

EPC

6/15/00

**ENVIRONMENTAL PROTECTION COMMISSION  
OF HILLSBOROUGH COUNTY  
COMMISSIONER'S BOARD ROOM  
JUNE 15, 2000  
10 A.M. – 12 NOON**

**AGENDA**

- I. CITIZENS WISHING TO APPEAR**
- II. PUBLIC HEARING**
  - Consider Hearing Officer's Recommended Order: Putney Appeal 1
- III. CITIZEN'S ENVIRONMENTAL ADVISORY COMMITTEE**
  - Items of Interest
- IV. CONSENT AGENDA**
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Manhattan Oil Company 117
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- VII. COMMISSIONER'S SECTION**
  - A. Presentations
  - B. Reception

Any person who might wish to appeal any decision made by the Environmental Protection Commission regarding any matter considered at the forthcoming public hearing or meeting is hereby advised that they will need a record of the proceedings, and for such purpose they may need to ensure that a verbatim record of the proceedings is made which will include the testimony and evidence upon which such appeal is to be based.

Visit our website at <http://epchc.org>

*In Honor of*

**ROGER P. STEWART**

*Executive Director  
of the  
Environmental Protection Commission*

1970 – 2000

Thursday, June 15, 2000  
11:00 am

**Welcome**

Jan K. Platt, EPC Chair

**Video**

**Presentations**

- *Rep Rob Wallace, Hillsborough County Legislative Delegation*
- *Fran Barford, Mayor of Temple Terrace*
- *Deborah Getzoff, DEP District Director*
- *Gene Heath, Asst. Executive Director of SWFWMD*
- *Susanne Cooper, TBRPC/ABM*
- *Larry Padgett, CEAC Chair*
- *Carol Iriq, Suncoast Girl Scouts*
- *Dan Kleman, County Administrator*

**Commissioners' Comments**

**Closing Remarks**

Jan K. Platt, EPC Chair

**Presentation of Building Sign**

Tom Koulianos

**Reception**

**AGENDA ITEM COVER SHEET**

**Date:** June 15, 2000

**Agenda Item:** Hearing Officer's Recommended Order: Putney Appeal

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**Description/Summary:**

Louis and Jeanie Putney appealed the Executive Director's denial of their request to impact wetlands on property located in Hillsborough County. The matter was set before Hearing Officer Vanessa Cohn. Upon Motion for Summary Judgment, the Hearing Officer issued the attached Recommendation finding that by not offering any mitigation, the Appellants had not demonstrated that the environmental benefits of the wetland would be adequately protected, and therefore, the Executive Director did not have authority to grant the requested authorization.

Appellants filed Exceptions to the Hearing Officer's Recommendation, as permitted by the Act.

**Attachments:**

Recommended Order dated May 11, 2000  
Appellant's Exceptions  
Executive Director's Response to Appellant's Exceptions  
Executive Director's Response to Exceptions  
Referral Letter regarding Record  
Copy of Part III of Chapter 1-2, Rules of the Commission

**Commission Action Recommended:**

1. Consider adopting the Hearing Officer's Recommendation upholding the Executive Director's denial of Appellants Louis and Jeanie Putney's request to impact wetlands
2. Consider the Exceptions filed by Appellants and response by the Executive Director
3. Consider entering a Final Order finding that Appellants did not demonstrate that the environmental benefits provided by the affected wetland would be adequately protected as required by EPC's Wetland Rule, Chapter 1-11.

COMMISSION

PAT FRANK  
CHRIS HART  
JIM NORMAN  
JAN PLATT  
THOMAS SCOTT  
RONDA STORMS  
BEN WACKSMAN

EXECUTIVE DIRECTOR

ROGER P. STEWART



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TAMPA, FLORIDA 33605  
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AIR MANAGEMENT DIVISION  
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WASTE MANAGEMENT DIVISION  
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WETLANDS MANAGEMENT DIVISION  
TELEPHONE (813) 272-7104

June 5, 2000

Ms. Jan Platt, Chairman  
Environmental Protection Commission  
601 East Kennedy Blvd.  
Tampa, FL 33602

Re: *Appeal of Louis and Jeanie Putney*

Dear Commissioner Platt:

Please find enclosed the Recommendation of Hearing Officer Vanessa Cohn, Esq., along with the complete record developed during the appeal proceedings. Additionally, there is a copy of the Exceptions filed by Appellants pursuant to our rule.

The Hearing Officer concluded that the Appellants:

...have not established by any evidence that they have demonstrated the environmental benefits provided by the affected wetland would be adequately protected pursuant to Rules of the Commission, §1-11.07. The Executive Director therefore, has no authority to grant written authorization to the Putneys to impact wetlands.

This matter will be scheduled for final decision by the EPC board at its meeting on June 15, 2000, at 10 a.m. At that time, the Commission may review the Exceptions and hear argument from both sides regarding the issues reasonably raised by the Exceptions. No testimony or additional evidence may be taken.

By copy of this letter, Commissioners are advised that the record is now available in the EPC Chairman's office for their review. In order to reject, reverse or modify a finding of fact made by the Hearing Officer, Commissioners must have specifically reviewed the record, and must make a finding that there is no substantial competent evidence in the record to support the Hearing Officer's conclusion.

Commission Jan Platt  
*Appeal of Louis and Jeanie Putney*  
June 5, 2000  
Page 2

Please feel free to contact me should you have any questions regarding these proceedings. I have not been involved with this matter in representing the Executive Director before the Hearing Officer, and therefore will be representing the EPC Board at the hearing on June 15, 2000. Please note however, that this is a quasi-judicial matter and any *ex parte* communication between any Commissioner and either party or representative, Louis or Jeanie Putney or the Executive Director is inappropriate.

Sincerely,



Kristin K. Bennett, Esq.  
Associate Attorney, EPC

cc: EPC Members  
Louis Putney, Esq. representing the Appellants  
Andrew Zodrow, Esq. representing the Executive Director

BEFORE THE ENVIRONMENTAL PROTECTION  
COMMISSION OF HILLSBOROUGH COUNTY

APPEAL OF:

EPC # LPUT00-003

Putney, Louis W. and Jeanie T.  
\_\_\_\_\_

**RECOMMENDED ORDER**

Upon due notice, on April 4, 2000, a hearing was held in Tampa, Florida, by Vanessa Cohn, assigned Hearing Officer for the Environmental Protection Commission of Hillsborough County (EPC), on the EPC's Motion for Summary Disposition.

**APPEARANCES**

For Appellants: Louis D. Putney, Esquire  
4805 South Himes Ave.  
Tampa, FL 33611-2616

For EPC: T. Andrew Zodrow, Esquire  
Environmental Protection Commission  
1900 9th Avenue  
Tampa, FL 33605

**STATEMENT OF THE ISSUE**

Whether the Executive Director of EPC, pursuant to the EPC Special Act 84-446 and Wetland Rule 1-11, had authority to issue authorization to Louis W. Putney and Jeanie T. Putney (Putney) to impact wetlands on their property.

## PRELIMINARY STATEMENT

The Putneys applied to EPC on August 10, 1999, for authorization to impact wetlands on their property located in Hillsborough County, Florida at folio No. 6149.0000. On October 15, 1999, EPC sent a letter to Mr. Putney recommending the application be denied. Among the reasons for the denial included a finding that (a) the proposed plan did not provide sufficient justification for the proposed project, (b) the applicant did not propose any mitigation for the impacts and (c) the proposed filling of the whole site did not attempt to avoid or minimize wetland impacts. On October 22, 1999, the Putneys responded by alleging the project was justified. Finally, on November 16, 1999, the Executive Director of EPC formally denied the request for authorization to impact wetlands on the property. The Putneys timely filed a Notice of Appeal on November 30, 1999, challenging the Executive Director's action. Shortly thereafter, the EPC referred the matter to the Hearing Officer, Vanessa Cohn. On March 15, 2000, the EPC filed a Motion for Summary.

### UNDISPUTED FACTS FOR PURPOSES OF SUMMARY DISPOSITION

1. Louis W. Putney and Jeanie T. Putney (Putneys) applied to EPC on August 10, 1999, for authorization to impact wetlands located on their property in Hillsborough County, Florida at folio No. 6149.0000.
2. On November 16, 1999, the EPC Executive Director denied the request of the Putneys to impact wetlands on their property.
3. On November 30, 1999, the Putneys filed a Notice of Appeal challenging the EPC Executive Director's decision to deny the impact to wetlands.
4. For purposes of the summary disposition, it was undisputed and the EPC acknowledges that some impact to the wetlands is required for the Putneys to make reasonable use



of the property. EPC also acknowledges for purposes of the summary disposition that the Putneys may even impact the entire wetland with a proper demonstration of adequate protection of the environmental benefits provided by the affected wetland.

5. In connection with their application to impact the wetlands on their property the Putneys have not proposed any on-site creation mitigation, off-site mitigation, either upland preservation or wetland creation mitigation.

6. The Putneys have proposed only using the existing County owned Hendry Road right-of-way adjacent to the site for use as minimization or possibly mitigation. The right-of-way is currently comprised of wetlands. Putneys have offered only to forego seeking closure of the County owned right-of-way.

7. Based on the submittals to EPC in the application for authorization to impact, the Putneys have not demonstrated how the environmental benefits provided by the affected wetlands would be adequately protected by specified conditions and time limitations which would be imposed upon approval of the development.

#### CONCLUSIONS OF LAW

8. The Hearing Officer has jurisdiction over the parties to and the subject matter of this proceeding pursuant to EPC's enabling act, 84-446, Laws of Florida, (Act) Section 9 and Rules of the Commission, § 1-2.33(4).

9. The applicants has the burden of proof to establish entitlement to a permit. Rules of the Commission, § 1-2.33(4); Florida Department of Transportation v. J.W.C. Company, 396 So. 2d 778 (Fla. 1st DCA 1981).

10. Fact issues not raised by the Notice of Appeal shall be accepted as undisputed. Rules

of the Commission, § 1-2.33(4).

11. The owner of wetlands in Hillsborough County has no right to use them for a purpose for which they are unsuited in their natural state. In addition, it shall be the priority of the EPC to avoid the disturbance of wetlands in the County. Rules of the Commission, § 1-11.01(1).

12. Permits are required for construction which may permit pollutants or contaminants to escape into the air, water, soil or property. Section 11 of the Act.

13. It is unlawful to cause or take such action which may reasonably be expected to cause water pollution in Hillsborough County as defined in Section 3 (15) of the Act. Section 17 of the Act.

14. Development within wetlands of Hillsborough County which destroys, reduces, or impairs the wetland, such as that proposed by the Putneys, constitutes pollution. Rules of the Commission, § 1-11.05(1).

15. Development within wetlands is prohibited except to the extent as may be specifically authorized in writing by the Executive Director. Rules of the Commission, § 1-11.05(1).

16. Review of proposed development will be made by weighing the environmental benefit provided by the target wetland with the impact that the proposed development could reasonably be expected to have upon the wetland's ability to provide those benefits. Rules of the Commission, § 1-11.06(1).

17. Written authorization may be given for impacting wetlands "only if reasonable use of the land cannot be accomplished without affecting the wetland, and only if the benefits provided by the affected wetland are adequately protected by conditions and time limitations." Rules of the Commission, § 1-11.07.

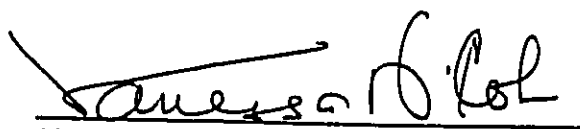
Disposition was directed to the Putneys' failure to demonstrate adequate protection pursuant to Rules of the Commission, § 1-11.07, constitutional issues are not relevant to the Executive Director's decision to deny the request for authorization to impact wetlands.

**RECOMMENDATION**

Based upon the foregoing undisputed facts and conclusions of law it is **RECOMMENDED** that the EPC enter a Final Order denying authorization to impact wetlands on the Putneys' property located in Hillsborough County, Florida at folio No. 6149.0000.

Respectfully submitted,

Dated: May 11, 2006



Vanessa N. Cohn, Esquire  
Hearing Officer for  
Environmental Protection Commission  
of Hillsborough County  
Cohn, Cohn & Hendrix, P.A.  
Post Office Box 3424  
Tampa, Florida 33601

cc: T. Andrew Zodrow, Esquire  
Louis D. Putney, Esquire

BEFORE THE ENVIRONMENTAL PROTECTION COMMISSION  
OF HILLSBOROUGH COUNTY, FLORIDA

IN RE:

EPC# LPUT00-003

Appeal of LOUIS W. PUTNEY and  
JEANIE T. PUTNEY, Husband and  
Wife,

Appellants.

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**APPELLANTS' EXCEPTIONS TO HEARING OFFICER'S REPORT**

COME NOW the Appellants, Louis W. Putney and Jeanie T. Putney, and file this their Exceptions to Hearing Officer's Report and allege:

1. The Hearing Officer appointed herein, Vanessa N. Cohn, Esquire, filed herein her Recommended Order on May 11, 2000.

2. EPC filed herein a pleading entitled "Motion for Summary Disposition". The Appellants filed herein a Motion to Strike the EPC motion as not being permitted by the rules. A copy of Appellant's Motion to Strike is attached hereto as Exhibit "A" and by this reference made a part hereof. The Hearing Officer proceeded to hearing upon EPC's "Motion for Summary Disposition".

3. Pursuant to instructions from the Hearing Officer, the Appellants submitted to her a proposed "Report of Hearing Officer" with "Appellants' Memorandum in Support of Proposed Report of Hearing Officer" and "Final Administrative Order"; copies of which are attached hereto as Appellants' Exhibits "B", "C", and "D", respectively, and by this reference made a part hereof. In drafting these papers

Appellants complied with the Hearing Officer's ruling that the appeal would be denied. Prior to the hearing the Appellants filed with the Hearing Officer the "Appellants' Statement of Factual and Legal Issues to be determined by the Hearing Officer, a copy of which is attached hereto as Exhibit "E", and by this reference made a part hereof.

4. The principal factual issues the Hearing Officer failed to address that were supported by Appellants' pleadings and exhibits are set forth in the "Findings of Fact" section of Appellants' proposed "Report of Hearing Officer" attached hereto as Exhibit "B", and made a part hereof.

5. The principal conclusions of Law the Hearing Officer failed to address are contained in the "Conclusions of Law" section of the aforementioned Appellants' proposed "Report of Hearing Officer".

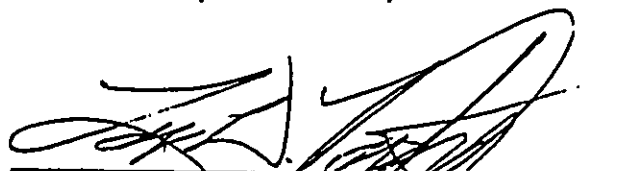
6. "Appellants' Memorandum in Support of Proposed Report of Hearing Officer" attached hereto as Exhibit "C", and made a part hereof sets forth the legal basis for the Appellants' proposed report.

7. Attached hereto as Exhibit "D", is a proposed "Final Administrative Order" conforming with the Hearing Officer's ruling denying the appeal but which contains the actual legal basis upon which the appeal was denied, that is, that the "no net loss" criteria can not be met.

WHEREFORE, Appellants request that their appeal be granted and that the permit to impact wetlands be issued, but that in the event the Commission upholds the decision of the EPC Executive Director and the Hearing Officer to deny the permit,

it is then requested that the Appellants' proposed "Final Administrative Order" submitted herewith be approved and adopted by the Commission.


Respectfully submitted,



LOUIS D. PUTNEY, ESQUIRE  
Florida Bar No.: 239976  
4805 South Himes Avenue  
Tampa, Florida 33611  
(813) 831-3376  
Attorney for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Appellants' Exceptions to Hearing Officer's Report has been filed by hand delivery with Jan Platt, Chairperson of the Hillsborough County Environmental Protection Commission at the main office of the Commission at 601 E. Kennedy Blvd., County Center, 2<sup>nd</sup> Floor, Tampa, Florida 33602, and a copy thereof has been served by U.S. Mail to T. Andrew Zodrow, Esquire, 1900 9<sup>th</sup> Avenue, Tampa, FL 33605, this 18th day of May, 2000.



LOUIS D. PUTNEY, ESQUIRE

BEFORE THE ENVIRONMENTAL PROTECTION COMMISSION  
OF HILLSBOROUGH COUNTY, FLORIDA

IN RE:

Appeal of LOUIS W. PUTNEY and  
JEANIE T. PUTNEY, Husband and  
Wife,

Appellants.

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APPELLANTS' MOTION TO STRIKE  
"EPC'S MOTION FOR SUMMARY DISPOSITION"

COME NOW the Appellants, LOUIS W. PUTNEY and JEANIE T. PUTNEY, by and through their undersigned attorney, and move to strike in its entirety the EPC's "Motion for Summary Disposition" filed herein and allege:

1. The EPC's "Motion for Summary Disposition" is not permitted by any Rule applicable to this proceeding and is, therefore, immaterial in its entirety to the above styled appeal.
2. The Rules of the EPC pertaining to appeals of the Director's Rulings do not provide for a "Summary Disposition" as requested in the EPC's motion. In fact, Rule 1-2.33 requires the Hearing Officer to afford all parties properly appearing before her "the requisite due process of law including, but not limited to the right to:
  - a. Present his case by oral and documentary evidence.
  - b. Submit rebuttal evidence and conduct such cross-examination as may be required, subject, however, to the ruling of the Hearing Officer.



c. Be accompanied, represented and advised by counsel, or to represent himself.

There is no provision for cutting off these rights and to do so would be a denial of due process to the Appellants.

3. Rule 1.510 of the Florida Rules of Civil Procedure pertaining to summary judgments does not apply to this appeal procedure since this appeal does not involve "a party seeking to recover upon a claim, counter-claim, cross-claim, or third party claim or to obtain a declaratory judgment." Apparently the EPC does not maintain that this Rule applies since it is not cited by the EPC and the EPC's motion is for "Summary Disposition", not summary judgment.

4. Even if Rule 1.510, FRCP were applicable to the above proceeding, it provides for the entry of a summary judgment only if "there is no genuine issue as to any material fact". The EPC's motion affirmatively states on page 5, line 2, as follows: "Although the agency disputes whether the proposed plan provides sufficient justification for the proposed impacts, i.e., whether reasonable use of the land can be accomplished without affecting the wetland" etc. Also, on page 5 at line 7, the following: "Factual issues may continue to exist with respect to the reasonable use of the property", etc. Therefore, on its face, the "Motion for Summary Disposition" acknowledges that there exists genuine issues of material facts and such motion, if applicable, could not be granted.

5. EPC Rule 1-2.34 specifically provides "The Hearing Officer shall hear and determine all factual disputes properly raised by the Notice of Appeal", etc., of which

there are many. The EPC Rules do not provide for a "Motion for Summary Disposition".

6. The EPC's attempt to find a legal basis for its motion "By analogy to an Administrative Procedure Act Section 120.57 (2) hearing" is far fetched and unworthy of consideration by the Hearing Officer. That Rule in no wise applies to the present procedure, is totally inconsistent with these proceedings, and the Appellants' rights to due process cannot be determined "by analogy".

WHEREFORE, the Appellants move to strike EPC's "Motion for Summary Disposition" filed herein.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Hand Delivery to T. Andrew Zodrow, Esquire, 1900 9<sup>th</sup> Avenue, Tampa, FL 33605, this 31<sup>st</sup> day of March, 2000, and that the original Appellants' Motion to Strike EPC's "Motion for Summary Disposition" has been filed with the Hearing Officer appointed herein.



LOUIS D. PUTNEY, ESQUIRE  
Florida Bar No.: 239976  
4805 South Himes Avenue  
Tampa, Florida 33611  
(813) 831-3376  
Attorney for Appellants

BEFORE THE ENVIRONMENTAL PROTECTION COMMISSION  
OF HILLSBOROUGH COUNTY, FLORIDA

IN RE:

EPC# LPUT00-003

Appeal of LOUIS W. PUTNEY and  
JEANIE T. PUTNEY, Husband and  
Wife,

Appellants.

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**REPORT OF HEARING OFFICER**

THIS APPEAL came on to be heard on April 4, 2000, before Vanessa N. Cohn, Esquire, the Hearing Officer appointed herein, upon the Motion for Summary Disposition filed herein by the EPC and the Appellants' Motion To Strike EPC's Motion for Summary Disposition, and the Hearing Officer, having heard argument of counsel, rules upon such motions as follows:

1. The Appellants' Motion to Strike be and the same is hereby denied.
2. EPC's Motion for Summary Disposition be and the same is hereby granted in part and denied in part as hereinafter set forth. The court reporter's record of the hearing duly reflects the Appellants' continuing objection to proceeding upon EPC's Motion for Summary Disposition.

**FINDINGS OF FACT**

Based upon the arguments of counsel and the agreements contained therein, pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits, the Hearing Officer makes the following Findings of Fact:

1. The legal description of the property which is the subject of the application (hereinafter "subject property") is as follows, to wit:

That part of Farm Tract 33 CLEWIS MUCK FARMS, according to the map or plat thereof, as the same is recorded in Plat Book 25, page 88, of the public records of Hillsborough County, Florida, lying West of Highway #301;

and the Hillsborough County Tax Assessor's Folio Number for said property is #61490.0000.

2. The entire tract of the subject property is a wetland, as defined in 1-11.02.2.h, Rules of the Hillsborough County EPC, and has been delineated as 100% EPC jurisdictional wetland, primarily a red maple swamp.

