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# Secondary and Cumulative Impact Analysis

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### I. Introduction

#### A. *A Brief History - Secondary Impacts*

The secondary impact analysis first developed as a judicially created doctrine for dredge and fill permitting in *del Campo v. State, Department of Environmental Regulation*, 452 So.2d 1004 (Fla. 1st DCA 1984). There the court instructed the Department of Environmental Regulation (DER), in reviewing a dredge-and-fill permit for a bridge, to consider the potential wetland impacts not only of the bridge construction, but also on the island to be bridged. The court rejected DER's position that the term "secondary impacts" was nowhere defined or utilized in the statute, and that DER should thus consider the wetland impacts of bridge construction exclusively, and not speculate about impacts resulting from the consequent development on the island. After *del Campo*, DER began incorporating review of secondary impacts into its dredge and fill permitting analyses, and DER and the courts continued to refine how that concept should be applied. As discussed later, the analysis eventually was implemented in the Environmental Resource Permit (ERP) rules. Prior to this rulemaking, the clearest judicial statement could be found in *Conservancy v. A. Vernon Builders*, 580 So.2d 772, 778 (Fla. 1st DCA 1991), in which the court stated, "[F]or purposes of applying and balancing the statutory public interest criteria in section 403.918 [the Department's policy is] to look 'at the actual jurisdictional area to be dredged and filled, and any other relevant activities that are 'very closely linked or causally related to the proposed dredging and filling.'"

As applied to Management and Storage of Surface Waters (MSSW) permitting by water management districts (WMDs), the secondary impact analysis was first established as a requirement in an order of the Governor and Cabinet acting as the Land and Water Adjudicatory Committee (LAWAC), reviewing a final order of the St. Johns River WMD. Similar to the Department's argument in *del Campo*, St. Johns contended that it could not apply a secondary impacts analysis because the term was nowhere defined or utilized in the MSSW statute. In *Sierra Club v. SJRWMD & DOT*, 1992 E.R. F.A.L.R. 131 (LAWAC 1992), LAWAC ordered the WMDs to develop a secondary impact analysis as part of the MSSW evaluation, and noted "The body of case law construing cumulative and secondary impacts analyses in the context of Chapter 403 would be persuasive but not binding precedent in the development of the law of cumulative and secondary impacts under Chapter 373, Florida Statutes."

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B. *A Brief History - Cumulative Impacts*

Like secondary impacts, the cumulative impact doctrine was not originally developed by express statutory authority, though DER did have a rule addressing the subject (Fla. Admin. Code R. 17-1.36). For a brief history, see *Conservancy*, *supra* at 778, and the cases cited therein. Often the distinction between secondary and cumulative impacts has seemed confusing. In attempting to distinguish the two concepts, *Conservancy* noted “the subtle tension that exists between the two analyses,” and explained that the cumulative impact analysis involved taking into consideration “the cumulative impacts of similar projects which are existing, under construction, or reasonably expected in the future,” whereas secondary impacts were those “caused or enabled by the project.” *Id.* at 778-779.

As *Conservancy* also explains, the doctrine was subsequently enacted into law, using the term “equitable distribution” rather than “cumulative impact” in section 403.919, Florida Statutes (1984 Supp.) as part of the Warren S. Henderson Wetlands Protection Act of 1984 (Ch. 84-79, Laws of Fla.). The statute was recognized as codifying the “cumulative impact doctrine” in *Florida Power v. DER*, 638 So.2d 545, 548 (Fla. 1st DCA 1994). The statute was amended by the Florida Environmental Reorganization Act of 1993 (FERA) (Ch. 93-213, Laws of Fla.) now codified at section 373.414(8), Florida Statutes, to use for the first time the term “cumulative impacts.” The new statute added other technical changes, including a qualifier that impacts on water or wetlands be “within the same drainage basin” and changing the general qualifier in the third category of impacts (“other activities regulated under this part”), which formerly just said “based upon land use restrictions and regulations,” to a more specific one delineating what is meant by those restrictions and regulations. These changes were generally seen as a clarification of, rather than a limitation on, prior case law or practice.

