit denial will demonstrate the loss of all economic use and that a taking has occurred. DEP v. Burgess, 667 So. 2d 267, 270 n.5 (Fla. 1st DCA 1995) (citing City of Pompano Beach v. Yardarm Restaurant, Inc., 641 So. 2d 1377, 1385-1386 (Fla. 4th DCA 1994)) (and cases cited therein).

Conclusion

In short, the Legislature delegated the District significant discretion in its environmental resource permit program and the District's denial of wetland permits to prevent significant impacts to ecosystems will be upheld in legal challenges. See, e.g., Florida Power Corp. v. Department of Envtl. Regulation, 638 So. 2d 545 (Fla. 1st DCA 1994); Swire Properties v. Bd. of Trustees of the Internal Improvement Trust Fund, 2003 Fla. ENV LEXIS 36 (January 29, 2003 Final Order); Kramer v. Dept of Envtl. Protection, 2002 Fla. ENV LEXIS 152 (January 26, 2002 Final Order); Frankel v. Dept. of Envtl. Protection, 1999 Fla. Div. Adm. Hear. LEXIS 5078 (January 12, 1999 Recommended Order); Flynn v. Dept of Envtl. Protection, 1997 Fla. ENV LEXIS 245 (December 12, 1997 Recommended Order). Moreover, it is extremely rare that any such denial would deny a landowner of all economically viable use of their property and require compensation. See Burgess, 667 So, 2d at 270. Thus, the District should exercise its authority and discretion to the fullest extent afforded to it by the Legislature, by allowing for mitigation only where it can fully offset wetland impacts, giving the benefit of the scientific or technical doubt to the natural system, and ensuring that any proposed project is in the public interest and will not degrade the water resources of the South Florida ecosystem.