3. The subject property in its present state as a wetland provides public environmental benefits to the people of Hillsborough County and the State of Florida, including, but not limited to certain of those defined in 1-11.06.1, Rules of the Hillsborough County EPC, to wit:

- a. Receive, store and discharge surface water runoff so as to contribute to hydrological stability and control of flooding and erosion; ...
- c. Recharge the groundwater;
- d. Provide filtration and uptake of nutrients and pollutants from surface water runoff; ...
- j. Increase rainfall production through available evaporative surfaces.

4. Reasonable use of the subject property by the Appellants cannot be accomplished without affecting the wetland which covers the entire property.

5. The proposed project encroaches on 100 percent of the wetlands as shown in the revised site plan.

6. It is not economically feasible for Appellants to make reasonable use of the subject property while minimizing impacts to the wetlands.

7. The Appellants have not proposed any creation mitigation plan or any off-site mitigation, either upland preservation or wetland mitigation. The Appellants cannot comply with EPC Rule 1-11.09, so as to permit a creation mitigation plan or off-site mitigation, because the subject property and its reasonable use do not fall within any of the provisions of said rule concerning adequate protection, to wit:

(1) Paragraph One. The adverse impact to the environmental benefits would not be temporary. No reasonable use of the property could be made that would be temporary.

(2) Paragraph Two. The subject property is not a "previously altered wetland".

(3) Paragraph Three. The reasonable use of the subject property does not permit the adverse impact to be confined to such a small area as to be of nominal consequence.

(4) Paragraph Four. The reasonable use of the subject property does not permit the adverse impact to have a limited effect on the existing environmental benefits of the wetland, and since the wetlands are 100% of the subject property,

there is no adjoining portion of the wetland of the same type of wetland to provide the same environmental benefits.

(5) Paragraph Five. The adverse impact of the reasonable use of the subject property on the wetland is not offset by the benefit of the development to the public, such as the construction of a public road or other public works.

(6) Paragraph Six. The reasonable use of the subject property does not permit the adverse impact to the site to be prevented by appropriate precautions.

(7) Paragraph Seven. The subject property is not a "previously altered wetland", and there are no uplands to be preserved. Appellants own no other real property in proximity to the subject wetland upon which they could create mitigation wetlands. If the subject property were a "previously altered wetland", and since the subject property is a forested wetland, this section would require Appellants to purchase three times the acreage (7.2 acres) of valuable uplands.

8. On November 16, 1999, the EPC Executive Director (EPC) duly provided notice of the denial to request to impact wetlands on the subject property.

9. On November 30, 1999, the Appellants filed a timely Notice of Appeal challenging the EPC Executive Director's decision to deny the impact.

10. Since the subject property is 100% wetlands it is impossible to develop it in any way and avoid any impacts to the wetlands.

11. The Appellants have minimized, to the extent possible, the impacts from the project. Thirty percent of the land, including a portion of the Hendry Right-of-Way, is conserved as green-space and wetlands. Minimization is not a form of

mitigation and the EPC Rules make no mention of "minimization" or give a definition of the term.

12. Since the subject property is already 100% wetlands it is impossible to create on-site mitigation wetlands.

13. The deposition of Robert Upcavage, Environmental Manager of the Wetlands Management Division of the EPC, taken on March 15, 2000, and March 22, 2000, filed herein established the following facts:

a. Page 13, lines 18 through 21:

Q Was there a determination, at some point, that the application itself was complete and that it would move ahead to the committee process?

A It was.

b. Page 82, lines 21 through 25 and page 83, line 1:

Q With regard to all of those photographs, based on your prior testimony, is it true that you can see no evidence of prior alteration of the wetlands on the Putney site?

A I don't see any evidence of alteration on that property.

c. Page 86, lines 5 through 8:

Q My question was: You have no evidence that this property was ever used for grazing or was in any way cleared, correct?

A Correct.

d. Page 90, lines 21 and 22:

Q Did it appear to be a healthy wetland?

A Yes, it did.

e. Page 91, lines 4 through 6:

Q Do you have any information that there was ever any logging of trees on this Putney site?

A I do not.

f. Page 93, lines 2 through 6:

Q Well, let me ask you, is it true that you saw little evidence that the wetlands had been disturbed?

A I saw a wetland that was at least at a new equilibrium and looked like a good wetland.

g. Page 107, lines 5 through 7:

Q And that means a mitigation plan is a voluntary agreement by both parties, correct?

A Correct.

h. Page 110, lines 13 through 20:

Q How does this provision relate to the application of the Putneys on their property?

A Evaluating this section, and as I would go through the different steps in here, I personally, in my professional opinion, don't believe this particular section provides you with an avenue for permitting.

Q You're speaking of section 11.09?

A Yes.



i. Page 111, lines 17 through 24:

Q Hold on a minute. First of all, the exception, number 2, could only apply if it were determined that this were a previously altered wetland, correct?

A Correct.

Q If it's not a previously altered wetland, we could not come within exception number 2?

A And that's what I'm saying.

j. Page 126, lines 3 through 22:

Q Okay. So you can see that our good wetlands are not substantially altered?

A Affected.

Q Okay. So they don't fall within the definition of previously altered wetlands?

A Not -- strike that.

Q Is that correct?

A That is correct.

Q So any exception that applies to previously altered wetlands would not be an exception the Putneys can take advantage of?

A I don't quite like the use of the word "exception," but within the parameters of 1-11.09, you don't meet these qualifications.

Q Okay. And specifically regarding number 2 and number 7, that speaks of the exception applying to a previously altered wetland, those two exceptions would not be available to Putneys, correct?

- A Professional opinion, you don't have that option available with that wetland.
- k. Page 127, lines 10 through 20:
- Q Okay. So they have nothing available to them under 11.09. What is available to them under these rules to get a permit from the EPC to fill these wetlands?
- A That you have to provide adequate justification for the impact that you're proposing.
- Q What section does that come under?
- A Intent, 1-11.01 1, last sentence: "It is the intent of the Commission that development requiring mitigation be a last resort used only when reasonable use of the property is otherwise unavailable."
- l. Page 128, lines 6 through 8:
- Q If reasonable use of the property is available, the wetlands just can't be disturbed?
- A That is correct.
- m. Page 130, lines 15 through 18:
- Q What possibly could the Putneys do in developing this property for commercial use in which they wouldn't disturb the wetlands? Give me one example.
- n. Page 131, lines 12 through 22:

A Can I do anything on this property without impacting wetlands?

Q Right.

A Is there any economic -

Q Name one thing that can be done on this property without disturbing the wetlands?

A You could enjoy it. You could walk out and become one with nature.

Q You're smiling as you say that.

A I know. Well, that's not economically viable.

o. Page 166, lines 1 through 4:

Q So if there were filling of wetlands that occurred prior to May of 1985, those were grandfathered in under these Rules?

A Under Chapter 1-11.

p. Page 171, lines 22 through 25, and page 172, line 1:

BY MR. PUTNEY:

Q To your knowledge, when did the EPC of Hillsborough County begin attempting to regulate the clearing and filling of wetlands?

A To the best of my knowledge, we consistently enforced wetlands regulation in 1979.

q. Page 182, line 8 through 14:

- Q Would you deny that reasonable use of the subject property by the appellants cannot be accomplished without affecting the wetlands?
- A By that statement, if you mean that the wetlands must be affected, in part or in whole, by any development to the property, I would believe that to be a true statement.
- r. Page 185, lines 16 through 25, and page 186, line 1 and 2:
- A And, yes, the intent is to review the justification for the impact. Then, once that has been accomplished, then review the mitigation proposal.
- Q And if justification is not met, any mitigation proposal is irrelevant, correct, under this statement?
- A That would be correct, even under the Rule.
- Q And in this case the applicants failed the first step, so any mitigation proposal that might have been submitted would be irrelevant, correct?
- A That would be correct. Of course, we'd be negligent not to mention that.
- s. Page 189, lines 4 through 12:
- Q Are you aware of any definition of minimization in the Act?
- A No.
- Q And you understand I'm referring to the -- not the document in front of you but the --

A -- the rule.

Q Okay.

A The word "minimization" is not in the Rule. I've looked for it.

t. Page 207, lines 5 through 10:

Q But you determined, based on your professional expertise the last time we took your deposition, there was no evidence that the land has been previously altered, correct?

A I indicated that the information that I had before me was not indicative of that.

14. The EPC has admitted the following facts in response to the Appellants' Request to Admit:

- a. When the Tampa By-pass Canal was dug, hundreds of acres of wetlands were filled with the dirt obtained from the canal.
- b. Exhibit number 2 attached to the Revised Statement of Appellants shows hundreds of acres of wetlands as they existed on January 21, 1968, that were later filled with dirt from the Tampa By-pass Canal.
- c. Exhibit number 3 attached to the Revised Statement of Appellants shows the development of hundreds of acres of former wetlands, as they existed in February, 1997.
- d. Exhibits 2 and 3 attached to the Revised Statement of Applicants shows Appellants' subject property as within the area described in Request for Admissions number 12 and 13.

- e. The subject property is located in the midst of extensive industrial and commercial zoning and development.
- f. The subject property is bordered on the North and South by former wetlands that have been cleared and filled, and on the East and West by public road rights of way.
- g. The subject property consists of 2.4 acres with 419 feet frontage adjoining the West side of the U.S. Highway 301 right-of-way.
- h. The subject property is totally undeveloped, and is not a "remnant" site.
- i. The 301 Industrial Park property and the Dallas Bull property adjacent to the subject property, as well as at least 6 businesses south of the subject property, are on former wetlands that have been cleared and filled.
- j. The subject property in its present state as a wetland provides public environmental benefits to the people of Hillsborough County and the State of Florida.

#### CONCLUSIONS OF LAW

The Hearing Officer made the following conclusions of law:

1. EPC Rule 1-11.09 prohibits any type of mitigation from being considered in this case since the Appellants' wetlands are not "previously altered wetlands" and none of the provisions of the rule apply to the Appellants' application.

This conclusion is supported by the deposition of Robert Upcavage of the EPC cited above.

2. A mitigation plan is a voluntary agreement by both parties and is not required by the rules of the EPC until proposed by applicant and accepted by EPC. (Deposition of Robert Upcavage, EPC, page 107, lines 5 through 7, EPC Rule 1-11.02e, 1-11.08, 1-11.09.)

3. The Appellants cannot have a feasible development on the subject property without affecting the wetlands since the subject property is 100% wetlands. (See transcript of April 4, 2000 hearing, at page 71.)

4. The application to impact wetlands submitted by the Appellants as a matter of law, is complete and is in compliance with the EPC rules.

5. Since the subject property is 100% wetland and reasonable use of the property cannot be accomplished without affecting the wetland and the environmental benefits provided by the affected wetland cannot be adequately protected by specified conditions, specifically, mitigation, which is prohibited in this case by the provisions of EPC Rule 1-11.09, the basis for denial of the appellants' application is found at the end of EPC Rule 1-11.09: "Staff will not recommend, nor will the commission approve any project without assurance that "no net loss" criteria are met." Under the facts of this case, the Appellants can not satisfy these criteria, and under the EPC Rules the Director is not authorized to grant the permit to impact wetlands.

**RECOMMENDATION**

The Hearing Officer recommends that the Executive Director's denial of the Appellants' application for permit to impact wetlands be upheld on the basis that the "no net loss" criteria can not be met.

Respectfully submitted,

DATED \_\_\_\_\_

\_\_\_\_\_  
VANESSA N. COHEN, ESQUIRE  
Hearing Officer for Environmental  
Protection Commission  
Cohn, Cohn, & Hendrix, P.A.  
P.O. Box 3424  
Tampa, Florida 33601

cc: Louis D. Putney, Esquire  
T. Andrew Zodrow, Esquire



BEFORE THE ENVIRONMENTAL PROTECTION COMMISSION  
OF HILLSBOROUGH COUNTY, FLORIDA

IN RE:

Appeal of LOUIS W. PUTNEY and  
JEANIE T. PUTNEY, Husband and  
Wife,

EPC# LPUT00-003

Appellants.

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APPELLANTS' MEMORANDUM IN SUPPORT OF  
PROPOSED REPORT OF HEARING OFFICER

COME NOW the Appellants, by and through their undersigned attorney, and file this Memorandum in Support of their proposed Report of Hearing Officer, and allege:

1. Assuming the Hearing Officer proceeded under FRCP 1.510 - Summary Judgment, the Hearing Officer should consider "the pleadings, depositions, answers to interrogatories, and admissions on file together with the Affidavits" and Appellants have accordingly included excerpts therefrom in their proposed Report of Hearing Officer.

2. EPC Rule 1-2.34- Report and Recommendation, requires the Hearing Officer to "render a written report containing individually numbered findings of fact based upon the evidence submitted to him. The Hearing Officer shall also separately offer conclusions regarding application of Chapter 84-446 and the rules and regulations to the facts as found, and a recommended draft Final Administrative Order for the Commission's consideration" and the Appellants have accordingly followed this rule.

3. EPC's Memorandum of Law claims that EPC Rule 1-11.08 "clearly requires an acceptable mitigation plan where wetlands are or may be adversely impacted by development." This is contrary to the clear wording of the rule. It does not include the word "require" and uses only the word "acceptable". Obviously there must be an "offer" before there can be an "acceptance". In other words, mitigation is by agreement between the applicant and the EPC. EPC Rule 1-11.02.2.e defines mitigation wetlands as "wetlands created or restored for mitigation purposes pursuant to agreement with governmental officials." (emphasis added). At no place in any of the EPC Rules is it stated that mitigation is required. Rule 3.3 - Mitigation, of SWFMD uses the same language, i.e., "mitigation will be approved" and "mitigation proposals", thereby following the same offer and acceptance "agreement", not "requirement". By the same token, Section 62-312.300(4) of the Florida Administrative Code (copy attached) clearly states "However, mitigation may not be required by the Department". This rule also uses the language "The Department shall consider any mitigation proposed by a permit applicant" (emphasis added). In the exhaustive treatise entitled "Wetlands Regulation and Mitigation after the Florida Environmental Reorganization Act of 1993" by Bruce Wiener and David Dagon in the Journal of Land Use and Environmental Law, Vol. 8:2 Supp on page 564 it is stated in Footnote 300:

We do not mean to imply that the Department can require mitigation. The agency's rules clearly state that it cannot. ... "Mitigation may be

proposed by a permit applicant, or suggested by the Department. ...  
However, mitigation may not be required by the Department."<sup>1</sup>

4. The case of Dolan v. City of Tigard, 114 S.Ct. 2309 (1994) cited by counsel for EPC and attached to his brief does not concern mitigation but involves a city's requirement that the landowner dedicate a portion of her property lying within a flood plain for improvement of a storm drainage system, etc. If this is analogous, then this case should be cited for the Applicants, not EPC, because the Supreme Court found in favor of the landowner. The Court held that the city's dedication requirements constitute an uncompensated taking of property. Dolan, pp. 2316 - 2322. In footnote 6 at page 2316 the Court states:

There can be no argument that the permit conditions would deprive petitioners of "economically beneficial use" of her property as she currently operates a retail store on the lot.

This would be the same holding in the present case if mitigation were "required" as urged by EPC counsel.

5. Chapter 84-446, Laws of Florida, concerning the EPC of Hillsborough County makes no mention of "mitigation" but does state in Section 21 as follows:

... the provisions of this act are not intended and shall not be construed as superseding or conflicting with any statutory provisions relating to, or rules and regulations promulgated by, the Department of Health and Rehabilitative Services and the Department of Environmental Regulation, but shall be construed as implementing and assisting the enforcement thereof.

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<sup>1</sup> This Rule is now applicable only to the NFWFMD.

Therefore, since State laws, rules and regulations do not require mitigation the Hillsborough County EPC Rules cannot require mitigation. It must be by agreement as stated in EPC Rule 1-11.03.2.e.

CONCLUSION: EPC Rules 1-11.07 and 1-11.08 do not require mitigation and Rule 1-11.09 prohibits mitigation in cases where the wetlands involved are not "previously altered" wetlands such as in present case. Therefore, the permit to impact wetlands cannot be denied on the basis of the lack of a mitigation proposal.

Respectfully submitted,



LOUIS D. PUTNEY, ESQUIRE  
Florida Bar No.: 239976  
4805 South Himes Avenue  
Tampa, Florida 33611  
(813) 831-3376  
Attorney for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellants' Statement of Factual and Legal Issues To Be Determined By the Hearing Officer has been furnished by U.S. Mail to T. Andrew Zodrow, Esquire, 1900 9<sup>th</sup> Avenue, Tampa, FL 33605, and that the original of same has been filed by hand delivery with the Hearing Officer appointed herein, this 14<sup>th</sup> day of April, 2000.



LOUIS D. PUTNEY, ESQUIRE

Notes of Decisions

The provisions of this Part shall only apply to activities in the geographical territory of the Northwest Florida Water Management District and to activities grandfathered under sections 373.414(9), (11), (12)(a), (13), (14), (15) and (16), F.S.

(1) It is the intent of this rule to implement Section 403.918(2)(b), F.S., by establishing criteria to be followed in evaluating proposals to mitigate the adverse impacts of dredging and filling in waters of the state that caused the project to be not permittable.

(2) Part III shall apply to those permit applications submitted pursuant to Sections 403.91-.929, F.S., and Chapter 62-312, F.A.C. Part III shall not apply to any person who has a valid Department permit or has submitted a complete dredge and fill permit application as of the effective date of this rule, unless the permit or application is substantially modified or the applicant elects to proceed under these rules. Modifications or changes to a project made in response to suggestions by the Department or modifications or changes to a project that result in the incorporation of mitigation or the reduction of wetland impacts shall not be considered substantial modifications for purposes of this subsection.

(3) The Department will, in each case, first explore project modifications that would reduce or eliminate the adverse environmental impacts of the project, and will suggest any such modifications to the applicant either in addition to or in lieu of mitigation, as provided in Rule 62-312.060(10), F.A.C. The applicant shall consider modifications to the project proposed by the Department, whether or not a mitigation proposal has been submitted. Should such mutual consideration of modification and mitigation not result in a permittable project the Department must deny the permit.

(4) The Department shall consider any mitigation proposed by a permit applicant in accordance with this rule. Mitigation may be proposed by a permit applicant, or suggested by the Department only where the proposed dredging and filling would otherwise be unable to meet the criteria of Sections 403.918(1) and (2)(a), F.S., and Rule 62-312.080, F.A.C. However, mitigation may not be required by the Department. Mitigation is neither necessary for nor applicable to projects covered by general permits or projects exempt from the requirements for individual dredge and fill construction permits.

(5) It is understood that in certain circumstances mitigation proposals for dredging and filling projects will not be able to offset the adverse impacts of the project sufficiently to yield a permittable project. Such instances may include projects that are in or that would significantly degrade Outstanding Florida Waters, the presence of endangered species or the likelihood that a particular wetland type may not be successfully created.

(6) The Department recognizes that other agencies are concerned with adverse impacts on waters of the state and may require mitigation for such impacts. Mitigation or reclamation required by other agencies will be acceptable to the Department to the extent that such mitigation or reclamation fulfills and Department's statutory requirements. If not, additional measures shall be necessary to fulfill the Department's requirements. It is the intent of the Department to reduce duplication of regulatory requirements. To that end.

inspections, reports or other similar reviews of mitigation projects by the Department of Environmental Protection or other agencies will be used to augment the Department's determination of compliance with permit requirements.

(7) The amount, type and location of mitigation, if any, required of electric utilities conducting dredge and fill activities for the purpose of providing energy service shall be determined in conjunction with the criteria in Section 403.918, F.S., in recognition of the fact that such activities generally promote the public interest.

*Specific Authority 373.026, 373.043, 373.044, 373.414(9), (11), (12)(a), (13), (14), (15), (16), 373.418, 403.061 FS. Law Implemented 373.409, 373.413, 373.414(9), (11), (12)(a), (13), (14), (15), (16), 373.416, 373.418, 403.061 FS. History--New 1-3-89, Formerly 17-12.300, 17-312.300, Amended 10-3-95.*

## ANNOTATIONS

### Adverse impact

Utility appealed denial of application for wetland resource permit to install power lines, claiming that Department of Environmental Regulation improperly rejected hearing officer's findings that installation of lines would not have adverse impact and did not require mitigation under Rules 17-312.300 (now Rule 62-312.300) and 17-312.340 (now Rule 62-312.340), F.A.C. Installation of lines would change forested wetlands to herbaceous wetlands, and finding that wetlands were not destroyed was based upon erroneous policy determination that two types of wetlands are equivalent. Desirability of conversion of wetlands is matter of public interest under 403.918, F.S., that should be resolved by Department, not question of fact to be determined by hearing officer. Denial of permit was upheld. *Florida Power Corp. v. Department of Environmental Regulation*, App., (1st) 638 So. 2d 545 (1994).

### Mitigation plan

Although hearing officer recommended issuing dredge and fill permit to petitioner, subject to mitigation plan to reduce damage to wetlands under Rule 17-312.300, F.A.C., petitioner filed exceptions to portions of recommended order defining Department of Environmental Protection's jurisdiction over site under Rule 17-301.400, F.A.C. Hearing officer's findings that area in question is not "isolated" under Rule 17-312.045, F.A.C., and is subject to Department jurisdiction were supported by competent, substantial evidence, and hearing officer was entitled to prefer some expert testimony over other expert testimony. Permit was issued subject to mitigation plan. *SDP Properties, Ltd. v. Department of Environmental Regulation*, 16 FALR 1108 (1994).

rulemaking required by the Henderson Act makes the water quality criteria vulnerable to a section 120.535, broadside.<sup>298</sup> Second, the lack of wetlands water quality rules may shift the burden of proof in challenged proceedings. If the Department further delays rulemaking, it ultimately may be unable to effectively require mitigation. A close examination of the mitigation process shows how this is possible.