The statute was again amended, more significantly, in 2000 by Ch. 2000-133, Laws of Florida. The statutory amendment created a new subsection (b) stating that the cumulative impacts test will be met if a project’s mitigation, whether within or outside the same drainage basin, will offset the adverse impacts of the proposed activity in the same drainage basin. The amendment may have been motivated by a rule challenge that was filed by the Sierra Club challenging a St. Johns River Water Management District interpretation of the statute, consistent with other WMDs, in a manner consistent with the statutory change. See, *Sierra Club v. St. Johns River Water Mgmt. Dist.*, 816 So.2d 687 (Fla. 5th DCA 2002), discussed further below, for a history of the litigation and legislative response.

As a result of the addition of subsection (b), secondary impact considerations are, generally speaking, much more a part of most ERP evaluations than are cumulative impact considerations. As further explained in the analysis below of *Sierra Club* and subsequent cases, cumulative impacts are now only considered where an applicant is not able to offer sufficient mitigation for a project’s primary and secondary impacts at the front end. This creates a strong incentive for permit applicants to try to achieve complete mitigation for those project impacts as

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part of the original project design, rather than to have to factor in mitigation for cumulative impacts as well because the original mitigation is insufficient.

## II. Secondary Impacts

### A. *The ERP Rules Codify Secondary Impacts*

Development of the ERP rules eliminated the need for the WMDs to develop secondary impact rules for MSSW distinct from or identical to DEP dredge and fill requirements, but created a new quandary. Chapter 93-213, Laws of Florida, directed the DEP and the WMDs to adopt ERP rules “relying primarily on [their] existing rules.” § 373.414(9), Fla. Stat. (2010) In other words, the statutory direction was to develop rules that represented substantially the status quo for existing regulatory requirements. The quandary was that the status quo varied somewhat between the DEP and the WMDs, and even among the WMDs. This was a result, in part, of the different bases of jurisdiction for dredge and fill and MSSW permitting, as well as different interpretations of MSSW jurisdiction from one WMD to another. Furthermore, as with pre-ERP law, the ERP legislation failed to define or describe what constitutes a secondary impact.

Developing specific rules addressing secondary impacts became one of the most contentious aspects of the ERP rulemaking. The original proposed rules were challenged by numerous petitioners, most of whom withdrew their petitions after a settlement was reached in the spring of 1995 and approved by the Environmental Regulation Commission. A few non-settlers continued to litigate the revised version in a rule challenge. The challenge was decided in favor of the DEP and that decision was affirmed on appeal in May of 1996. The rule challenge decision contains a brief history of the process of rule development, and specifically upholds the agencies’ authority under chapter 373 to develop secondary impact rules. *See Fla. Elec. Power Coordinating Group et al. v. SRWMD et al.*, Nos. 94-2722RU, 2930RP, 2935 RP, 2936RP, 1995 WL 1052582 (DOAH Final Order July 24,1995). The statutory authority for “relying primarily on the existing rules” of DER under WMDs can be found at chapter 93-213, section 30, Laws of Florida, codified at section 373.414(9).

A major key to harmonizing the differences between the DEP and the WMD approaches was the treatment of threatened and endangered (listed) species. Generally speaking with regard to listed species, the DEP, having jurisdiction confined to state wetlands, looked at off-site impacts, whereas the WMDs, with broader MSSW jurisdiction, looked more expansively within their project area, but not outside of it.

The result of the rulemaking efforts can be found in section X.2.7 of the Applicant’s Handbook (AH) or Basis of Review (BOR), the alternative titles for the manuals adopted by rule and used by the respective WMDs and DEP for evaluating ERP applications. (This article uses “X” in the citation because the WMD chapter numbers vary from one WMD to another, but section numbers generally are the same.) The preface to the secondary impact rule states that

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“an applicant must provide reasonable assurance that a regulated activity will not cause adverse secondary impacts to the water resource,” of which “[a]quatic or wetland dependent species are an integral part,” particularly those “which are listed as threatened, endangered or of special concern . . . .” *De minimus* impacts are excluded. The rule then establishes a four part “secondary impact criterion:”