Normally, the need for mitigation arises where the applicant fails to provide reasonable assurances that water quality rules will not be violated.<sup>299</sup> Since the applicant carries the burden of showing compliance with water quality standards, the Department does not necessarily have to expend additional resources (e.g., staff time, funds) to carefully screen the potential effects of dredge and fill projects. Instead, the applicant must provide the information (or "reasonable assurances") concerning the need for mitigation.<sup>300</sup>

This allocation of the burden of proof is critical to the Henderson Act and the administrative structure of the Reorganization Act. In close cases, the Department is better able to extract<sup>301</sup> mitigation measures from an applicant. In effect, with the burden placed on the applicant, the Department gains assurances that at the very least, most large scale projects would require mitigation.

298. See FLA. STAT. § 120.535 (1991) (requiring agencies to engage in rulemaking as soon as practicable and feasible; offering relief to those affected by incipient policies capable of maturation into rules). Although at one time courts would not force an agency into rulemaking, e.g., *McDonald v. Department of Banking & Finance*, 346 So. 2d 569 (Fla. 1st DCA 1977), it is now the law that "[r]ulemaking is not a matter of agency discretion." FLA. STAT. § 120.535(1) (1991).

Florida's mandatory rulemaking requirement stands in marked contrast to federal administrative procedures, which do not penalize agencies for sluggish responses to rulemaking. E.g., *Pulido v. Heckler*, 738 F.2d 503, 506 (10th Cir. 1985) ("[A]s a general rule, an administrative agency is not required to promulgate detailed rules interpreting every statutory provision that may be relevant to its actions.") (citing *SEC v. Chenery Corp.*, 332 U.S. 194 (1947)); *WWHT, Inc. v. Federal Communications Comm'n*, 656 F.2d 807, 813 (D.C. Cir. 1981) ("The mere filing of a petition does not require an agency to grant it, or to hold a hearing, or engage in any other public rule making proceedings."); accord *ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 38-39* (1947) reprinted in *JACOB A. STEIN, ET AL. 1 ADMINISTRATIVE LAW App. 1C-75* (1977).

299. See FLA. STAT. § 403.918(1) (1991); *Reorganization Act*, *supra* note 1, § 30, at 33, 1993 Fla. Sess. Law Serv. 1652, 1663 (to be codified at FLA. STAT. § 373.414(1) (1993)).

300. We do not mean to imply that the Department can require mitigation. The agency's rules clearly state that it cannot. See FLA. ADMIN. CODE ANN. r. 17-312.300(4) (Jan. 3, 1989) ("Mitigation may be proposed by a permit applicant, or suggested by the Department. . . . However, mitigation may not be required by the Department.")

301. Again, the Department can never require mitigation. See *id.* However, the realpolitik of a permit application gives the Department the power to "leverage" mitigation measures from an applicant. See generally Memorandum from Chuck Allen, et al., to Mitigation Banking Task Force at 2 (Nov. 6, 1991) (candidly stating that Department staff may "decide that the project is permissible and that no mitigation is necessary. However, most likely if the project is determined to be permissible, mitigation will be required.") (emphasis added) (on file with authors).

BEFORE THE ENVIRONMENTAL PROTECTION COMMISSION  
OF HILLSBOROUGH COUNTY, FLORIDA

IN RE:

EPC# LPUT00-003

Appeal of LOUIS W. PUTNEY and  
JEANIE T. PUTNEY, Husband and  
Wife,

Appellants.

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**FINAL ADMINISTRATIVE ORDER**

THIS APPEAL, having come before the Environmental Protection Commission of Hillsborough County, Florida upon the Report of the Hearing Officer appointed herein, Vanessa N. Cohn, Esquire, and the Commission having considered said report, a copy of which is attached hereto and made a part hereof, and the Commission having approved said report, including the Findings of Fact, Conclusions of Law, and Recommendation, it is, thereupon,

ORDERED, that the Executive Director's denial of the Appellants' application for permit to impact wetlands be upheld on the basis that the "no net loss" criteria can not be met.

ORDERED this \_\_\_\_ day \_\_\_\_\_, 2000.

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Chairperson, Environmental Protection  
Commission of Hillsborough County

cc: Louis D. Putney, Esquire  
T. Andrew Zodrow, Esquire



BEFORE THE ENVIRONMENTAL PROTECTION COMMISSION  
OF HILLSBOROUGH COUNTY, FLORIDA

IN RE:

Appeal of LOUIS W. PUTNEY and  
JEANIE T. PUTNEY, Husband and  
Wife,

Appellants.

---

**APPELLANTS' STATEMENT OF FACTUAL AND LEGAL ISSUES  
TO BE DETERMINED BY THE HEARING OFFICER**

COME NOW, the Appellants, LOUIS W. PUTNEY and JEANIE T. PUTNEY, by and through their undersigned attorney, and pursuant to the Notice of Hearing and Order Setting Forth Prehearing Schedule, file this their Statement of Factual and Legal Issues to be determined by the Hearing Officer, and allege:

**FACTUAL ISSUES**

1. HISTORY OF PROPERTY. The Appellants purchased the subject property on March 8, 1968, more than 32 years ago. The Appellants have held sole title to the subject property since its purchase and have not sold or developed any portion thereof, or any property adjacent thereto. The property consists of 2.4 acres with 419 feet frontage adjoining the west side of U. S. Highway 301 approximately two miles north of the intersection of Interstate 4 and U. S. Highway 301 and 3.5 miles south of the intersection of Interstate 75 and the Fowler Avenue exit to U. S. Highway 301. The property is part of Clewis Muck Farms subdivision which was filed

for record on May 31, 1928. In 1952 U. S. Highway 301 was constructed across Clewis Muck Farms subdivision bisecting Farm Track 33, resulting in the subject property fronting on the west side of U. S. Highway 301.

2. HISTORY OF DEVELOPMENT. When the subject property was purchased by the Appellants, it was undeveloped and has remained undeveloped to the present day. The Appellants had reasonable investment-backed expectations for development when they purchased the property, since it has 419 feet frontage on a major highway, U. S. Highway 301, in an area of commercial, and industrial growth and is of sufficient size for development, being 2.4 acres. The State of Florida already owned sufficient right of way (200 feet) to four-lane the highway when the Appellants purchased the property and the Florida Department of Transportation is presently in the process of proceeding with plans and designs for developing the highway adjoining Appellants' property into a four lane divided suburban highway within the existing right of way.

The 66 foot undeveloped right-of-way for Hendry Road adjoining the subject property on the west contains miscellaneous shrubs and red maple trees, the same as Appellants' property, and has a slightly lower elevation. Should this road right-of-way be legally closed, the one-half of the right-of-way adjacent to Appellants' property would vest in the Appellants as adjoining owners. In the event of such closure, Appellants' would dedicate the newly vested property as conservation area. The adjacent 40 foot ditch right-of-way has a lower elevation than Hendry Road, and adjacent to the ditch on the west is a 40 foot drainage easement dedicated by 301

Industrial Park. These three parcels are approximately 975 feet long, as shown on the plat of 301 Industrial Park. This total land area of 3.26 acres constitutes an adjacent off-site conservation area presently in public hands.

3. HISTORY OF ZONING AND REGULATIONS. The subject property is presently zoned AR (agricultural) and is in the Interstate 75 corridor. It is included in Urban Land Use Classification Community Mixed Use-12 (CMU). Appellants have been advised by a Senior Planner in the Hillsborough County Planning Commission Office that, considering the surrounding commercial and industrial zoning, the subject property could reasonably be re-zoned to almost any use, such as commercial, industrial, etc., within Community Mixed Use -12(CMU). Appellants have also been advised by land use attorney James P. LaRussa, a former zoning hearing officer, that the subject property should be re-zoned and Appellants have an excellent chance of, and could reasonably expect to secure a re-zoning of the property to the typical uses set forth in the Community Mixed Use - 12(CMU) Urban Land Use classification within the very near future.

Therefore, Appellants have reasonable expectations of securing a re-zoning of subject property in the near future. Upon approval of Appellants' Natural Resources Permit Application, they will use the property for agricultural purposes within the present AR zoning, specifically a plant nursery, and within one year obtain a re-zoning of the property within the Community Mixed Use -12 (CMU) classification.

After clearing and filling the land in accordance with the Revised Site Plan, and after re-zoning of the property, the Appellants intend to construct mini-storage units

as shown on the Revised Proposed Use Plan After Re-Zoning. This use is within the Urban Land Use Classification Community Mixed Use -12 (CMU) and General Business and Commercial zoning regulations, and is entirely compatible with adjoining properties.

At the time Appellants purchased the subject property there were no Federal, state or county laws or regulations governing or restricting the alteration of land, including wetlands, in Hillsborough County. Although the "Hillsborough County Pollution Control Act" (Ch. 67-104, Laws of Florida) was passed by the Florida Legislature and became effective on October 1, 1967, it did not in any way regulate the clearing and filling of land, including wetlands. In fact, in Hillsborough County Environmental Protection Commission vs. Frandorson Properties, 283 So. 2d 65 (2 DCA 1973) the Second District Court of Appeal ruled that this act controlled only air and water pollution, saying, "Nothing, fairly read, forbids the destruction or removal of organic or inorganic materials already present or growing there". Although this Act was amended in 1969 (Ch. 69-1149), 1971 (Ch. 71-681), 1972 (72-563), 1973 (Ch. 73-496), and 1984 (Ch. 84-446), no provision was made to prohibit or regulate the clearing or filling of lands, including wetlands. In fact, the rules of the Environmental Protection Commission (the County Commission of Hillsborough County) pertaining to wetlands adopted May 14, 1985, specifically provided as follows in Rule I-II.03, 4, d: "If the evidence reveals the disturbance [of wetlands] occurred prior to May 14, 1985, the prior activity shall not constitute a violation of this rule [prohibiting alteration of wetlands except when authorized]". It was not until 1985, 17 years after the

Appellants purchased the subject property, that the Hillsborough County Environmental Commission adopted rules (Ch. 1-11) restricting the use of wetlands. Effective October 1, 1984 the Warren S. Henderson Wetlands Protection Act was passed by the Florida Legislature -- 16 years after Appellants purchased subject property.

4. RIGHT TO USE PROPERTY. When Appellants obtained title to the subject property on March 8, 1968, they had and continue to have the intent and right to clear and fill the subject property to raise its elevation in accordance with neighboring commercial and industrial properties and to use the property as commercial frontage on U. S. Highway 301. The clearing and filling of the property is necessary to conform to the level of U. S. Highway 301 and the properties adjoining the subject property. There has been no development on the property as yet.

5. PRESENT NATURE AND EXTENT OF PROPERTY. All of the subject property is considered a wetland on which are growing miscellaneous shrubs and red maple trees. The Appellants own no other property in Hillsborough County except their homestead and have not sold or developed any property near or adjoining the subject property. This is not a "remnant" property.

6. REASONABLE EXPECTATIONS. The reasonable expectations of the Appellants under the Florida common law were and continue to be to clear and fill the subject property and; as private property owners, to develop it as a commercial venture. Under Florida common law the Appellants had every right to expect to do this, and the surrounding landowners have been permitted by Hillsborough County to

do just that. Even the offices of the Southwest Florida Water Management District, 7601 U. S. Highway 301 North, are located on filled land to the south of Appellants property.

7. REASONABLE EXPECTATIONS OF NEIGHBORING LANDOWNERS. Under Florida common law, before and after Appellants purchased their property, many adjoining land owners cleared, filled, and developed their properties for various commercial and industrial uses. Some of such properties are presently occupied by the following: The Dallas Bull Bar, 8222 U. S. Highway 301 North; The 301 Industrial Park, U. S. Highway 301 and Maislin Drive; Morgan Corporation, 8108 U. S. Highway 301 North; Carpenters Technical Training Center, 7930 U. S. Highway 301 North; Barnes Industrial Plastic Piping, Inc., 7930 U. S. Highway 301 North; Florida Utility Trailers, 7808 U. S. Highway 301 North; Gulf Coast Thermo King, 7802 U. S. Highway 301 North; West Central Signs, Inc., 7720 U. S. Highway 301 North; Gator Ford Trucks, 7520 U. S. Highway 301 North; Tampa Volvo and GMC Trucks, 7520 U. S. Highway 301 North; and Southwest Florida Water Management District, 7601 U. S. Highway 301 North.

8. DIMINUTION IN INVESTMENT-BACKED EXPECTATIONS. Should their application be denied, the Appellants will be effectively deprived of all reasonable economical use and beneficial value of their property without just compensation. The Appellants' reasonable investment-backed expectations were and continue to be to develop the subject property, as previously stated. The property can not be developed or otherwise be put to any productive use unless their application is granted. The

Appellants have the ability to fund and secure financing for the development proposed, and have, from time to time, developed plans and secured proposals from development companies such as Florida Structures, Inc., Florida Pre-fab. Inc., and Durastress, Inc.

Since purchasing the subject property Appellants have paid Hillsborough County in ad valorem taxes on the subject property the total sum of \$27,406.90, which sum, with compounded interest at 6% per annum, would now total \$47,584.53. The Hillsborough County Property Appraiser has increased the assessed value of the property from \$2,400, when the property was purchased in 1968, to \$77,428 currently, although no improvements have been made on the property. The Appellants paid \$3,000 for the property thirty-one years ago. With interest compounded at 6% per annum this amounts to \$18,264 today. Adding the cost of the land to the taxes paid over the past 30 years with interest compounded at 6% per annum, the total cost of the property to the Appellants is presently \$65,848.

To have a value to Appellants in accordance with their reasonable investment-backed expectations when purchased, the land must be cleared and filled and raised to the level of adjoining land and U. S. Highway 301. If the Appellants are permitted to develop their land in accordance with the Revised Site Plan filed with their application it will have a value of approximately \$419,000, or \$1,000 per front foot, after an expenditure of approximately \$150,000 for clearing, filling, and finishing. Recent comparable sales, such as the sale of six acres by the Florida State Fair Authority to the Florida Department of Transportation for \$1 million (\$166,666 per

acre), when applied to Appellants' property (2.4 acres with 419' highway frontage) confirm a value of \$400,000, were the property to be cleared and filled. If the Appellants are denied their application the entire value of the property will have been taken from them for a public benefit without just compensation.

9. PROCEDURE. Appellants' property is a "lot of record" as defined in Section II.03.02-II.03.05 of the Hillsborough County Land Development Code and is a "non-conforming lot" having "non-conforming characteristics" as defined in said sections and therefore should be afforded the protections provided in said sections.

The proposed activity and the reasons for the activity are as previously stated herein.

The Appellants will avoid any negative impacts to adjacent properties through the means shown on the Revised Site Plan. In addition, protective barriers will be employed during the clearing and filling process. A 5' berm and a 25' slope covered with grass and vegetation, and retention ponds will be constructed within the filled area as shown on the Revised Site Plan, thus preventing surface water from flowing onto adjoining lands.

Hillsborough County defines "wetlands" as excluding wetlands cleared and filled at the time Appellants purchased their property and for 17 years thereafter, i.e., until May 14, 1985. The facts set forth herein clearly show that Appellants have the legal right to clear and fill the subject property as requested in the application. Their vested private property rights beginning before the passage of any restrictive state or county laws or regulations and continuing unbroken to the present time entitle



them to the granting of their application. To deny their application would be to deny the Appellants all economically viable, beneficial, and reasonable uses of their property. A denial of this permit would be a violation of the Appellants' equitable and legal rights under the fifth and fourteenth amendments of the U. S. Constitution as well as Article I, Sections 2 and 9, and Article X, Section 6, of the Florida constitution and would be a taking of such property without due process and without just compensation, would deny the Appellants of the equal protection of the laws and would inflict extensive damages upon the Appellants. Therefore, their application should be approved.

10. The legal description of the property which is the subject of their application (hereinafter "subject property") is as follows, to wit:

That part of Farm Tract 33 CLEWIS MUCK FARMS, according to the map or plat thereof, as the same is recorded in Plat Book 25, page 88, of the public records of Hillsborough County, Florida, lying West of Highway #301;

and the Hillsborough County Tax Assessor's Folio Number for said property is #61490.0000.

11. The entire tract of the subject property is a wetland, as defined in 1-11.02.2.h, Rules of the Hillsborough County EPC, and has been delineated as 100% EPC jurisdictional wetland, primarily a red maple swamp.

12. The subject property in its present state as a wetland provides public environmental benefits to the people of Hillsborough County and the State of Florida, including, but not limited to certain of those defined in 1-11.06.1, Rules of the Hillsborough County EPC, to wit:

- a. Receive, store and discharge surface water runoff so as to contribute to hydrological stability and control of flooding and erosion; ...
- c. Recharge the groundwater;
- d. Provide filtration and uptake of nutrients and pollutants from surface water runoff; ...
- j. Increase rainfall production through available evaporative surfaces.

13. Reasonable use of the subject property by the Appellants cannot be accomplished without affecting the wetland which covers the entire property.

14. If the Appellants are denied a permit by Hillsborough County to clear and fill the subject property, they will have been effectively deprived of all reasonable use and beneficial value of such property.

15. The proposed project encroaches on 100 percent of the wetlands as shown in the revised site plan.

16. It is not possible for Appellants to make reasonable use of the subject property while minimizing impacts to the wetlands.

17. The Appellants have not proposed any creation mitigation plan or any off-site mitigation, either upland preservation or wetland mitigation. The Appellants cannot comply with EPC Rule 1-11.09, so as to permit a creation mitigation plan or off-site mitigation, because the subject property and its reasonable use do not fall within any of the provisions of said rule concerning adequate protection, to wit:

(1) Paragraph One. The adverse impact to the environmental benefits would not be temporary. No reasonable use of the property could be made that would be temporary.

(2) Paragraph Two. The subject property is not a "previously altered wetland".

(3) Paragraph Three. The reasonable use of the subject property does not permit the adverse impact to be confined to such a small area as to be of nominal consequence.

(4) Paragraph Four. The reasonable use of the subject property does not permit the adverse impact to have a limited effect on the existing environmental benefits of the wetland, and since the wetlands are 100% of the subject property, there is no adjoining portion of the wetland of the same type of wetland to provide the same environmental benefits.

(5) Paragraph Five. The adverse impact of the reasonable use of the subject property on the wetland is not offset by the benefit of the development to the public, such as the construction of a public road or other public works.

(6) Paragraph Six. The reasonable use of the subject property does not permit the adverse impact to the site to be prevented by appropriate precautions.

(7) Paragraph Seven. The subject property is not a "previously altered wetland", and there are no uplands to be preserved. Appellants own no other real property in proximity to the subject wetland upon which they could create mitigation wetlands. If the subject property were a "previously altered wetland", and since the

subject property is a forested wetland, this section would require Appellants to purchase three times the acreage (7.2 acres) of valuable uplands.

18. On November 16, 1999, the EPC Executive Director (EPC) duly provided notice of the denial to request to impact wetlands on the subject property.

19. On November 30, 1999, the Appellants filed a timely Notice of Appeal challenging the EPC Executive Director's decision to deny the impact.

### LEGAL ISSUES

1. That the Hearing Officer has jurisdiction over the parties and subject matter of the appeal filed herein has been stipulated.

2. At the time the Appellants purchased the subject property on March 8, 1968, there was no common law, federal law, state law, county ordinance, city ordinance, or other legal prohibition to the Appellants clearing and filling the subject property.

3. Chapter 84-446, Laws of the State of Florida, was passed on June 18, 1984, (16 years after Appellants purchased the subject property), and constituted the first state law in Florida which regulated the clearing and filling of the subject property.

4. Rules of the Hillsborough County EPC, that first regulated the clearing and filling of the subject property were adopted on May 14, 1985 (17 years after Appellants purchased said property), and said rules were specifically identified as

Chapter 1-11 of the Rules of the Environmental Protection Commission of Hillsborough County.

5. At the time the Appellants purchased the subject property it was the law and public policy of the State of Florida and Hillsborough County to encourage the reclamation (clearing and filling) of swamp lands (wet lands).

6. At the time the Appellants purchased the subject property they had the legal right to clear and fill said property, which right was a part of the "bundle of rights" they purchased with said property.

7. At the time the Appellants purchased the subject property the laws, ordinances, and regulations of the State of Florida and Hillsborough County allowed the Appellants to have reasonable expectations to clear, fill, and develop said property.

8. Chapter 1-11 of the Rules of the Hillsborough County EPC, pertaining to wetlands and prohibiting alteration of wetlands except when authorized, was adopted May 14, 1985, and specifically provided in Rule 1-11.03, 4, d, as follows: "If the evidence reveals the disturbance occurred prior to May 14, 1985, the prior activity shall not constitute a violation of this rule".

9. The clearing and filling of the subject property in the manner proposed by the Appellants in their application would not constitute a statutory or common law nuisance.

10. The Appellants cannot comply with EPC Rule 1-11.09, so as to permit a creation mitigation plan or off-site mitigation, because the subject property and its

reasonable use do not fall within any of the provisions of said rule concerning adequate protection, to wit:

(1) Paragraph One. The adverse impact to the environmental benefits would not be temporary. No reasonable use of the property could be made that would be temporary, and this paragraph is therefore not applicable.

(2) Paragraph Two. The subject property is not a "previously altered wetland" and this paragraph is therefore not applicable.

(3) Paragraph Three. The reasonable use of the subject property does not permit the adverse impact to be confined to such a small area as to be of nominal consequence, and this paragraph is therefore not applicable.

(4) Paragraph Four. The reasonable use of the subject property does not permit the adverse impact to have a limited effect on the existing environmental benefits of the wetland, and since the wetlands are 100% of the subject property, there is no adjoining portion of the wetland of the same type of wetland to provide the same environmental benefits, and this paragraph is therefore not applicable.

(5) Paragraph Five. The reasonable use of the subject property on the wetland is not offset by the benefit of the development to the public, such as the construction of a public road or public works, and this paragraph is therefore not applicable.

(6) Paragraph Six. The reasonable use of the subject property does not permit the adverse impact to the site to be prevented by appropriate precautions, and this paragraph is therefore not applicable.

(7) Paragraph Seven. The subject property is not a "previously altered wetland", and there are no uplands to be preserved, and this paragraph is therefore not applicable.

11. Since the subject property consists of 2.4 acres with 419 feet frontage on U.S. Highway 301 in a heavily developed commercial and industrial area and is 100% jurisdictional wetlands which have not been previously altered, neither avoidance, minimization, nor mitigation are available to the Appellants under the facts and law of this case.

12. Whether a portion of the subject property is mapped "Flood Zone A" requiring volumetric compensation for any filling is not relevant under the facts and law of this case.

13. If the Appellants are denied a permit by Hillsborough County to clear, fill, and develop the subject property, such property will have been taken from them through governmental regulation without just compensation.

#### ADMISSIONS BY EPC

Pursuant to the Appellant's Request for Admissions served herein on February 16, 2000, the EPC has admitted the following numbered admissions:

11. When the Tampa By-pass Canal was dug, hundreds of acres of wetlands were filled with the dirt obtained from the canal.

12. Exhibit number 2 attached to the Revised Statement of Appellants shows hundreds of acres of wetlands as they existed on

January 21, 1968, that were later filled with dirt from the Tampa Bypass Canal.

13. Exhibit number 3 attached to the Revised Statement of Appellants shows the development of hundreds of acres of former wetlands, as they existed in February, 1997.

14. Exhibits 2 and 3 attached to the Revised Statement of Applicants shows Appellants' subject property as within the area described in Request for Admissions number 12 and 13.

16. The subject property is located in the midst of extensive industrial and commercial zoning and development.

17. The subject property is bordered on the North and South by former wetlands that have been cleared and filled, and on the East and West by public road rights of way.

18. The subject property consists of 2.4 acres with 419 feet frontage adjoining the West side of the U.S. Highway 301 right-of-way.

21. The subject property is totally undeveloped, and is not a "remnant" site.

23. The 301 Industrial Park property and the Dallas Bull property adjacent to the subject property, as well as at least 6 businesses south of the subject property, are on former wetlands that have been cleared and filled.

25. The subject property in its present state as a wetland provides public environmental benefits to the people of Hillsborough County and the State of Florida.

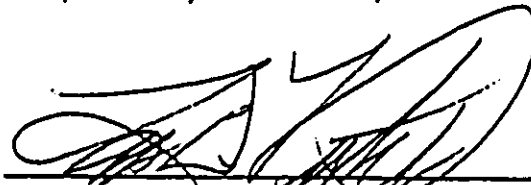
#### **DEPOSITION OF ROBERT UPCAVAGE, REPRESENTATIVE OF EPC**

The deposition of Robert Upcavage, the representative of EPC, taken on March 15, 2000, and March 22, 2000, filed in this proceeding, contains many admissions



binding on the EPC and is hereby made of part of the Appellants' Statement of Factual and Legal Issues to be determined by the Hearing Officer.


Respectfully submitted,



LOUIS D. PUTNEY, ESQUIRE  
Florida Bar No.: 239976  
4805 South Himes Avenue  
Tampa, Florida 33611  
(813) 831-3376  
Attorney for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellants' Statement of Factual and Legal Issues To Be Determined By the Hearing Officer has been furnished by U.S. Mail to T. Andrew Zodrow, Esquire, 1900 9<sup>th</sup> Avenue, Tampa, FL 33605, and that the original of same has been filed by U.S. Mail with the Hearing Officer appointed herein, this 4<sup>th</sup> day of April, 2000.



LOUIS D. PUTNEY, ESQUIRE

BEFORE THE ENVIRONMENTAL PROTECTION  
COMMISSION OF HILLSBOROUGH COUNTY

APPEAL OF:

EPC # LPUT00-003

Putney, Louis W. and Jeanie T.  
\_\_\_\_\_ /

**EXECUTIVE DIRECTOR'S RESPONSE TO APPELLANTS'**  
**EXCEPTIONS TO RECOMMENDED ORDER**

Respondent, Executive Director of the Environmental Protection Commission of Hillsborough County, responds to the exceptions served on May 18, 2000, by Appellants, Louis W. Putney and Jeanie T. Putney (Appellants) as follows:

On May 11, 2000, the assigned Hearing Officer entered a Recommended Order recommending that a final order be entered denying authorization to impact wetlands on the Appellants' property. The Hearing Officer found that the Executive Director did not have authority under the rules to authorize any wetland impact, based on the facts of this case.

On May 18, 2000, the Appellants timely filed several exceptions to the Recommended Order. The Appellants' exceptions, however, failed to address any specific errors in findings of fact or conclusions of law. Paragraphs 1 through 3 of the Appellants' exceptions do not allege any error to the Recommended Order, nor do they provide any specific reference to evidence in the record, or to the Hearing Officer's application of the existing rules to the facts as found. The only comments regarding the Recommended Order are found in paragraphs 4 through 7 of the exceptions.

The appropriate scope of review for a Hearing Officer's recommended findings of fact and conclusions of law is well established. Section 1-2.35, Rules of the Commission,

provides that exceptions shall be limited to challenge of the Hearing Officer's determination of facts with specific reference to evidence in the record, or to challenge the Hearing Officer's application of the existing rules to the facts as found. The Commission may reject, reverse, or modify a Hearing Officer's finding of fact only if it finds that the fact is not supported by substantial competent evidence in the record. No evidence may be taken at the hearing on the exceptions, although opinions of the public may be heard at the Commission's discretion. The Commission shall affirm, reverse, or modify the Hearing Officer's findings of fact, make appropriate conclusions of law, and promptly render a written Final Order thereon, provided that the Commission shall not take any action which conflicts with or nullifies any provision of Chapter 84-446 or the rules enacted pursuant to said act.

#### Exceptions directed to Findings of Fact

Courts have consistently rejected efforts by agencies to overturn recommended findings, for example, holding that:

the agency may reject the findings of the hearing officer only when there is no competent substantial evidence from which the findings could reasonably be inferred... (Emphasis in original)

Berry v. State of Florida Department of Environmental Regulation, 530 So.2d 1019, 1022 (Fla. 4th DCA 1988).

Paragraph 4 of Appellants' exceptions seems to attempt to challenge the findings of facts in the "Undisputed Facts for Purposes of Summary Judgment" (Undisputed Facts) section of the Recommended Order. An agency reviewing a recommended order may not reject, reverse or modify the findings of fact of a hearing officer or administrative law

judge unless the agency first determines from a review of the entire record that the fact is not supported by substantial competent evidence in the record. Section 1-2.35, Rules of the Commission; Accord Dunham v. Highlands County School Board, 652 So.2d 894 (Fla. 2d DCA 1995); Florida Dept. of Corrections v. Bradley, 510 So.2d 1122 (Fla. 1st DCA 1987).

Standard evidentiary matters such as admissibility, relevancy, and weight of evidence presented at a formal administrative hearing usually constitute "factual issues susceptible to ordinary methods of proof that are not infused with [agency] policy considerations." Schimsher v. School Board of Palm Beach County, 694 So.2d 856, 862 (Fla. 4th DCA 1997); Martuccio v. Dept. of Professional Regulation, 622 So.2d 607, 609 (Fla. 1st DCA 1993). A reviewing agency may not reweigh or change the relevancy of evidence presented at a formal administrative hearing or attempt to resolve conflicts therein, as those are evidentiary matters within the province of the hearing officer. Heifetz v. Dept. of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985).

The agency has no authority to reevaluate the quantity or quality of the evidence presented at the formal hearing, beyond making a determination that the evidence is competent and substantial. Brogan v. Carter, 671 So.2d 822, 823 (Fla. 1st DCA 1996). There clearly exists competent substantial evidence in the record supporting the Hearing Officer's findings. (See attached Motion for Summary Disposition referred to as Exhibit A) In addition, there are no references to any evidence in the record in the Appellants' exceptions suggesting that the findings in the "Undisputed Facts" section of the recommended order are erroneous or require additional findings of fact. Therefore, the Appellants' exception should be rejected.

### Exceptions directed to Conclusions of Law

After the hearing on the Motion for Summary Disposition, each party submitted its own proposed Report and Recommended Order for the Hearing Officer's review. Paragraphs 5, 6 and 7 of the Appellants' exceptions challenge the Hearing Officer's failure to address the Appellants' proposed conclusions of law contained in their proposed Report of Hearing Officer, Memorandum in Support and the proposed Final Administrative Order. Section 1-2.35, Rules of the Commission, provides that exceptions to conclusions of law are to be limited to the Hearing Officer's application of the existing rules to the facts as found. Appellants' exceptions do not contradict or assign any error to any specific conclusions of law or application of the existing rules to the facts as found in the recommended order. The Appellants base their legal arguments on their own interpretations of the controlling law as applied to their own interpretations of the testimony of a witness during deposition, as well as the EPC's Wetland Rule, Chapter 1-11.

Appellants' proposed report contains proposed findings of fact styled as conclusions of law in paragraphs 3 and 4. They do not include any legal interpretations or involve legal issues in any way. Paragraphs 1, 2 and 5 of Appellants' proposed conclusions of law were not adopted by the Hearing Officer.

Appellants take exception to the conclusions of law by alleging facts beyond the scope of the Hearing Officer's decision. Appellants claim that the wetlands have not been previously altered, and thus the rules prohibit any impacts to wetlands. Not only is this interpretation of the Wetland Rule clearly erroneous, there is no finding of fact to support the allegation that the subject wetlands were not previously altered. Although Appellants

made allegations to this effect in the proceeding below, the Hearing Officer did not make such a finding, and instead decided the appeal on a completely unrelated basis. The Commission may not reweigh or change the relevancy of evidence presented at a formal administrative hearing or attempt to resolve conflicts therein, as those are evidentiary matters within the province of the hearing officer. Heifetz v. Dept. of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Furthermore, as the rules prohibit the Commission from accepting any new evidence, it would be inappropriate for the Commission to make any finding of fact that Appellants wetlands were or were not previously altered.

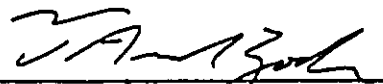
Section 1-2.35, Rules of the Commission, states the Commission shall not take any action in making its final order which conflicts with or nullifies any provision of Chapter 84-446 or the rules enacted pursuant to said act. The Appellants' claim regarding the ability to meet "no net loss" criteria and the alleged "previously altered nature of the wetlands" conflicts with the entire EPC Wetland Rule by suggesting that in Hillsborough County there can be no wetland impacts to those wetlands that have not been previously altered. EPC's Wetland Rule acknowledges that impacts to wetlands will be allowed where they are necessary to make reasonable use of the property and the environmental benefits of the wetland are adequately protected. Section 1-11.01, also recognizes the rights of property owners to use their land in a reasonable manner, but that development requiring mitigation is a last resort when reasonable use of the property is otherwise not available. The Appellants' objection to the Hearing Officer's legal conclusion based on a "no net loss" limitation contradicts the intent section, as well as mitigation provisions, of the wetland rule.

The Conclusions of Law contained in the Hearing Officer's Recommended Order are supported by the rules and statutes. Appellants did not take exception to the Hearing Officer's finding of fact that there was no evidence that the environmental benefits of the wetland proposed to be adversely affected would be adequately protected by specified conditions and time limitations. The Hearing Officer's conclusion of law regarding the necessity for mitigation is logically based upon the Hearing Officer's determination that Section 1-11.07, of the Wetland Rule requires a demonstration of adequate protection for impacted wetlands. Therefore, the Hearing Officer's interpretation is not erroneous and the Appellants' exceptions should be rejected.

#### CONCLUSION

Therefore, the Executive Director requests that all exceptions filed by the Appellants be rejected and the Hearing Officer's Recommended Order be adopted in its entirety. Respectfully submitted this 6th day of June 2000.

Respectfully submitted,



T. Andrew Zdrog, Esq.  
FL BAR ID 0080055  
Environmental Protection  
Commission of Hillsborough  
County  
1900 9th Ave.  
Tampa, FL 33605  
(813) 272-5960

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing was hand delivered to Kristin K. Bennet, Esquire, c/o Jan Platt, Chairperson of the Environmental Protection Commission of Hillsborough County, C/O, 1900 9th Ave., Tampa, Florida 33605 and sent via U.S. Mail to Louis D. Putney, Esq., 4805 South Himes Ave., Tampa, FL 33611-2616, on this 6th day of June 2000.



T. ANDREW ZODROW, ESQUIRE

FL BAR ID 0080055  
Environmental Protection Commission  
of Hillsborough County  
1900 9th Ave.  
Tampa, FL 33605  
(813) 272-5960



BEFORE THE ENVIRONMENTAL PROTECTION  
COMMISSION OF HILLSBOROUGH COUNTY

APPEAL OF:

EPC # LPUT00-003

Putney, Louis W. and Jeanie T.  
\_\_\_\_\_ /

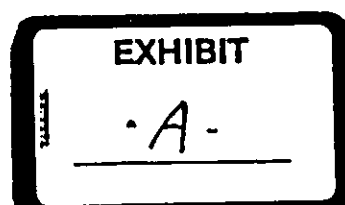
MOTION FOR SUMMARY DISPOSITION

Comes now the Executive Director of the Environmental Protection Commission of Hillsborough County (EPC) and moves the hearing officer to enter a summary disposition on the grounds that there are no material facts in dispute. In support movant would show that, based upon the pleadings and papers filed in this matter, the Agency is entitled to an entry of Findings of Fact, Conclusions of Law and Recommendations to the Commission that the matter be disposed of in favor of the Executive Director as a matter of law. The following facts are undisputed:

1. On November 16, 1999, the EPC Executive Director denied the request of Louis W. and Jeanie T. Putney (Appellants) to impact wetlands on Appellants' property.

2. On November 30, 1999, the Appellants filed a Notice of Appeal challenging the EPC Executive Director's decision to deny the impact to wetlands.

3. With the exception of roughly 800 square feet of forested uplands, the property at issue is 2.4 acres and is comprised of 100 percent forested wetlands, composed of a red maple swamp, and is subject to the wetlands jurisdiction of the Hillsborough County Environmental Protection Commission (EPC). (See Affidavit of



Robert Upcavage, hereinafter referred to as Exhibit 1)

4. The proposed project encroaches on 100 percent of the wetlands as shown in the revised site plan. (See also Exhibit 1)

5. As reflected in the October 22, 1999 letter attached to the Notice of Appeal (referred hereinafter as Exhibit 2) the Appellants have not proposed how they would try to avoid any impacts to the wetlands. (See also Exhibit 1)

6. The Appellants have not demonstrated how the wetland impacts from the proposed project would be minimized. The only alleged minimization proposed by the Appellants would occur after the entire wetland has been impacted, and consists of sloping setbacks, retention ponds, and the Hendry Road right-of-way that would be left as "green space." (See Exhibits 1 and 2)

7. The Appellants have not proposed any on-site creation mitigation. (See Exhibits 1 and 2)

8. The Appellants have not proposed any off-site mitigation, either upland preservation or creation wetland mitigation. (See Exhibits 1 and 2)

9. The Appellants have only proposed using the existing County owned Hendry Road right-of-way adjacent to the site for use as alleged minimization or possibly mitigation. The right-of-way is currently comprised of wetlands. (See Exhibit 1) Appellants have only offered to forego seeking closure of the County owned right-of-way, and suggest that by leaving its existing wetland functions as green space, that it would replace the lost functions of the impacted wetland. (See Exhibit 2)

10. Rules of the Commission, §1-2.33(4), place the burden of proof on the Appellant to establish entitlement to a permit. In addition, the rule states further that, "[f]act issues not raised by the Notice of Appeal shall be accepted as undisputed."

Conclusions of Law:

11. The above undisputed facts demonstrate that the environmental benefits of the wetland to be adversely affected as proposed by the Appellants have not been adequately protected by specified conditions and time limitations, and thus the Executive Director's denial of the request to impact wetlands was appropriate. The following laws and rules support the EPC's decision to deny the application to impact wetlands:

a. Section 11 of the Act - by requiring permits for construction which may permit pollutants or contaminants to escape into the air, water, soil or property.

b. Section 17 of the Act - by making it unlawful to cause or take such action which may reasonably be expected to cause water pollution in Hillsborough County as defined in Section 3 (15) of the Act.

c. Section 1-11.01(1) of the Rules - "The owner of wetlands has no right to use them for a purpose for which they are unsuited in their natural state." In addition, the rules state "[i]t shall be the priority of the Environmental Protection Commission to avoid the disturbance of wetlands in the County."

d. Section 1-11.05(1), of the Rules - Development within wetlands is prohibited except to the extent as may be specifically

authorized in writing by the Executive Director.

e. Section 1-11.06(1), of the Rules - Review of proposed development will be made by weighing the environmental benefit provided by the target wetland with the impact that the proposed development could reasonably be expected to have upon the wetland's ability to provide those benefits.

f. Section 1-11.07, of the Rules - Written authorization may be given for impacting wetlands "only if reasonable use of the land cannot be accomplished without affecting the wetland, and only if the benefits provided by the affected wetland are adequately protected by conditions and time limitations."

g. Section 1-2.34(2), of the Rules - Furthermore, the "Hearing Officer shall not reach constitutional issues where unnecessary to make a recommendation."

WHEREFORE, the Executive Director of the Environmental Protection Commission respectfully requests that the Hearing Officer enter a finding that Louis W. and Jeanie T. Putney are subject to Chapter 84-446, Laws of Florida, and, pursuant to Environmental Protection Commission Rule Chapter 1-11, the Appellants' request for application to impact wetlands be denied.

And further, that findings be entered recognizing the undisputed facts set out in this motion, as well as conclusions of law and recommendations to the Commission consistent with this motion and the accompanying memorandum.

MEMORANDUM IN SUPPORT  
OF MOTION FOR SUMMARY DISPOSITION

PROCEDURAL POSTURE:

This case involves the denial of a request to impact wetlands. Although the agency disputes whether the proposed plan provides sufficient justification for the proposed impacts, i.e., whether reasonable use of the land can be accomplished without affecting the wetland, it is clear that the Appellants have not offered any evidence that the benefits provided by the affected wetland are adequately protected by conditions and time limitations. Factual issues may continue to exist with respect to the reasonable use of the property but there remain no disputed issues of fact regarding the conditions of the permit adequately protecting the environmental benefits of the wetlands on the property pursuant to Rules of the Commission, §1-11.07. It is the Executive Director's position that Appellants' failure in this one request requires denial of the permit application.

The EPC Wetland Rule recognizes the prevailing law that there is no right to use land for purposes unsuited to its natural state. In addition, the rule prohibits wetland impacts and that impacts are authorized as an exception, putting the burden on the applicant to demonstrate entitlement and proof of "adequate protection" under Rules of the Commission, §1-11.07.

The Appellants' Notice of Appeal filed on November 30, 1999 generally relies on a letter dated October 22, 1999 for the reasons and grounds of the appeal. (See Exhibit 2) Specifically in paragraph (2) of the October 22, 1999 letter, Appellants admit they


have not proposed any mitigation for the adverse impacts proposed. The only offer proposed by the Appellants regarding the protection of environmental benefits involves the setting aside of green space of the setbacks and retention ponds. In addition, the Appellants have offered to forego closing a County owned right-of-way. As a matter of law these cannot be considered mitigation, as required by Rules of the Commission, Chapter 1-11, and do nothing to protect, let alone adequately protect, the environmental benefits provided by the target wetland. Appellants refuse to propose mitigation upon their allegation that there is no legal requirement for mitigation, that they do not own uplands, and that mitigation is usually unsuccessful. However, under the terms of the rule, the Appellants must affirmatively demonstrate that the environmental benefits of the wetland are adequately protected. There is nothing in the factual record that supports that they have made this demonstration.

The Appellants also make various Constitutional arguments regarding the reasonable investment backed expectations of the owners as well as the denial of all economically viable, beneficial, and reasonable use of the property. These issues are not relevant to the matter at issue. Again, apart from the reasonable use of the property, the Appellants must also demonstrate that the benefits provided by the affected wetland are adequately protected by conditions and time limitations. Section 6, of EPC's enabling act requires the Hearing Officer to make findings of fact, conclusions of law, and a final recommendation to

the Commission. Rules of the Commission, §1-2.34, calls for the Hearing Officer to hear and determine all factual disputes properly raised by the Notice of Appeal concerning actions or decisions of the Executive Director relating to, compliance with chapter 84-446, and rules and regulations promulgated by the Commission. It does not allow the Hearing Officer to reach Constitutional issues where it is unnecessary to make a recommendation. In this case the substantive issues on appeal should be limited to those in Rules of the Commission, Chapter 1-11.

Rules of the Commission, §1-2.31(4), give the Hearing Officer the power to consider procedural motions without hearings, using the Rules of Civil Procedure as guidance. By analogy to an Administrative Procedure Act §120.57(2) hearing in which there are no disputed issues of material fact, the Hearing Officer is permitted to accept oral or written evidence in opposition to the agency's action. In the present case, because there are no disputed issues of material fact relating to the demonstration of the protection of environmental benefits under Rules of the Commission, §1-11.07, summary disposition relating to the permit denial is appropriate.

Respectfully submitted,

  
T. Andrew Zodrow, Esq.  
FL BAR ID 0080055  
Environmental Protection  
Commission of Hillsborough  
County  
1900 9th Ave.  
Tampa, FL 33605  
(813) 272-5960

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing was hand delivered to Louis D. Putney, Esq., 4805 South Himes Ave., Tampa, FL 33611-2616, on this 15<sup>th</sup> day of March 2000.

  
\_\_\_\_\_  
T. ANDREW ZOBROW, ESQUIRE

FL BAR ID 0080055  
Environmental Protection Commission  
of Hillsborough County  
1900 9th Ave.  
Tampa, FL 33605  
(813) 272-5960



BEFORE THE ENVIRONMENTAL PROTECTION  
COMMISSION OF HILLSBOROUGH COUNTY

APPEAL OF:

EPC # LPUT00-003

Putney, Louis W. and Jeanie T.  
\_\_\_\_\_ /

Affidavit of Robert Upcavage in Support of  
EPC's Motion for Summary Disposition

STATE OF FLORIDA )

COUNTY OF HILLSBOROUGH )

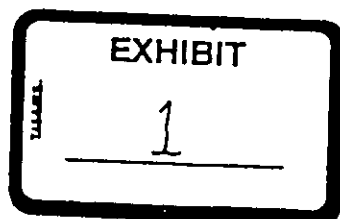
Robert Upcavage, affiant, personally appeared before me, the undersigned authority, and having been duly sworn, based on his personal knowledge hereby says:

1. I am an Environmental Manager with the Environmental Protection Commission of Hillsborough County (EPC). I currently work in the Wetlands Management Division. Included in my duties is supervision of permitting and compliance of development of waters and wetlands of the County.

2. I have worked for EPC since 1989. I have reviewed over 100 Requests to Impact wetlands during my career with EPC. I am very familiar with EPC's permitting requirements for dredging and filling in wetlands of the County. I have visited the proposed Putney site and I am generally familiar with the site. During various times I was involved in the review of the permit application for the proposed Putney project.

3. I have reviewed several binding wetland delineations performed on the property and recently performed my own wetland delineation on the site at issue on March 3, 2000. Based on my review, only an area roughly 80 feet by 10 feet, for a total of 800 square feet, of the Appellants' 2.4 acre property is upland. The remainder of Appellants' 2.4 acre property is jurisdictional wetland and falls under the jurisdiction of the EPC as wetlands of the County. The portion of the property that is currently in the Hendry Road Right-of-way is currently comprised of wetlands of the County.

4. I have reviewed the information submitted by Louis W. and Jeanie T. Putney (Appellants) in support of their application to impact wetlands on their property. Appellants have not provided *any* information relating to how the environmental benefits provided by the affected wetland are or would be adequately protected by conditions and time limitations.



5 Appellants propose filling all (100 percent) of the wetlands on the property outside of the right-of-way and refuse to provide any off-site mitigation, either creation mitigation or upland preservation. They have not demonstrated how they would avoid any impacts and the only offer to minimize impacts by the Appellants include, after the *entire wetland* is filled, the setbacks and retention ponds would be left as green space.

6. In addition, both clearing operations in the past and the intense commercial development in the immediate area, as evidenced by Appellants' information, have substantially affected the wetlands on the Appellants' property.

7. Based on my review of the site and the current rules of the EPC regarding development in wetlands of the County, I anticipate that the Appellants could fill at least a portion of the property and make reasonable use of the property. The main reason the Request to Impact was denied was based on the Appellants' failure to provide *any* information about how the environmental benefits of the wetland would be protected as required by EPC Rule 1-11, and more specifically EPC Rule 1-11.07. The most common method of protecting or replacing environmental benefits is through mitigation whereby the functions provided by wetlands are re-created in adjacent areas or in the same watershed. Although there are several options available for satisfying this requirement, in this case the Appellants have refused to provide any mitigation.

FURTHER AFFIANT SAYETH NOT.

Robert Upcavage  
ROBERT UPCAVAGE

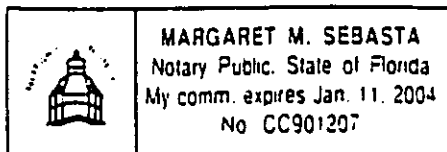
Subscribed and sworn to (or affirmed) before me this 15 day of March, 2000, by ROBERT UPCAVAGE, who:

PLEASE CHECK ONE OF THE FOLLOWING:

- did take an oath  
 did not take an oath

PLEASE CHECK ONE OF THE FOLLOWING:

- is/are personally known to me  
 produced a Florida Driver's License as identification  
 produced \_\_\_\_\_ as identification



Margaret M. Sebastia  
Notary Public  
Name: Margaret M. Sebastia  
Commission No. CC 901207  
My commission expires: 01/11/04

# Louis D. Putney

Attorney At Law

4805 SOUTH HIMES AVENUE  
TAMPA, FLORIDA 33611-2616

Personal Injury and Wrongful Death  
Wills, Estates and Guardianship  
Employment Discrimination  
Family Law

TELEPHONE  
(813) 831-3373  
FAX (813) 831-8770

October 22, 1999

Hillsborough County Environmental  
Protection Commission  
1900 9<sup>th</sup> Ave.  
Tampa, FL 33605

ATTN: Darrell F. Howton, Director, Wetlands Division

Re.: EPC Review of Request to Impact Wetlands on the Louis Putney  
Property / Folio #: 61490.0000/ Application Received Date 10 August  
1999/ STR 18-28-20

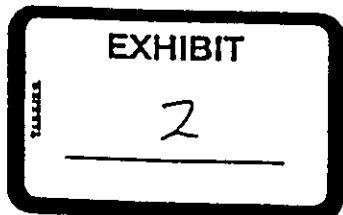
Dear Mr. Howton:

Thank you for your letter of October 15, 1999, concerning the above referenced subject. I understand from your letter that the EPC Wetland Mitigation Committee recommends denial of authorization to develop the subject property for four reasons to which I will briefly reply.

1. The "Revised Statement of Applicants" incorporated into the Applicants' "Wetland Impact Justification and Mitigation Proposal" filed with your office as part of their application for wetland development clearly and in great detail explains the justification for the proposed impacts. This statement is six pages long and is exhaustive in providing a clear economic and constitutional basis justifying the development of this property and the proposed impacts.

At time this property was purchased there were no laws regulating clearing and filling of wetlands and, in fact, the government encouraged the reclamation of wetlands. When the By-Pass Canal was dug hundreds of acres of wetlands were filled with the fill dirt obtained.

As to the pre-impact character of nearby property, we have submitted Exhibit 2 attached to the Revised Statement which is an aerial photograph taken by the U.S. Department of Agriculture on January 21, 1968, (2 months prior to the applicants' purchase of the subject



property) which clearly shows the character of nearby property to be wetlands which have since been cleared, filled, and developed commercially. Also, submitted was Exhibit 3 which is a composite aerial photograph taken in February, 1997, showing the development of the property shown in Exhibit 2, all of which was permitted by Hillsborough County. Interim aerial photographs are available from the County showing the progression of development during this period of time. Exhibit 4 is the present composite zoning map of the area showing the extensive commercial and industrial zoning permitted by Hillsborough County. These exhibits demonstrate beyond question the applicants' expectations of developability.

2. The applicants have not proposed the attempted creation of artificial wetlands in mitigation for the impacts proposed for several reasons including the following:
  - A. There is no valid legal basis to require such mitigation attempt when not proposed by the applicant.
  - B. There is no legal requirement for mitigation.
  - C. The applicants do not own any uplands upon which such mitigation could be attempted.
  - D. Such attempted mitigation is usually unsuccessful and wasteful.

The applicants have not proposed upland preservation because there are no uplands on the site.

Concerning the impact of mitigation on the economic viability of the projects, it is obvious that for the applicants to purchase 2.4 acres of uplands and attempt to convert them to wetlands would essentially destroy the economic viability of the projects and wipe out the margin of value of the land after the cost of clearing and filling the site. Mitigation under these circumstances amounts to another way of taking the property without just compensation as required by the U.S. and Florida Constitutions.

Hillsborough County Environmental  
Protection Commission  
October 22, 1999  
Page -3-

3. Obviously, when the entire tract is wetlands, then wetlands will be impacted if the property is developed. Reasonable use of the property cannot be accomplished without affecting the wetland.

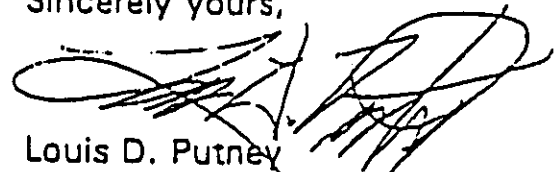
Concerning minimization of impacts, the applicants' site plan submitted to you shows 21 % of the site allotted to sloping set backs and retention ponds all of which will remain green space. In addition, as stated in the applicants' "Wetlands Impact Justification and Mitigation Proposal" filed with your office, the applicants will forego applying for the closure of the Hendry Road right of way resulting in additional minimization of impact of 9%, making a total of 30% of the land area being reserved for green space and wetlands conservation. To further arbitrarily reduce the usable portion of the land is not feasible in making any viable economic use of the land.

4. The entire application speaks to fairness and must be considered as a request for waiver or variance. The history of the property, the pictures of adjoining properties that have been filled and developed, the zoning of adjoining properties and the "Revised Statement of Applicants" all show that the applicants will be treated unfairly if their application is denied. It is not only unfair but also unconstitutional to take their property through regulation without just compensation.

The applicants hereby request a written decision of the Executive Director as suggested without further delay.

Thanking you, I am,

Sincerely yours,



Louis D. Putney  
Attorney for Applicants

LDP/me

Enclosure(s)

cc: Louis W. Putney and Jeanie T. Putney

ATTORNEYS AT LAW  
COHN COHN  
& HENDRIX  
A PROFESSIONAL ASSOCIATION

May 31, 2000

VIA HAND DELIVERY

T. Andrew Zodrow, Esquire  
Environmental Protection Commission  
1900 9<sup>th</sup> Avenue  
Tampa, FL 33605

Re: EPC adv. Putney  
Our File No. 6311.4965

Dear Andy:

Enclosed please find the original Pleadings filed with the Hearing Officer, Vanessa N. Cohn in the above reference matter. It would be appreciated if you would be so kind as to forward these pleadings directly to the Chairman of the Board of the Environmental Protection Commission in accordance with the rules.

Pursuant to instructions from Vanessa, I did not enclose any other items, unless you advise me otherwise.

If you need anything further or have any questions, please call me. Again, thank you for your assistance and attention to this matter.

Cordially, *Sheree*

COHN, COHN & HENDRIX, P.A.

Sheree A. Vinson  
Paralegal to Vanessa N. Cohn

/sav  
encl.

-76-

## APPEALS

### Right

Section 9 of the Act provides that

Any person aggrieved by an action or decision of the environmental director may appeal to the commission by filing within twenty (20) days after the date of the action or decision complained of, a written notice of appeal.

The notice is required to state what action or decision is being appealed and to give the reasons or grounds for the appeal.

Section 14 of the Act provides that failure to request an administrative hearing by service of notice of appeal within twenty (20) days after service of a citation of the Director "shall constitute a waiver" of the right, and "any such unappealed order for restoration shall become an order of the commission by operation of law."

### Appeal Procedure

The notice of appeal is to be filed with the Chairman of the Commission, served by certified mail, and a copy sent to the Director. If timely filed, the matter will be assigned to a Hearing Officer for processing.<sup>1</sup>

The Hearing Officer controls the proceeding. Chapter 1-2 of the Rules establishes the basic process followed, but each Hearing Officer is given the latitude for setting the timeframe according to the needs of the parties, and his own calendar. Some Hearing Officers have scheduled preliminary hearings at which the procedure for the entire case is determined, others have held hearings at the request of a party or as separate motions are filed. EPC is not subject to the procedures of Chapter 120, the Florida Administrative Procedures Act; however, its procedures are often instructive as to what is appropriate.

The Hearing Officer is to determine "all factual disputes relating to compliance with th(is) act and rules and regulations".<sup>2</sup> He is then required to write a report to the Commission, specifically containing (1) his findings of fact based upon a preponderance of the evidence and testimony presented to him, (2) his conclusions of law on how the rules apply to the facts, and (3) his recommendations for how the Commission should decide the issues raised by the appeal. The parties may serve exceptions to the report within ten (10) days from the date it is served on them.

### Commission's Responsibility

The Commission is required to determine the final agency position on the issues raised, and render a written decision. If exceptions are filed by either party, the Commission is to hear argument on the matter on reasonable notice to the parties. The Commission may affirm, reverse or modify the decision of the hearing officer

provided that the commission shall not take any action which conflicts with or nullifies any of the provisions of this act or rules enacted pursuant to the act.<sup>1</sup>

### Review of the Facts

The purpose of the administrative proceeding is to formulate agency action.<sup>4</sup> The Director has taken a position which the appellant claims to be inappropriate or incorrect for some reason. The theory is that all relevant information is gathered, presented to, and reviewed by the Hearing Officer. He makes the factual determinations since he examines the evidence first hand. The Commission is not entitled to receive additional evidence.<sup>5</sup> However, the Commission is able to change a factual determination of the Hearing Officer, but only if

- a) it reviews the complete record, and
- b) states with particularity that the finding of fact is not based on competent substantial evidence in the record.<sup>6</sup>

The Commission must state the reasons why it finds a Hearing Officer's finding of fact to be unsupported by competent substantial evidence in the record.<sup>7</sup> Since the Hearing Officer is the finder of fact, the Commission may remand the matter back with instructions if it has any question regarding a fact as found, or which it believes the Hearing Officer should have made a finding.

### Review of the Conclusions of Law

Once the facts are established, then the law must be applied to those facts. The Act and the rules are the law. The Hearing Officer's Conclusions of Law should recite what his understanding of the law is as it applies to the facts, and from this application, he makes his recommendation to the Commission.

As the policy making body, the Commission makes the final administrative decision when a dispute arises so as to ensure that the Commission's rules are properly applied and implemented, and that its purpose of "control and regulation of activities which are causing or may reasonably be expected to cause pollution..."<sup>8</sup> are carried out. The Commission establishes environmental policy, knows what its rules provide, and is the appropriate interpreter of them. Where its rules work an unintended result, the Commission is also the body able to implement rulemaking to effect necessary changes. However, the rulemaking is prospective, and the Commission is required to apply the rules as written in any given case.

The Commission may reject the Hearing Officer's conclusions of law if

- a) it finds that the law applied was incorrect or misinterpreted, or
- b) that the law was incorrectly applied to the facts.

As the policy maker, this consideration is peculiarly within the Commission's discretion, although reasons should be given. If the Commission modifies the Hearing Officer's conclusions of law, it will need to determine whether its has sufficient facts, or the record reflects sufficient facts to reach the appropriate conclusion based upon proper application of the law. If the Hearing Officer's view of the case precludes a fact finding that the Commission determines to be necessary, a remand is appropriate.<sup>9</sup>



### Final Agency Action

The Commission is not obligated to follow the Hearing Officer's recommendation. If it determines that alternative action is appropriate to its policy, it may rule accordingly, as long as it is consistent with law. Normal rules of fairness apply so that similar treatment should be accorded persons in similar situations. If circumstances not anticipated by the rules exist in a particular case, a refinement to existing policy may be developed and applied as long as it does not contradict the wording of the law. Reasons must be given, and the matter then becomes precedent for subsequent cases.

### Prohibition against Ex Parte Communication

Florida Law prohibits ex parte communications regarding the merits of a case once the Report of the Hearing officer is transmitted to the agency head; ie. the Commission. This applies to all parties and their representatives. The Florida Administrative Code provides that if an ex parte communication is received, it should be placed on the record and an opportunity to rebut within ten days given to the other parties. The recipient may also withdraw from further action on the matter "if he deems it necessary to eliminate the effect of the ex parte communication."<sup>10</sup>

### Judicial Appeal

Any person who is aggrieved by the final administrative decision of the Commission may seek review as provided in the Act: appeal by petition for writ of certiorari to the 2nd District Court of Appeal. New evidence is not permitted; the court will only review the record generated through the administrative process.<sup>11</sup> The Court is not entitled to revisit the evidence to reweigh it or to determine its relative credibility.<sup>12</sup> Instead, the Court will review to ensure that (1) procedural due process was accorded, (2) essential requirements of law observed, and (3) whether administrative findings and judgments are supported by competent substantial evidence.<sup>13</sup> If the Court finds the administrative action improper, it should remand the matter back to the agency with instructions.

In the area of administrative expertise, a final administrative order is entitled to a presumption of correctness unless it clearly appears invalid on its face.<sup>14</sup> The act provides that its provisions are to be "liberally construed in order to effectively carry out the purposes of th(e) act in the interest of public health, safety and general welfare".<sup>15</sup> The Florida Supreme Court has ruled that a reviewing court should review the reasons asserted by the agency in modifying a Hearing Officer's recommendations.<sup>16</sup> However, it has also been held that even when a decision is within the discretion of the agency, such as the appropriate correction for a violation, a court may determine that the remedy selected is "inappropriate" for the particular circumstances.<sup>17</sup>

#### ENDNOTES

1. If Notice is filed solely for the purpose of preserving the right during the continuation of negotiations, the matter will not be immediately set before a Hearing Officer. Either party can request at any time that the proceedings commence.

2. Section 6(1), Act.

3. Section 9, Act.

4. Cobb v. DER, DOAH Case No. 87-4169 (July 14, 1988)

5. Nest v. DPR, Bd of Medical Examiners, 490 So.2d 987 (Fla 1st DCA 1986).

6. See, Berry v. DER, 13 FLW 1998 (Fla. 4th DCA, 8/31 1988); Harvey v. Nuzum, 345 So.2d 1106 (Fla. 1st DCA 1977).

7. McDonald v. Dept of Banking Finance, 346 So.2d 569 (Fla DCA 1977).

8. Section 2, Act.

9. Manasota 88, Inc. v. Tremor, 545 So.2d 439 (Fla. 2d DCA 1989).

10. F.S. 120.66(2).

11. Battaglia Fruit Co. v. City of Maitland, 13 FLW 1733 (5th DCA, 7/21 1988).

12. City of Miramar v. Giordano, FLW 194 1/4/83 (Fla 4th DCA, 12/29/82).

13. City of Deerfield Beach v. Vaillant, FLW 348, 7/30/82 (Fla. July 29, 1982).

14. See, 158 So.2d 523; 108 So.2d 601.

15. Section 21, Act.

16. DPR v. Bernal, 13 FLW 603 (Fla. 10/6/88)

17. DER v. Brown, 449 So.2d 908 (Fla 3rd DCA, 1984) where agency requirement that violator perform all the restoration of impacted wetlands was held to be an inappropriate remedy in the circumstances where the agency could do the work at the violator's expense.

MAY 18, 2000 - ENVIRONMENTAL PROTECTION COMMISSION - DRAFT  
MINUTES

The Environmental Protection Commission (EPC), Hillsborough County, Florida, met in Regular Meeting, scheduled for Thursday, May 18, 2000, at 10:00 a.m., in the Boardroom, County Center, Tampa, Florida.

The following members were present: Chairman Jan Platt and Commissioners Pat Frank, Chris Hart, Jim Norman, Thomas Scott, Ronda Storms (arrived at 10:05 a.m.), and Ben Wacksman (arrived at 10:25 a.m.; interviewing candidate for EPC Executive Director position).

Chairman Platt called the meeting to order at 10:04 a.m. Commissioner Scott led in the pledge of allegiance to the flag and gave the invocation.

#### CLEAN AIR MONTH AWARDS

Mr. Jerry Campbell, Director, Air Management Division, EPC, recalled April had been proclaimed Clean Air Month, and a contest had been held in local schools. Commissioners Storms, Hart, and Frank presented certificates and certificates for savings bonds to three local school children who had submitted art work.

#### CITIZENS WISHING TO APPEAR

Ms. Patricia Mitchell, 1013 Bal Harbour Drive, Apollo Beach, spoke of community interest in appointment of the EPC Executive Director. Ms. Gaye Townsend, Long Leaf Drive, Lutz, spoke in opposition to augmentation of lakes, as listed on the Consent Agenda. The following people indicated their preference for the EPC Executive Director and commented on issues related to water: Mr. Bob Murphy, Save Our Bays and Canals (SOBAC) member, 1441 Ju Mana Loop, Apollo Beach, who also commented on activities and growth of SOBAC; Mr. Bob Bettis, vice president, SOBAC; Ms. Marilyn Smith, P. O. Box 66, Sydney; and Attorney B. John Ovink, 113 West Stanley Street. Chairman Platt read a letter from the Tampa Bay Group of the Sierra Club regarding selection of the EPC Executive Director and a letter from Representative Rob Wallace, chairman, Legislative Delegation, expressing appreciation for EPC support in repealing automobile emission inspections.

#### CITIZENS ENVIRONMENTAL ADVISORY COMMITTEE (CEAC)

Mr. Larry Padgett, CEAC chairman, said CEAC requested approval of changes to bylaws, which were basically bookkeeping in nature and which were in agenda backup. Commissioner Scott so moved. Commissioner Wacksman seconded the motion, which carried seven to zero. Mr. Padgett said CEAC had submitted a letter to the EPC regarding selection of the EPC Executive Director, but the individual CEAC preferred was not on the list of four candidates.

He requested Consent Agenda item H, Update--Bullfrog Creek Water Quality Report, be deferred to another meeting when there would be time for CEAC members to discuss that item with EPC Board members.

#### CONSENT AGENDA

- A. Approval of Minutes, April 11, 12, and 18, 2000
- B. Monthly Activity Reports
- C. Legal Department Monthly Report
- D. Pollution Recovery Trust Fund
- E. Gardinier Settlement Trust Fund
- F. Quarterly Status Report--Superfund Sites
- G. Information on Water Quality Issues--Groundwater Augmentation of Round Lake, Northwest Hillsborough County
- H. Update--Bullfrog Creek Water Quality Report

Commissioner Frank moved the Consent Agenda, minus item H, Update--Bullfrog Creek Water Quality Report, which was continued to the next EPC meeting. Commissioner Wacksman seconded the motion, which carried seven to zero.

#### SELECTION OF EPC EXECUTIVE DIRECTOR

Ms. Sharon Wall, Director, Human Resources Department, described the selection process that had resulted in four finalists, and she suggested EPC Board members select one candidate after which she would negotiate with that individual regarding compensation, then return to the EPC. Commissioner Hart suggested a second name be designated in the event the selected individual later declined. Discussion ensued about the voting procedure. Consensus was that each EPC Board member would write their first and second choice on a sheet of paper and sign their name. Ms. Wall would tally votes and announce the first and second ranked candidates as well as how each individual had voted. EPC Chief Counsel Sara Fotopolus Attorney Fotopulous would confirm that the suggested voting procedure fulfilled requirements of the Sunshine Law. After discussion about the time to be allotted, Commissioner Stórms moved that each candidate be given three minutes to make introductory comments, with questions and answers by EPC Board members afterward if they desired. Commissioner Scott seconded the motion, which carried seven to zero.

The following candidates presented their qualifications: Mr. Cory Chadwick, director, Department of Environmental Services, Southwest Ohio; Dr. Rick Garrity, Director, Water Resource Team; Mr. Darrell Howton, Director, Wetlands Management Division, EPC; and Mr. Steven Kuhrtz, vice president, environmental health and safety, GATX Terminals Corporation, Chicago, Illinois. Questions from EPC Board members to the candidates addressed priorities the candidates would set, current and future major environmental issues for the County, what changes should be made, and how controversy would be handled. Dr. Garrity was given the opportunity to rebut remarks made about him during public

comment.

After further discussion about how to designate the second choice candidate, consensus was that EPC Board members would submit their written selections to Ms. Wall, who would tally the votes and announce the top choice. The procedure would be repeated for the second-choice candidate. Attorney Fotopulos said the suggestion complied with the Sunshine Law voting was performed and announced in the meeting and documentation was available for public inspection. Commissioner Frank emphasized that all candidates were well-qualified. Commissioner Storms reviewed factors upon which she had made her selection, as did other EPC Board members, at her request.

EPC Board members submitted the name of their first-choice candidate to Ms. Wall, who announced the individual votes, and said Dr. Garrity had been selected. Commissioner Hart moved to offer the appointment to Dr. Garrity. Commissioner Scott seconded the motion, which carried seven to zero. EPC Board members marked and submitted their second choices to Ms. Wall, who announced the individual votes. To break the tie between Messrs. Chadwick and Howton, Commissioner Norman changed his vote to Mr. Howton. Ms. Wall announced Mr. Howton was the second-choice candidate. Commissioner Wacksman moved to unanimously declare Mr. Howton as the second-choice candidate. Commissioner Scott seconded the motion, which carried seven to zero. Chairman Platt thanked the applicants and commented that over 40 persons nationwide had applied. Mr. Stewart commended EPC Board members on their selection.

There being no further business, the meeting was adjourned at 11:40 a.m.

READ AND APPROVED:  
CHAIRMAN

ATTEST:  
RICHARD AKE, CLERK

By:  
Deputy Clerk

fw

MAY 23, 2000 - ENVIRONMENTAL PROTECTION COMMISSION SPECIAL  
MEETING - DRAFT MINUTES

The Environmental Protection Commission (EPC), Hillsborough County, Florida, met in Special Meeting to consider the Tampa Bay Water (TBW) Request for Variance Regarding Construction of the Regional Surface Water Treatment Plant, scheduled for Tuesday, May 23, 2000, at 10:30 a.m., in the Boardroom, County Center, Tampa, Florida.

The following members were present: Vice Chairman Chris Hart and Commissioners Pat Frank, Jim Norman, Thomas Scott, and Ben Wacksman.

The following members were absent: Chairman Jan Platt (out of town) and Ronda Storms (prior commitment).

Vice Chairman Hart called the meeting to order at 11:34 a.m.

In response to Vice Chairman Hart, EPC Assistant Counsel Kristin Bennett explained, rather than being repetitive, the record from the Board of County Commissioners land use meeting earlier that day would serve as the EPC presentation regarding the TBW variance request. Vice Chairman Hart asked for a motion in that regard. Commissioner Wacksman so moved, seconded by Commissioner Scott, and carried five to zero. (Chairman Platt and Commissioner Storms were absent.)

Attorney Bennett said EPC, in conjunction with the Water Resource Team, had reviewed the variance request and the final Department of Environmental Protection (DEP) order. Since EPC did not regulate safe drinking water standards and normally did not get involved in those reviews, it deferred to DEP and the Department of Health determinations. Because the issue was outside EPC's jurisdiction and did not negatively impact EPC programs, EPC staff recommended not petitioning the variance granted to TBW, Commissioner Norman so moved, seconded by Commissioner Wacksman.

Vice Chairman Hart called for public comment; there was no response. The motion carried four to one; Commissioner Frank voted no. (Chairman Platt and Commissioner Storms were absent.)

There being no further business, the meeting was adjourned at 11:48 a.m.

READ AND APPROVED:

CHAIRMAN

ATTEST:  
RICHARD AKE, CLERK

By:  
Deputy Clerk

jp

MONTHLY ACTIVITIES REPORT  
AIR MANAGEMENT DIVISION  
MAY

A.	Public Outreach/Education Assistance:	<u>13,440</u>
B.	Industrial Air Pollution Permitting	
1.	Permit Applications Received (Counted by Number of Fees Received):	
	a. Operating:	<u>5</u>
	b. Construction:	<u>6</u>
	c. Amendments:	<u>0</u>
	d. Transfers/Extensions:	<u>1</u>
2.	Delegated Permits Issued by EPC and Non-delegated Permits Recommended to DEP for Approval ( <sup>1</sup> Counted by Number of Fees Collected - <sup>2</sup> Except for Title V Facilities where it is Counted by Number of Emission Units affected by the Applicant's Request):	
	a. Operating <sup>1</sup> :	<u>3</u>
	b. Construction <sup>1</sup> :	<u>1</u>
	c. Amendments <sup>1</sup> :	<u>1</u>
	d. Transfers/Extensions <sup>1</sup> :	<u>1</u>
	e. Title V Operating <sup>2</sup> :	<u>0</u>
	f. Permit Determinations <sup>2</sup> :	<u>4</u>
3.	Intent to Deny Permit Issued	<u>0</u>
4.	General Permits	<u>1</u>
C.	Administrative Enforcement	
1.	Documents Issued:	
	a. Notice of Intent to Initiate Enforcement	<u>1</u>
	b. Citation	<u>2</u>
	c. Emergency Order	<u>0</u>
2.	Total Cases Initiated:	<u>5</u>
3.	Cases Resolved:	<u>2</u>
4.	Cases Referred to Legal Department:	<u>0</u>
5.	Consent Orders Signed:	<u>0</u>
6.	Contributions to the Pollution Recovery Fund: \$	<u>-0-</u>

<u>Organization Name</u>	<u>Violation</u>	<u>Amount</u>
--------------------------	------------------	---------------

a.



D.	Inspections:	
1.	Industrial Facilities:	<u>5</u>
2.	Air Toxics Facilities:	
a.	Asbestos Emitters	<u>0</u>
b.	Area Sources (i.e. Drycleaners, Chrome Platers, etc...)	<u>23</u>
c.	Major Sources	<u>0</u>
3.	Asbestos Demolition/Renovation Projects:	<u>24</u>
E.	Open Burning Permits Issued:	<u>0</u>
F.	Number of DOF Permits Monitored:	<u>13</u>
G.	Total Citizen Complaints Received:	<u>81</u>
H.	Total Citizen Complaints Closed:	<u>81</u>
I.	Noise Sources Monitored:	<u>7</u>
J.	Air Program's Input to DRI's:	<u>4</u>
K.	Test Reports Reviewed:	<u>49</u>
L.	Compliance:	
1.	Warning Notices Issued:	<u>24</u>
2.	Warning Notices Resolved:	<u>22</u>
3.	Advisory Letters Issued:	<u>22</u>
M.	AOR's Reviewed	<u>45</u>

FEES COLLECTED FOR AIR MANAGEMENT DIVISION  
MAY

	Total Revenue
1. Non-delegated construction permit for an air pollution source	
(a) New Source Review or Prevention of Significant Deterioration sources	\$ -0-
(b) all others	<u>\$ -0-</u>
2. Non-delegated operation permit for an air pollution source	
(a) class B or smaller facility - 5 year permit	\$ -0-
(b) class A2 facility - 5 year permit	<u>\$ -0-</u>
(c) class A1 facility - 5 year permit	<u>\$ -0-</u>
3. (a) Delegated Construction Permit for air pollution source (20% of the amount collected is forwarded to the DEP and not included here)	<u>\$7,400</u>
(b) Delegated operation permit for an air pollution source (20% of the amount collected is forwarded to the DEP and not included here)	<u>\$3,840</u>
(c) Delegated General Permit (20% is forwarded to DEP and not included here)	<u>\$ 80</u>
4. Non-delegated permit revision for an air pollution source	<u>\$ -0-</u>
5. Non-delegated permit transfer of ownership, name change or extension	<u>\$ -0-</u>
6. Notification for commercial demolition	
(a) for structure less than 50,000 sq ft	<u>\$1,725</u>
(b) for structure greater than 50,000 sq ft	<u>\$ 645</u>
7. Notification for asbestos abatement	
(a) renovation 160 to 1000 sq ft or 260 to 1000 linear feet of asbestos	<u>\$ 725</u>
(b) renovation greater than 1000 linear feet or 1000 sq ft	<u>\$1,000</u>
8. Open burning authorization	<u>\$ -0-</u>
9. Enforcement Costs	<u>\$ -0-</u>

ACTIVITIES REPORT  
WATER MANAGEMENT DIVISION

MAY, 2000

A. ENFORCEMENT

1. New Enforcement Cases Received:	0	
2. Enforcement Cases Closed:	1	
3. Enforcement Cases Outstanding:	45	
4. Enforcement Documents Issued:	0	
5. Warning Notices:	11	
a. Issued:	5	
b. Resolved:	6	
6. Recovered costs to the General Fund:	\$ 0	
7. Contributions to the Pollution Recovery Fund:	\$200.00	
<u>Case Name</u>	<u>Violation</u>	<u>Amount</u>
a. Country Road Park	Expired Permit	\$200.00

B. PERMITTING - DOMESTIC

1. Permit Applications Received:	46	
a. Facility Permit:	18	
(i) Types I and II	0	
(ii) Type III	18	
b. Collection Systems-General:	15	
c. Collection Systems-Dry Line/Wet Line:	13	
d. Residuals Disposal:	0	
2. Permit Applications Approved:	17	
a. Facility Permit:	2	
b. Collection Systems-General:	12	
c. Collection Systems-Dry Line/Wet Line:	5	
d. Residuals Disposal:	0	
3. Permit Applications Recommended for Disapproval:	0	
a. Facility Permit:	0	
b. Collection Systems-General:	0	
c. Collection Systems-Dry Line/Wet Line:	0	
d. Residuals Disposal:	0	
4. Permit Applications (Non-Delegated) Recommended for Approval:	0	
5. Permits Withdrawn:	0	
6. Permit Applications Outstanding:	50	
a. Facility Permit:	31	
b. Collection Systems-General:	5	
c. Collection Systems-Dry Line/Wet Line:	12	
d. Residuals Disposal:	0	

C. INSPECTIONS - DOMESTIC	<u>65</u>
1. Compliance Evaluation:	<u>12</u>
a. Inspection (CEI):	<u>0</u>
b. Sampling inspection (CSI):	<u>12</u>
c. Toxics Sampling Inspection (XSI):	<u>0</u>
d. Performance Audit Inspection (PAI):	<u>0</u>
2. Reconnaissance:	<u>35</u>
a. Inspection (RI):	<u>10</u>
b. Sample Inspection (SRI):	<u>0</u>
c. Complaint Inspection (CRI):	<u>25</u>
d. Enforcement Inspection (ERI):	<u>0</u>
3. Special:	<u>18</u>
a. Diagnostic Inspection (DI):	<u>0</u>
b. Residual Site Inspection (RSI):	<u>0</u>
c. Preconstruction Inspection (PCI):	<u>2</u>
d. Post Construction Inspection (XCI):	<u>16</u>
D. PERMITTING - INDUSTRIAL	
1. Permit Applications Received:	<u>2</u>
a. Facility Permit:	<u>2</u>
(i) Types I and II	<u>2</u>
(ii) Type III with groundwater monitoring	<u>0</u>
(iii) Type III w/o groundwater monitoring	<u>0</u>
b. General Permit:	<u>0</u>
c. Preliminary Design Report:	<u>0</u>
(i) Types I and II	<u>0</u>
(ii) Type III with groundwater monitoring	<u>0</u>
(iii) Type III w/o groundwater monitoring	<u>0</u>
2. Permits Recommended to DEP for Approval:	<u>0</u>
3. Permit Applications Outstanding:	<u>36</u>
a. Facility Permits:	<u>35</u>
b. General Permits:	<u>1</u>
E. INSPECTIONS - INDUSTRIAL	<u>24</u>
1. Compliance Evaluation:	<u>5</u>
a. Inspection (CEI):	<u>4</u>
b. Sampling Inspection (CSI):	<u>1</u>
c. Toxics Sampling Inspection (XSI):	<u>0</u>
d. Performance Audit Inspection (PAI):	<u>0</u>
2. Reconnaissance:	<u>19</u>
a. Inspection (RI):	<u>10</u>
b. Sample inspection (SRI):	<u>0</u>
c. Complaint Inspection (CRI):	<u>9</u>

<b>F. CITIZEN COMPLAINTS</b>		
1. Domestic:		<u>30</u>
a. Received:		<u>13</u>
b. Closed:		<u>17</u>
2. Industrial:		<u>12</u>
a. Received:		<u>5</u>
b. Closed:		<u>7</u>
3. Water Pollution:		<u>35</u>
a. Received:		<u>17</u>
b. Closed:		<u>18</u>
<b>G. RECORD REVIEWS</b>		
1. Permitting:		<u>3</u>
2. Enforcement:		<u>0</u>
<b>H. ENVIRONMENTAL SAMPLES ANALYSED FOR:</b>		
1. Air Division:		<u>94</u>
2. Waste Division:		<u>2</u>
3. Water Division:		<u>131</u>
4. Wetlands Division:		<u>0</u>
<b>I. SPECIAL PROJECT REVIEWS</b>		
1. DRI's:		<u>1</u>
2. Permitting:		<u>0</u>
3. Enforcement:		<u>0</u>
4. Other:		<u>0</u>
<b>J. WATER QUALITY MONITORING SPECIAL PROJECTS</b>		
1. Data Review		<u>0</u>
2. Special Sampling		<u>0</u>
3. Biomonitoring/Toxicity Reviews (DW)		<u>0</u>
4. Biomonitoring/Toxicity Reviews (IW)		<u>3</u>
5. Other		<u>0</u>
<b>K. TAMPA PORT AUTHORITY/DEP DREDGE &amp; FILL</b>		<u>1</u>

AR05.00

Table B.2.a.

**Issued Domestic Wastewater Facility Permit Report for EPC Activities Report,  
for Month of May 2000**

06-Jun-00

Facility ID Number	Facility Name	Application Number	Application Received Date	Issue Date	Permit Type	Permitted Capacity, MGD
FLA012124	MACDILL AFB	004	2/29/00	5/30/00	DW1-MR	1.2
FLA012261	RIVERVIEW OAKS SHOPPING CENTER	004	2/22/00	5/22/00	DW3-MR	0.02

**Legend, common permit Type and Subtype codes:**

Facility Size Class	Type Code	Subtype Code	Description
Type I	DW1	MR	minor revision, change monitoring or minor modification
Type II	DW2	MT	transfer of ownership or time extension
Type III	DW3	NR	permit renewal
Type III (<10,000gpd)	DW4	RA	substantial revision modification with increase in capacity
		RO	substantial revision modification with no increase in capacity
		RM	substantial revision not associated with substantial modification

**Environmental Protection Commission of Hillsborough County  
Collection / Transmission System Permits Monthly Report to EPC Board for May 2000**

06-Jun-00

Permit Number	Issue Date	Project Name	Project Location	No of Units	Units , Type	Flow, GPD	WWTP Name	Permit Type
0127518002	5/25/00	Regency Park North - Phase I	North of Lake Kathy Drive, East of Grand Regency Blvd.	1	OFFICE/WAREHOUSE CENTER	17,463	Falkenburg Road WWTP	Dry Line
0166119001	5/11/00	University Lakes Professional Park	Bruce B. Downs Blvd. and Skipper Road	6	OFFICE BUILDINGS	2,250	Howard F. Curren AWWTP	Dry Line
0169040001	5/18/00	Kids Zone Learning Center	Linebaugh Avenue west of Henderson	1	DAY CARE CENTER	550	Dale Mabry AWWTP	General
0169091001	5/4/00	Brandon Dodge	State Road 60 and U.S. Highway 301	1	AUTO DEALERSHIP	1,300	Howard F. Curren AWWTP	General
0169213001	5/11/00	Tampa Palms - Tampa Tech West, Parcel 23 (Ph. I)	Tampa Palms Blvd. and Bruce B. Downs Blvd.	9	SINGLE FAMILY HOMES	1,800	Howard F. Curren AWWTP	General
0169267001	5/18/00	East Monte/Pearson Road Neighborhood Pump Station	Pearson Road north of Bloomingdale Avenue	75	SINGLE FAMILY HOMES INFRASTRUCTURE & A MASTER PUMP STATION	15,000	Valrico Regional AWWTP	General
0169310001	5/25/00	Avalon Heights Apartments Suites	Fletcher Avenue and 46th Street	120	APARTMENTS	84,480	Howard F. Curren AWWTP	Wet Line

## Environmental Protection Commission of Hillsborough County Collection / Transmission System Permits Monthly Report to EPC Board for May 2000

06-Jun-00

Permit Number	Issue Date	Project Name	Project Location	No of Units	Units , Type	Flow, GPD	WWTP Name	Permit Type
0169435001	5/18/00	Parsons Avenue 4" Force Main	Parsons Avenue, south of U.S. 92		INFRASTRUCTURE	0	Valrico Regional AWWTP	General
0169540001	5/11/00	Plant City Crossings	Thonotosassa Road and Interstate 4	1	SHOPPING CENTER	15,370	City of Plant City WWTP	General
0169544001	5/18/00	Burney Simmons Elementary School	Collins Street and Alsobrook Street		PORTABLE CLASSROOMS & GANG TOILETS	6,875	City of Plant City WWTP	General
0169755001	5/18/00	7-Eleven At Anderson & Linebaugh	Southwest corner of Anderson Road and Linebaugh Avenue	1	CONVENIENCE STORE	650	River Oaks WWTP	Wet Line
0169757001	5/18/00	Buckhorn Groves	Durant Road and Pearson Road	160	SINGLE FAMILY HOMES	32,000	Valrico Regional AWWTP	Dry Line
0169763001	5/18/00	Gran Kayman P.S. Modifications (Proj. #P98-0071)	Gran Kayman Way		INFRASTRUCTURE	0	South County Regional AWWTP	General
0169768001	5/25/00	Big Bend Subdivision - Phases IA & IB	Big Bend Road east of U.S. 41	190	SINGLE FAMILY HOMES	38,000	South County Regional AWWTP	Wet Line

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**Environmental Protection Commission of Hillsborough County  
Collection / Transmission System Permits Monthly Report to EPC Board for May 2000**

06-Jun-00

Permit Number	Issue Date	Project Name	Project Location	No of Units	Units , Type	Flow, GPD	WWTP Name	Permit Type
0169772001	5/18/00	Bayshore Trails	S. MacDill Avenue and Bayshore Trails Drive	58	SINGLE FAMILY HOMES	11,600	Howard F. Curren AWWTP	General
0169774001	5/18/00	Arbor Lakes, Ph. 1B	South Mobley Road and Arbor Lake Drive	29	SINGLE FAMILY HOMES	5,800	Northwest Regional AWWTP	General
0169775001	5/18/00	Robinson High School	Northeast of S. Manhattan and Rembrandt Drive	1	SCHOOL	0	Howard F. Curren AWWTP	General
0170121001	5/25/00	Super Transport Expansion	Northeast Corner of Industrial Lane and Enterprise Cove	1	COMMERCIAL FACILITY	1,200	Howard F. Curren AWWTP	General

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COMMISSION  
PAT FRANK  
CHRIS HART  
JIM NORMAN  
JAN PLATT  
THOMAS SCOTT  
RONDA STORMS  
BEN WACKSMAN

EXECUTIVE DIRECTOR  
ROGER P. STEWART



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WATER MANAGEMENT DIVISION  
1900 - 9<sup>TH</sup> AVENUE  
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TELEPHONE (813) 272 - 5530

WASTE MANAGEMENT DIVISION  
TELEPHONE (813) 272 - 5788

WETLANDS MANAGEMENT DIVISION  
TELEPHONE (813) 272 - 7104

## MEMORANDUM

**DATE:** June 7, 2000

**TO:** Tom Koulianos, Director of Finance and Administration

**FROM:** Joyce H. Moore, Executive Secretary, Waste Management Division through  
Hooshang Boostani, Director of Waste Management  
*H.B.*

**SUBJECT:** **WASTE MANAGEMENT'S MAY 2000 AGENDA INFORMATION**

### A. ADMINISTRATIVE ENFORCEMENT

1. New cases received	2
2. On-going administrative cases	
a. Pending	5
b. Active	60
c. Legal	9
d. Tracking Compliance (Administrative)	17
e. Inactive/Referred cases	22
f. Criminal Compliance tracking	2
3. NOI's issued	1
4. Citations issued	1
5. Consent Orders signed	0
6. Civil Contributions to the Pollution Recovery Fund	\$3,738.64
7. Criminal Contributions to the Pollution Recovery Fund	\$0.00
8. Enforcement Costs collected	\$700.94
9. Cases referred to Legal Dept.	0
10. Cases Closed	0

### B. SOLID AND HAZARDOUS WASTE

1. Permits (received/reviewed)	70/69
2. EPC Authorization for Facilities NOT requiring DEP permit	3/0
3. Other Permits and Reports	
a. County Permits	00/00
b. Reports	66/69
4. Inspections (Total)	279



a. Complaints	53
b. Compliance/Reinspections	38
c. Facility Compliance	15
d. Small Quantity Generator	173
5. Enforcement	
a. Complaints Received/Closed	56/51
b. Warning Notices Issued/Closed	2/1
c. Compliance letters	50
d. Letters of Agreement	0
e. DEP Referrals	0
6. Pamphlets, Rules and Material Distributed	420

**C. STORAGE TANK COMPLIANCE**

1. Inspections	
a. UST Compliance	50
b. AST Compliance	13
c. UST Installation	3
d. AST Installation	2
e. UST Closure	4
f. AST Closure	1
g. Compliance Re-Inspections	17
2. Installation Plans Reviewed	6
3. Closure Plans & Reports	11/8
a. Closure Plans Received/ Reviewed	7/7
b. Closure Reports Received/Reviewed	4/1
4. Enforcement	
a. Non-compliance Letters	41
b. Warning Notices Issued/Closed	4/2
c. Cases referred to Enforcement	1
d. Complaints Received/Investigated	5/5
e. Complaints Referred	0
5. Discharge Reporting Forms Received	0
6. Incident Notification Forms Received	0
7. Cleanup Notification Letters Issued	2
8. Public Assistance	200+

**D. STORAGE TANK CLEANUP**

1. Inspections	29
2. Reports Received/Reviewed	48/52
a. Site Assessment	21/17
b. Source Removal	2/3
c. Remedial Action Plans (RAP's)	1/2
d. Site Rehabilitation Completion Order/ No Further Action Order	6/7

	e. Others	18/23
3.	State Cleanup	
	a. Active Sites	4
	b. Funds Dispersed	\$12,625.67
<b>E.</b>	<b>RECORD REVIEWS</b>	52
<b>F.</b>	<b>PUBLIC INFORMATION PROJECTS</b>	1
	K. Boatwright, speaker for Annual SQG Statewide Workshop	

## ASSESSMENT SECTION

### A. EPC Wetlands Reviews

1. Wetland Delineations	
a. Wetland Delineations (\$120)	41
b. Wetland Delineation Dispute	2
c. Wetland Line Survey Reviews	23
d. Additional Footage Fees	\$696.59
2. Misc. Activities in Wetlands (\$0 or \$100 as applicable)	
a. Nuisance Vegetation	8
b. Other	21
3. Impact/Mitigation Proposal (\$775)	4
4. Mitigation Agreements Recorded	5
5. FDOT Reviews	0

### B. EPC Delegation/Reviews from State/ Regional/ Federal Authorities

1. Tampa Port Authority Permit Apps. (\$50 or \$150 as applicable)	27
2. Wastewater Treatment Plants (FDEP)	20
3. FDEP Wetland Resource Apps.	0
4. FDEP Grandfathered Delineation	0
5. SWFWMD Wetland Resource Apps.	0
6. Army Corps of Engineers	0

	TOTALS
7. Interagency Clearinghouse Reviews	0
8. DRI Annual Report	2
<b>C. Hills. County/ Municipality Permit Application Reviews</b>	
1. Land Alteration/Landscaping (\$100)	2
2. Land Excavation (\$785 or \$650 as applicable)	0
3. Phosphate Mining	
a. Unit Review/Reclamation (\$760)	1
b. Annual Review/Inspection (\$375)	0
4. Rezoning	
a. Reviews (\$85)	30
b. Hearings	1
c. Hearing Prep (hours)	0
5. Site Development/Commercial (\$360)	
a. Preliminary	8
b. Construction	27
6. Subdivision	
a. Preliminary Plat (\$140)	4
b. Master Plan (\$550)	0
c. Construction Plans (\$250)	14
d. Final Plat (\$90)	10
e. Waiver of Regulations (\$100)	0
f. Platted, No-Improvements (\$100)	5
g. Minor - Certified Parcel (\$100)	31
7. As-Builts (\$255)	3

TOTALS

8. Miscellaneous Reviews (no fees)	
a. Wetland Setback Encroachment	1
b. Easement /Vacating	2
c. NRCS Review	0
9. Preapplications (no fees)	
a. Review preparation (hours)	2
b. Meetings/Reports	4
10. Development Review Committee (no fees)	
a. Review preparation (hours)	3.5
b. Meetings	0
D. Other Activities	
1. Unscheduled meetings with members of the public (walk-ins)	64
2. Other Meetings	115
3. Telephone conferences	850
4. Presentations	1
5. Correspondence	181
6. Correspondence Review (hours)	14.5
7. Special Projects (hours)	87.25
8. On-site visits	96
9. Appeals (hours)	1

ADMINISTRATIVE ENFORCEMENT	TOTALS
A. NEW CASES RECEIVED	4
B. ACTIVITIES	
1. Ongoing Cases	
a. Active	57
b. Legal	3
2. Number of "Notice of Intent to Initiate Enforcement"	5
3. Number of Citations Issued	0
4. Number of "Emergency Order of the Director"	0
5. Number of Consent Orders Signed	2
C. CASES CLOSED	
1. Administrative / Civil Cases Closed	7
2. Criminal Cases Closed	1
3. Cases Referred to Legal Dept.	0
D. CONTRIBUTIONS TO POLLUTION RECOVERY	\$1,950.00
E. ENFORCEMENT COSTS COLLECTED	\$576.00



## INVESTIGATIONS / COMPLIANCE SECTION

A. COMPLAINTS	TOTALS
1. Received	47
2. Return Inspections	67
3. Closed	57
B. WARNING NOTICES	
1. Issued	17
2. Return Inspections	70
3. Closed	22
C. MITIGATION	
1. Compliance / Monitoring Reviews	20
2. Compliance Inspections	24
D. OTHER ACTIVITIES	
1. Case Meetings	5
2. Other Meetings	34
3. Telephone Calls	458
4. File Reviews	34
5. Cases Referred to Enforcement Coordinator	4
6. Letters	68

ADMINISTRATIVE / TECHNICAL SECTIONS.

A. SOIL SCIENTIST

1. Case Reviews	6
2. Field Soil Investigations	6
3. Reports or Notes of Soil Investigations	6
4. Special Projects	
- Brandon Urban Dispersed Wells	
- Regional Reservoir and & Pipeline	
- A Regional Guidebook for Assessing the Functions of Low Gradient, Blackwater, Riverine Wetlands in Peninsular Florida	

B. ADMINISTRATIVE SUPPORT STAFF

1. File Reviews	15
2. Telephone Assistance	594
3. Letters	194
4. Incoming Projects	139
5. Additional Info / Additional Footage	17 / 4
6. Resubmittals / Revisions	13 / 4
7. Surveys / Data Entry	13 / 527

C. ENGINEERING STAFF

1. Meetings	50
2. Reviews	43
3. Aerial Reviews	28
4. Telephone Inquiries	55
5. Field Investigations	5

**LEGAL DEPARTMENT MONTHLY REPORT**  
**June 15, 2000**

**A. ADMINISTRATIVE CASES**

**NEW CASES [ 1 ]**

**DOT [ ]**: EPC issued a citation to DOT for failing to obtain a Director's Authorization prior to excavating solid waste from old landfills at two sites in Hillsborough County. DOT filed a letter of appeal, but indicated that negotiations for settlement are currently underway. We will hold the appeal proceedings in abeyance pending settlement discussions.

**EXISTING CASES [ 10 ]**

**FIBA/Bridge Realty [LBRI95-162]**: EPC issued a citation to the owner, Bridge Realty, and former tenant, FIBA Corp., for various unlawful waste management practices, and ordered that a contamination assessment must be conducted, a report submitted and contaminated material appropriately handled. Bridge Realty and FIBA appealed. Bridge Realty initiated a limited assessment; staff requested additional information only a portion of which was delivered. However, an alternate remedial plan has been approved and memorialized in a letter. We have been advised that the required corrective actions have been completed but have not yet received the final report.

**Woodcock [LWOO98-160]**: On April 26, 2000, Mr. Woodcock submitted proposed plans for removal of the vertical seawall and restoration of the impacted wetlands area. Environmental Protection Commission sent a proposed Letter of Agreement formalizing the plans submitted by Mr. Woodcock. Negotiations continue. It is anticipated that the Letter of Agreement will be finalized within the month.

**Kinman [LKIN98-164]**: The Kinmans requested an 84-446 administrative review of the EPC Director's Decision upholding the delineation of wetlands on their property, and amended their appeal in December 1998. The Hearing Officer agreed to hold the administrative process in abeyance to give petitioner an opportunity to apply for impacts and for the agency to respond. EPC has sent correspondence to the opposing side regarding status but they have not responded to EPC's request.

**City of Tampa [LCOTZ99-005]**: Appeal of EPC Citation for the improper disposal of street sweeping debris. Parties agreed in June 99 to abate the proceeding for 90 days to develop a plan for the proper disposal of the material. The plan has been reviewed and comments relayed to COT. Respondent submitted additional information and we await DEP's comments.

**Cone Constructors, Inc. [LCONB99-006]**: Citation for Noise Rule violations during the construction of the SunCoast Parkway was appealed. Proceedings are in abeyance pending settlement. [See Civil Cases FDOT & Cone Constructors, Inc.]

**Presto Food Stores Inc. [LPRE00-002]**: Appeal of a citation regarding out of compliance Underground Storage Tanks. The landowner requested an administrative hearing, asserting a lack of ownership of the UST system. The tenants also claim no ownership. The Hearing Officer continued the pre-hearing conference pending the property owner's efforts to properly close the system. Tanks have been emptied of product. EPC has agreed to give the property owner a brief abeyance pending the owner's circuit court litigation against the operator.

**Watermark [LWATB98-168]**: Appeal of a citation for out-of-compliance Underground Storage Tanks (UST's) at the Kings Point Golf Course. The regulatory deadline for upgrading or properly closing the UST's is passed. The landowner requested an administrative hearing, asserting that extenuating circumstances should be considered. Efforts continue to resolve this matter without having to refer to a hearing officer.

**Putney [LPUTZ00-003]**: Appeal of Director's denial of request to impact wetlands was referred to Hearing Officer Vanessa Cohn. Parties undertook discovery and attempted to limit issues so that a summary hearing was possible. EPC was granted Summary Disposition on April 4 making the April 12 hearing unnecessary. The Recommended Order of the Hearing Officer has been submitted to the agency. On May 18, 2000 the Appellants filed exceptions to the Recommended Order. On June 6, 2000 the Executive Director filed responses to Appellants' exceptions. Argument on the exceptions and responses will be heard at the June EPC meeting.

**Windemere Utilities** [LWIN00-002]: Applicant filed a formal Chapter 120 Administrative Petition challenging the EPC's denial of a permit issuance and modification based on the inadequacy of the treatment plant and disposal system's operating capacity. EPC has referred the petition to DOAH and requested assignment of an ALJ. Hearing date has been set for July 20 - 21, 2000. Discovery has been sent by both parties. The deadline for a pre-hearing conference is July 5, 2000.

#### **RESOLVED CASES [ 1 ]**

**Starlight MHP WWTS** [LSTAB98-167]: The Parties met on June 2, 2000, to finalize the Consent Order. Penalties were paid in full and the terms of the Consent Order are to be implemented. The enforcement section of the Water Division will continue to monitor the situation for compliance with the terms of the Consent Order.

### **B. CIVIL CASES**

#### **NEW CASES [ 0 ]**

#### **EXISTING CASES [ 11 ]**

**Holley, Raymond, et al.** [LHOL94-161]: Suit filed to compel proper closure for an abandoned underground storage tank, and to obtain civil penalties and costs. The Defendants defaulted and filed bankruptcy. The property was thereafter auctioned to a third party who did not follow through with the purchase. The bankruptcy case closed in April, 1998. EPC has lifted the Bankruptcy stay and renewed its previously filed Motion for Judgment after Default. Staff determined that Defendants may be eligible for state assistance in tank closure and cleanup under the Abandoned Tank Restoration Plan, and are awaiting Defendants' application for such assistance. EPC has not heard from Defendant and has calculated penalties and costs to include in default judgment. Amended Motion for Judgment after Default was filed with supporting affidavit on June 6, 2000 and the hearing is set for July 6, 2000.

**Slusmeyer** [LSLU94-152]: Defendant failed to comply with a prior judgment and injunction requiring proper closure of underground storage tanks. Although Defendant verbally agreed and was given until April to comply with the judgment, he failed to do so. EPC asked the court for an order of contempt and injunctive relief. On April 27, the judge took the issue of contempt under advisement and allowed Defendant 60 days to comply with the judgment, after which further sanctions may be sought.

**Kings Food Mart** [KIN96-159]: Authority granted to compel assessment of reported contamination at a retail gasoline facility, and to compel compliance with leak detection regulations for an existing Underground Storage Tank system. Complaint is being drafted.

**Mulberry Phosphate** [LMULF98-166]: Authority granted January 1998, to proceed against Mulberry to recover environmental damages as result of a process water spill from an impoundment system failure. The spill impacted the Alafia River and Tampa Bay. EPC is also seeking recovery of costs of enforcement and civil penalties. EPC is working cooperatively with DEP and NOAA to resolve this case jointly. EPC conducted a damage assessment and evaluation of appropriate restoration, and currently several mitigation projects, in both Hillsborough and Polk, are being reviewed and considered as possible settlement options.

**Stasiak v. EPC** [LSTA98-163]: Mortgage holder attempted foreclosure of EPC's interest in certain real property held by virtue of a recorded settlement agreement against the property owner U.S.H. & B. EPC consented to foreclosure as long as our rights to proceeds were protected. U.S.H.&B. filed Chapter 11 Bankruptcy and a plan providing for appropriate resolution has been filed with the Court. EPC staff were called for depositions between the parties, but the issues have now been settled. The property is currently in compliance with all regulations and a Consent Order is pending to close the case.

**672 Recovery, Inc.** [LREC97-155]: EPC provided authority in March 1999 to compel compliance with EPC rules requiring a Director's Authorization for operation of a wood waste processing facility. 672 Recovery, Inc. has recently sold the operation and no longer operates the facility. The current owner is operating the facility in compliance with a permit issued by DEP. EPC is still seeking to recover penalties and costs from 672 Recovery, Inc. and staff are reviewing the file to determine amounts. Opposing counsel has been contacted and has agreed to review the citation regarding the EPC's request for costs and penalties.

**FDOT & Cone Constructors, Inc.** [LCONB99-007]: Authority granted in March 1999, to take appropriate legal action to enforce the agency's nuisance prohibition and Noise Rule violated during the construction of the SunCoast Parkway. A letter has been sent to counsel for Cone Constructors. A signed settlement agreement with payment of associated investigative costs is anticipated shortly.

**Qasem J. v. EPC, et al.** [LQAS98-161]: In foreclosing a mortgage on a UST facility, Plaintiff named EPC as a Defendant because of our recorded judgment against the former owner/operator, a relative of the current Plaintiff (EPC case against Emad Qasem). EPC has asserted the priority of our judgment lien. Defendant, property owner, HJEM, Inc. has filed summary judgment asserting the Plaintiff's mortgage was entered into fraudulently and that it has priority over all lien holders. EPC has responded by asserting the priority of its judgment over the Defendant, HJEM, Inc.'s ownership of the property as the property was sold to HJEM, Inc. subject to EPC's judgment. Hearing on the summary judgment is currently set for June 8.

**Acevedo v. EPC** [LACE99-001]: EPC has been named as Defendant in suit filed to recover damages for injuries allegedly sustained as a result of an auto accident. EPC's Response to the Complaint has been filed. The County Attorney's office is representing the Commission in this matter and settlement is being discussed.

**Georgia Maynard** [LMAYZ99-003]: Authority to take appropriate action against Ms. Maynard as owner and operator of an underground storage tank facility was granted, August 1999. A prior Consent Order required certain actions be taken to bring the facility into compliance, including the proper closure of out-of-compliance tank systems. The requirements of the agreement have not been met. Respondent has asserted willingness to comply, but financial inability. Complaint is being drafted. A pre-litigation letter was sent to Respondent advising of pending action. An attorney representing Ms. Maynard responded by suggesting the matter could be resolved without litigation.

**Tampa Scrap Processors, Inc.** [LTPA98-157]: Authority granted in August of 1998 to proceed against all responsible parties for violations relating to the management of solid waste, used oil and hazardous waste and to compel a site assessment and a report of the findings. A meeting with the property owner before suit was filed produced a Consent Order signed October 19, 1998. Tampa Scrap has failed to comply with the terms of the Consent Order; the Tampa Port Authority is willing to perform the requirements of the settlement. We have filed suit against Tampa Scrap to protect our rights to legal enforcement of the specific terms of the Consent Order. No answer has been filed, and we will pursue Default Judgment.

**Integrated Health Services** [LIHSF00-005]: IHS, a Delaware corporation, has filed for bankruptcy and noticed EPC. IHS is a holding company that has acquired a local nursing home, which operation includes a domestic wastewater treatment plant that is not in compliance. The Debtor has filed a motion requesting that utility companies be required to continue service to the Debtors so that their residents can continue without relocation.

**RESOLVED CASES [ 0 ]**

COMMISSION

PAT FRANK  
CHRIS HART  
JIM NORMAN  
JAN PLATT  
THOMAS SCOTT  
RONDA STORMS  
BEN WACKSMAN



ADMINISTRATIVE OFFICES, LEGAL &  
WATER MANAGEMENT DIVISION  
1900 - 9TH AVENUE  
TAMPA, FLORIDA 33605  
TELEPHONE (813) 272-5960  
FAX (813) 272-5157

AIR MANAGEMENT DIVISION  
TELEPHONE (813) 272-5530

WASTE MANAGEMENT DIVISION  
TELEPHONE (813) 272-5788

WETLANDS MANAGEMENT DIVISION  
TELEPHONE (813) 272-7104

EXECUTIVE DIRECTOR

ROGER P. STEWART

ENVIRONMENTAL PROTECTION COMMISSION  
OF HILLSBOROUGH COUNTY  
POLLUTION RECOVERY TRUST FUND  
AS OF MAY 31, 2000

Fund Balance as of 10/01/99		\$1,024,661
Interest Accrued	FY00	38,729
Deposits	FY00	175,944
Disbursements	FY00	86,350

Fund Balance \$1,152,984

Encumbrances Against Fund Balance:

(57a)	Cypress Head Swamp	8,967
(14)	Wetland Surveys	1,781
	Seagrass Study/Sheriff	27,500
	Art. Reef FY00	28,287
(53)	Clayton Lake	6,007
(54)	Mosi Restoration	963
(56)	Oakview Utilities	74,925
(55)	Riverview Civic Center	39,525
(61)	Thalasssea Study	13,245
(63)	McKay Bay	15,000
(64)	Hughes Hard Chrome	3,373
(71)	Seagrass Recovery	8,566
(66)	Asbestos Abatement	5,000
(72)	Brooker Creek	1,266
(75)	Adopt A Pond	50,000
(78)	River Crest Restoration	15,000
(79)	Epps Park Restoration	10,000
(68)	Lutz Nature Park	16,000
(73)	Balm Road Scrub	300,000
(82)	Hill. Co. Env. Network	50,000
	Waste Reduction/Tampa	98,657
	Upper Tampa Bay Trail	77,300
	Charlie Walker Cons. Cen.	5,000
	Cockroach Bay Turtle	59,920

Total of Encumbrances 916,282

Minimum Balance 100,000

Fund Balance Available May 31, 2000 \$136,702



COMMISSION

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EXECUTIVE DIRECTOR

ROGER P. STEWART

ENVIRONMENTAL PROTECTION COMMISSION  
OF HILLSBOROUGH COUNTY  
ANALYSIS OF GARDINIER SETTLEMENT TRUST FUND  
AS OF MAY 31, 2000

Fund Balance as of 10/01/99	\$1,579,471
Interest Accrued FY00	53,716
Disbursements FY00	- 0 -
Fund Balance	\$1,633,187

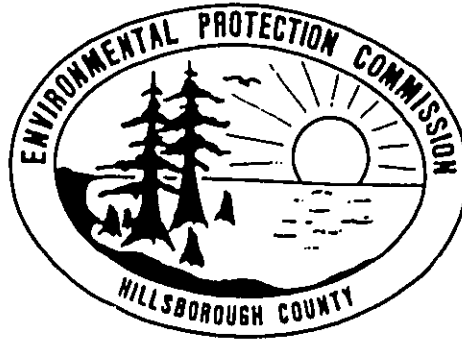
Encumbrances Against Fund Balance:

Alafia River, Add. (SWIM/DEP)	8,948
Cockroach Bay Exotic Con. (HCC)	8,618
Alafia River/Wolf Branch	300,000
Ballast Point Seawall Phase II	25,000
Audubon Society Riverview CC	50,000
Oakview Utilities	50,000
Port Redwing	300,000
Davis Tract	200,000
Apollo Beachhabitat Restoration	100,000
Fantasy Island Restoration	50,000
Mechanical, Seagrass Planting	50,000
Total of Encumbrances	\$1,142,566
Fund Balance Available May 31, 2000	\$ 490,621



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TELEPHONE (813) 272 - 7104

## Memorandum

**To:** EPC Members  
**From:** Sara M. Fotopulos, General Counsel *SMF*  
**Date:** June 6, 2000  
**Subject:** Trust Fund Agreement re: DEP settlement with TECO

As you know, DEP settled their suit against TECO some months back. The terms of settlement included a provision for payment of two million dollars to EPC's Pollution Recovery Fund in lieu of a penalty. The money is to be used for the Bay Region Atmospheric Chemistry Experiment (the "BRACE" program), currently being implemented by the National Estuary Program.

After consideration of the various options available to DEP, Mr. Stewart has agreed that it would be most appropriate for an independent Trustee to manage and disburse the funds. In this way, we can be sure that the funds will be spent to benefit the citizens of our community, those who have been impacted over the years by TECO's operations. Additionally, the fund will be completely independent of EPC's activities, we will not be burdened by the administration of the fund, and all appearances of propriety will be preserved.

- I have contacted the Salem Trust Company, a trust company with which DEP has previously done business. At this time I have not received confirmation that the Trust Company is willing. Because time is short (the first TECO payment is due July 1, 2000), I attach a copy of the proposed Trust Fund Agreement.

**Request:** Authority for Mr. Stewart to execute a similar Trust Fund Agreement with an independent Trust Company.



# TAMPA BAY POLLUTION RECOVERY TRUST FUND AGREEMENT

TRUST AGREEMENT, the "Agreement," entered into as of \_\_\_\_\_ by and between the Environmental Protection Commission of Hillsborough County, the "Grantor," and \_\_\_\_\_

\_\_\_\_\_  
Name and Address of Corporate Trustee

\_\_\_\_\_  
Insert "Incorporated in the state of \_\_\_\_\_

\_\_\_\_\_  
" or "a national bank" \_\_\_\_\_, the "Trustee."

WHEREAS, Tampa Bay Electric Company ("TECO") is obligated pursuant to the terms of that certain Consent Final Judgment (the "Judgment") entered on December 16, 1999, in Case No. 99-9737 in the Circuit Court in and for the Thirteenth Judicial Circuit (the "Court") to make periodic payments to the Hillsborough County Environmental Protection Commission (the "HCEPC") to fund activities within the Bay Region Atmospheric Chemistry Experiment (the "BRACE program");

WHEREAS, HCEPC and the Florida Department of Environmental Protection (the "FDEP") have entered into a Memorandum Agreement (the "Memorandum"), dated May 12, 2000, pursuant to the terms of the Judgment, establishing the terms for the management and disposition of the funds received from TECO for use in the BRACE program;

WHEREAS, the HCEPC has elected to establish a local pollution recovery fund (the "Tampa Bay Pollution Recovery Trust Fund") to carry out the provisions of the Judgment, pursuant to Fla. Stat. Ch. 403.1651;

WHEREAS HCEPC, the Grantor, acting through its authorized officer, has selected the Trustee to be the trustee under this agreement, and the Trustee is willing to act as trustee,

NOW, THEREFORE, the Grantor and the Trustee agree as follows:

Section 1. Definitions. As used in this Agreement:

- (a) The term "Grantor" means the HCEPC and any successors or assigns of the Grantor.
- (b) The term "Trustee" means the Trustee who enters into this Agreement and any successor Trustee.
- (c) The term "FDEP" means the Florida Department of Environmental Protection, an Agency of the State of Florida or any successor thereof.
- (d) The term "Authorized Expenditures" as used in this document means action related to the performance of the BRACE program which has been authorized by the FDEP in consultation with the Tampa Bay Estuary Program ("TBEP").

Section 2. Duration. This agreement shall remain in full force and effect until terminated pursuant to its terms or until distribution of all assets, whichever occurs first.

Section 3. Trust. This Trust shall be funded from the sum(s) paid to the HCEPC by TECO, pursuant to the Judgment. Upon funding, this Trust shall become active and be administered pursuant to the terms of this instrument.

Section 4. Establishment of Fund. The Grantor and the Trustee hereby establish a trust fund (the Fund), for the benefit of the BRACE program administered by the FDEP. The Grantor and the Trustee intend that no third party have access to the Fund except as herein provided. The Fund is established initially as a standby trust for the purpose of receiving the property described in Section 3. Such property and any other property subsequently transferred to the Trustee is referred to as the Fund, together with all earnings and profits thereon, less any payments or distributions made by the Trustee pursuant to this Agreement. The Fund shall be held by the Trustee, IN TRUST, as hereinafter provided. The Trustee shall not be responsible nor shall it undertake any responsibility for the amount or adequacy of, nor any duty to collect from TECO, any payments necessary to discharge any liabilities or obligations incurred or authorized by the FDEP.

Section 5. Payment for BRACE program costs and expenses. The Trustee shall make payments from the Fund as the FDEP Secretary, or his designee, shall direct, in writing, to provide for the payment of Authorized Expenditures of the BRACE program. The Trustee shall reimburse such persons as specified by the FDEP Secretary from the Fund for Authorized Expenditures in such amounts as the FDEP Secretary shall direct in writing.

Section 6. Payments Comprising the Fund. Payments made to the Trustee for the Fund shall consist of cash.

Section 7. Trustee Management. The Trustee shall invest and reinvest the principal and income of the Fund and keep the Fund invested as a single fund, without distinction between principal and income, in accordance with general investment policies and guidelines which the grantor may communicate in writing to the Trustee from time to time, subject, however, to the provisions of this Section. In investing, reinvesting, exchanging, selling, and managing the Fund, the Trustee shall discharge his duties with respect to the trust fund solely in the interest of the beneficiary and with the care, skill, prudence, and diligence under the circumstances then prevailing which persons of prudence, acting in a like capacity and familiar with such matters, would use in the conduct of an enterprise of a like character and with like aims; except that:

- (a) Securities or other obligations shall not be acquired or held, unless they are securities or other obligations of the Federal or a State government;
- (b) The Trustee is authorized to invest the Fund in time or demand deposits of the Trustee, to the extent insured by an agency of the Federal or a State government; and
- (c) The Trustee is authorized to hold cash awaiting investment or distribution uninvested for a reasonable time and without liability for the payment of interest thereon.

Section 8. Commingling and Investment. The Trustee is expressly authorized in its discretion:

- (a) To transfer from time to time any or all of the assets of the Fund to any common, commingled, or collective trust fund created by the Trustee in which the Fund is eligible to participate, subject to all of the provisions thereof, to be commingled with the assets of other trusts participating therein; and
- (b) To purchase shares in any investment company registered under the Investment Company Act of 1940, 15 U.S.C. 80a-1 et seq., including one which may be created, managed, underwritten, or to which investment advice is rendered or the shares of which are sold by the Trustee. The Trustee may vote such shares in its discretion.

Section 9. Express Power of Trustee. Without in any way limiting the powers and discretion conferred upon the Trustee by the other provisions of this Agreement or by law, the Trustee is expressly authorized and empowered:

- (a) To sell, exchange, convey, transfer, or otherwise dispose of any property held by it, by public or private sale. No person dealing with the Trustee shall be bound to see to the application of the purchase money or to inquire into the validity or expediency of any such sale or other disposition;
- (b) To make, execute, acknowledge, and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;
- (c) To register any securities held in the Fund in its own name or in the name of a nominee and to hold any security in bearer form or in book entry, or to combine certificates representing such securities with certificates of the same issue held by the Trustee in other fiduciary capacities, or to deposit or arrange for the deposit of such securities in a qualified central depository even though, when so deposited, such securities may be merged and held in bulk in the name of the nominee of such depository with other securities deposited therein by another person, or to deposit or arrange for the

deposit of any securities issued by the United States Government, or any agency or instrumentality thereof, with a Federal Reserve bank, but the books and records of the Trustee shall at all times show that all such securities are part of the Fund;

(d) To deposit any cash in the Fund in interest-bearing accounts maintained or savings certificates issued by the Trustee, in its separate corporate capacity, or in any other banking institution affiliated with the Trustee, to the extent insured by an agency of the Federal or a State government; and

(e) To compromise or otherwise adjust all claims in favor of or against the Fund.

**Section 10. Taxes and Expenses.** All taxes of any kind that may be assessed or levied against or in respect of the Fund and all brokerage commissions incurred by the Fund shall be paid from the Fund. All expenses incurred by the Trustee in connection with the administration of this Trust, including fees for legal services rendered to the Trustee, the compensation of the Trustee and all other proper charges and disbursements of the Trustee shall be paid from the Fund.

**Section 11. Annual Valuation.** The Trustee shall annually, at least 30 days prior to the anniversary date of establishment of the Fund, furnish to the Grantor and to the Secretary of the FDEP a statement confirming the value of the Trust. Any securities in the Fund shall be valued at market value as of no more than 60 days prior to the anniversary date of establishment of the fund. The failure of the Grantor to object in writing to the Trustee within 90 days after the statement has been furnished to the Grantor and the FDEP Secretary shall constitute a conclusively binding assent by the Grantor, barring the Grantor from asserting any claim or liability against the Trustee with respect to matters disclosed in the statement.

**Section 12. Advice of Counsel.** The Trustee may from time to time consult with counsel, who may be counsel to the Grantor, with respect to any question arising as to the construction of this Agreement or any action to be taken hereunder. The Trustee shall be fully protected, to the extent permitted by law, in acting upon the advice of counsel.

**Section 13. Trustee Compensation.** The Trustee is authorized to charge against the principal of the Trust its published Trust fee schedule in effect at the time services are rendered.

**Section 14. Successor Trustee.** The Trustee may resign or the Grantor may replace the Trustee, but such resignation or replacement shall not be effective until the Grantor has appointed a successor Trustee and this successor accepts the appointment. The successor trustee shall have the same powers and duties as those conferred upon the Trustee hereunder. Upon the successor trustee's acceptance of the appointment, the Trustee shall assign, transfer, and pay over to the successor trustee the funds and properties then constituting the Fund. If for any reason the Grantor cannot or does not act in the event of the resignation of the Trustee, the Trustee may apply to a court of competent jurisdiction for the appointment of a successor trustee or for instructions. The successor trustee shall specify the date on which it assumes administration of the trust in a writing sent to the Grantor, FDEP Secretary, and the present Trustee by certified mail 10 days before such change becomes effective. Any expenses incurred by the Trustee as a result of any of the acts contemplated by this Section shall be paid as provided in Section 10.

**Section 15. Instructions to the Trustee.** All orders, requests, and instructions by the Grantor to the Trustee shall be in writing, signed by such persons as are designated in the attached Exhibit A or such other designees as the Grantor may designate by amendment to Exhibit A. The Trustee shall be fully protected in acting without inquiry in accordance with the Grantor's orders, requests, and instructions. All orders, requests, and instructions by the FDEP Secretary to the Trustee shall be in writing, signed by the FDEP Secretary, or the designee, and the Trustee shall act and shall be fully protected in acting in accordance with such orders, requests, and instructions. The Trustee shall have the right to assume, in the absence of written notice to the contrary, that no event constituting a change or a termination of the authority of any person to act on behalf of the Grantor or the FDEP hereunder has occurred. The Trustee shall have no duty to act in the absence of such orders, requests, and instructions from the Grantor and/or the FDEP, except as provided for herein.

**Section 16. Amendment of Agreement.** This Agreement may only be amended by an instrument, in writing, executed by the Grantor, the Trustee, and the FDEP Secretary.

**Section 17. Irrevocability and Termination.** Subject to the right of the parties to amend this Agreement as provided in Section 16, this Trust shall be irrevocable and shall continue until terminated at the written agreement of the Grantor, the Trustee, and the FDEP Secretary. Upon termination of the Trust, all remaining trust property, less final trust administration expenses, shall be delivered to the Grantor.

Section 18. Immunity and Indemnification. The Trustee shall not incur personal liability of any nature in connection with any act or omission, made in good faith, in the administration of this Trust, or in carrying out any directions by the Grantor or the FDEP Secretary issued in accordance with this Agreement.

Section 19. Choice of Law. This Agreement shall be administered, construed, and enforced according to the laws of the State of Florida.

Section 20. Interpretation. As used in this Agreement, words in the singular include the plural and words in the plural include the singular. The descriptive headings for each Section of this Agreement shall not affect the interpretation or the legal efficacy of this Agreement.

IN WITNESS WHEREOF the parties have caused this Agreement to be executed by their respective officers duly authorized and their corporate seals to be hereunto affixed and attested as of the date first above written.

\_\_\_\_\_  
Signature of Grantor

\_\_\_\_\_  
Signature of Trustee

\_\_\_\_\_  
Title

\_\_\_\_\_  
Title

\_\_\_\_\_  
Signature of Witness or Notary

\_\_\_\_\_  
Signature of Witness or Notary

Seal

Seal

## AGENDA ITEM SUMMARY SHEET

**Date:** June 6, 2000

**Agenda Item:** Modification to Personnel Staffing Requirements of Hillsborough Independent Monitoring Program (HIMP)

**Description/Summary:**

Beginning in April 1999, EPC staff, in consultation with members of the County Water Team, held several technical meetings to discuss the Hillsborough Independent Monitoring Program (HIMP). At these meetings, the purpose, monitoring objectives, design characteristics, and cost of the conceptual HIMP were discussed. At EPC and BOCC Board Meetings in August, September, and October of 1999, the Boards provided their input to the process. At the BOCC meeting on November 4, 1999, the final configuration of the HIMP was approved. This conceptual HIMP will provide the independent capability to monitor critical environmental features and potential impacts from the proposed water withdrawal projects. Cost estimates for first year start-up are \$269,000. Ensuing annual costs are projected in the range of \$190,000.

Four (4) new positions were authorized for the HIMP: One Environmental Scientist I and one Environmental Specialist I in the Benthic Program, plus one Environmental Scientist I and one Environmental Technician II in the Water Quality Monitoring Program. Both positions in the Benthic Program, and the Environmental Scientist I position in the Water Quality Monitoring Program have been filled.

Our experiences with the level of sophistication required with the electronic samplers and the difficulty with data-handling led us to the conclusion that the technician grades did not provide candidates with sufficient education and qualifications to meet the minimum standards for the work. Therefore, we are planning to modify that job description from Environmental Technician II to Environmental Scientist I

As of June 6, 2000, only \$224,792 of the \$425,454 budgeted in FY 99-00 for Personnel under this Character has been encumbered. The proposed modification represents an increase in salary of 25.7%, (roughly \$6,500 annually), moving to Pay Grade AL from Pay Grade AG. This increase in salary should not prove to be a problem, considering the conservative surplus within the Personnel character overall.

**Board Action Recommended:**

Staff requests Board concurrence with the described Personnel Action.

## AGENDA ITEM COVER SHEET

**Date:** June 7, 2000

**Agenda Item:** **Request for Authority to Take Legal Action Windemere Utility Company.**

---

### Description/Summary:

Windemere Utility Co. is the owner and is responsible for the operation of the wastewater treatment system (WWTS) that serves the Windemere Utility Company Franchise Service Area, composed of 1069 customers, located at the south end of Swan Lake Drive, Lutz, Florida.

The WWTS has a history of poor operation and maintenance for which EPC has issued Warning Notices in February 1998, August 1998, and December 1999, and a Notice of Intent to Initiate Enforcement in July, 1999. Alleged violations of the Act, Chapters 1-1 and 1-5, Rules of the Commission, and Chapters 62-600, and 62-610, F.A.C., include: repeated solids losses; improper sludge accumulation in percolation ponds; effluent limit violations for total residual chlorine and total suspended solids; unpermitted effluent discharges; inadequate pond freeboard; failure to maintain pond berms; missing or incomplete records; failure to report abnormal events; improper operation and maintenance, and; modifying a WWTS without a permit.

Consent Order negotiations between EPC and Windemere resulted in an impasse.

Additionally, on February 14, 2000, EPC denied Windemere's Application For A Domestic Wastewater Facility Permit due to the applicant failing to demonstrate and provide reasonable assurance that the wastewater treatment plant has adequate capacity to operate in compliance with existing permit limits and applicable rules, pursuant to Sections 62-610.514(1) and 62-620.320, F.A.C. This action is currently being challenged under Chapter 120, F.S., and is scheduled for hearing in July.

### Commission Action Recommended:

Grant authority to pursue appropriate legal action against Windemere Utility Company to compel compliance with all applicable environmental rules and regulations, and to recover civil penalties and reasonable costs of enforcement.

ENVIRONMENTAL PROTECTION COMMISSION  
OF HILLSBOROUGH COUNTY

AGENDA ITEM COVER SHEET

DATE: June 6, 2000

TO: Environmental Protection Commissioners

FROM: Brenda Fonda, Enforcement Coordinator, Waste Management Division

SUBJECT: Request for Authority to Take Legal Action regarding Manhattan Oil

RECOMMENDATION: Ask for authority to pursue appropriate legal action

BACKGROUND:

Manhattan Oil Company is located at 5301 South Manhattan Avenue. The property is owned by Mr. William M. Chiles. The Property and Facility include underground storage tank (UST's) systems. On this property are four UST's which are unmaintained and have not been properly closed. The UST's are bare-steel systems, are all subject to the 62-761 requirement to be retrofitted or properly closed by December 31, 1995. None of these four tanks have been retrofitted for future use. None of these four tanks have been properly closed. In addition, a Final Order issued September 17, 1998, required certain corrective actions. This order has not been complied with.

EPC has contracted with the Department of Environmental Protection (DEP) to administer the UST program in Hillsborough County. EPC also has independent authority under its enabling act, 84-446, Laws of Florida, as amended and has adopted by reference, in EPC Rules, Chapter 1-12, the UST rules of the DEP.

Chapter 62-761, FAC and Chapter 1-12, Rules of the Commission require that unmaintained or abandoned tanks be properly closed.

Mr. Chiles has violated Chapter 1-12 of the Rules of the Commission and Section 17 of the Hillsborough County Environmental Protection Act by improperly operating and failing to properly retrofit or close the Underground Storage Tank Systems at this facility.

ACTION TAKEN BY THE COMMISSION

<input type="checkbox"/> Approved	<input type="checkbox"/> Disapproved	<input type="checkbox"/> Continued/Deferred Until _____
Other: _____		
SPECIAL INSTRUCTIONS: _____		
By: _____		
<u>MEETING</u>		
<u>DATE:</u> _____		
DIAGRAM (IF APPROPRIATE)		



**AGENDA ITEM COVER SHEET**

**Date:** June 15, 2000

**Agenda Item:** Contract for Incoming Executive Director

---

**Description/Summary:**

Roger Stewart's retirement is effective June 30, 2000. The contract for the new Executive Director should be approved prior to assumption of the position on July 1, 2000.

Sharon Wall was asked to negotiate and prepare a contract for Rick Garrity. A copy will be distributed under separate cover.

**Commission Action Recommended:**

Approve the contract for Rick Garrity as our new Executive Director beginning July 1, 2000.

**Environmental Protection Commission**  
of Hillsborough County

June 15, 2000 - 10:00AM - 12:00PM

**Sign Up Sheet**  
For Citizens Wishing To Speak To The Commission

Name (Please Print)	Subject Matter (Please Print)
<i>Louis D. Putney</i>	<i>Putney Appeal</i>

BEFORE THE ENVIRONMENTAL PROTECTION COMMISSION  
OF HILLSBOROUGH COUNTY, FLORIDA

IN RE:

EPC# LPUT00-003

Appeal of LOUIS W. PUTNEY and  
JEANIE T. PUTNEY, Husband and  
Wife,

Appellants.

---

**FINAL ADMINISTRATIVE ORDER**

THIS APPEAL, having come before the Environmental Protection Commission of Hillsborough County, Florida upon the Report of the Hearing Officer appointed herein, Vanessa N. Cohn, Esquire, and the Commission having considered said report, a copy of which is attached hereto and made a part hereof, and the Commission having affirmed said report, including the Findings of Fact, Conclusions of Law, and Recommendation, it is, thereupon,

ORDERED, that authorization to impact wetlands on the Appellants' property located in Hillsborough County, Florida, at Folio Number 61490.0000 be, and the same is hereby, denied.

ORDERED this \_\_\_\_ day \_\_\_\_\_, 2000.

---

Chairperson, Environmental Protection  
Commission of Hillsborough County

cc: Louis D. Putney, Esquire  
Kristin K. Bennett, Esquire