1. Secondary impacts cannot “cause violations of water quality standards or adverse impacts to the functions of wetlands or other surface waters . . . .” The rule then lists specific presumptions relating to potential impacts associated with facilities that increase boat traffic (e.g. docks, boat ramps, and drydocks), impacts on wildlife from roads in wetlands, impacts to water quality from septic tanks and propeller dredging, and impacts to habitats that can be offset by presumptive buffers to wetlands (minimum 15 and average 25 foot width, unless additional measures are needed for nesting, denning, and critically important feeding habitat).
2. The proposed activity cannot adversely impact the ecological value of uplands to aquatic or wetland-dependent listed animal species if those values enable the existing nesting or denning by these species, but such impacts are permissible if those values only enable foraging or wildlife corridors. A table is provided in the rules for wildlife animal species listed as endangered, threatened, or of special concern by the U.S. Fish and Wildlife Service or the Florida Game and Fresh Water Fish Commission. Compliance with habitat management guidelines of those agencies provides the necessary reasonable assurance of no adverse impacts. The table may vary from WMD to WMD based upon the range of the particular species.
3. The explanation of the Department’s position as stated above in the *Conservancy* case - i.e., that the Department considers activities that are “very closely linked and causally related” - is applied to dredging and filling that will cause impacts to significant historical and archeological resources.
4. More broadly following the *Conservancy* language, the rule requires the applicant to provide reasonable assurance that expansion where plans have been submitted to the permitting agency, as well as on-site and off-site activities regulated under the ERP program that are very closely linked or causally related to the proposed project, will not cause water quality violations or adverse impacts on wetlands and other surface water functions. The agency must consider both intended and reasonably expected uses, including those that would not occur “but for” the proposed project. Applicants are also directed to design projects in a way that does not necessitate future impacts.

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B. *Further Codification in UMAM Rule*

In 2004 the DEP adopted Rule 62-345 of the *Florida Administrative Code*, which establishes a uniform mitigation assessment method (“UMAM”) to be used as part of the ERP process to determine the amount of mitigation needed to offset adverse impacts to wetlands and other surface waters and to award and deduct mitigation bank credits. The UMAM methodology “is not intended to supersede or replace existing rules” regarding secondary impacts. Fla. Admin. Code R. 62-345.100(4). However, the rule does add specific provisions for assessing potential secondary impacts from collisions between fish or wildlife and boat traffic, automobile traffic, or towers; impacts to uplands used by aquatic or wetland dependent listed species; and impacts to historical or archeological resources. The rule provides that the amount and type of mitigation:

shall include measures such as the implementation of management plans, participation in a wildlife management park established by the Florida Fish and Wildlife Conservation Commission, incorporation of culverts or bridged crossings designed to facilitate wildlife movement, fencing to limit access, reduced speed zones, plans to protect significant historical or archeological resources, or other measures designed to offset the secondary impact . . . .

Fla. Admin. Code R. 62-345.100(5). This rather general language contrasts sharply with the scoring system otherwise used under the UMAM rule, and the scoring system does not apply to the assessment of these types of secondary impacts.

C. *Selected Cases*

The codification of secondary impacts did not necessarily settle the debate over what exactly is meant by “very closely linked and causally related.” While pre-ERP, the case that has perhaps most thoroughly examined the concept is *Florida Bay Initiative v. DOT*, 19 F.A.L.R. 3712 (SFWMD 1997) (Final Order). The case involved whether the SFWMD should issue wetland resource and MSSW permits to the FDOT to widen a 20.4 mile portion of U.S. 1 between Florida City and Key Largo. The FDOT proposed to widen U.S. 1 to a three lane divided road (two lanes north, one south) to address hurricane evacuation and traffic safety concerns. At issue was whether the road improvements would cause adverse secondary impacts upon sensitive ecosystems within the Florida Keys, through both the growth-inducing impacts of roadway improvements themselves and the impact that the consequential improvements to hurricane evacuation would have upon Monroe County’s Rate of Growth Ordinance. The Recommended Order of the Administrative Law Judge and the Final Order of the SFWMD Governing Board both rejected that argument, and found among other things that Monroe County’s Comprehensive Plan and land development regulations, which had contemplated a four lane widening, acted as an intervening variable to break the causal relationship between road

widening and adverse environmental impacts. The permits were therefore issued. The project was later substantially modified, but for reasons unrelated to this litigation.

The *Florida Bay Initiative* case demonstrates an interesting interplay between the public interest test and secondary impacts analysis. It also is a rejection of petitioners' attempts to circumvent application of prior case law, which held that environmental permitting decisions should not take into consideration noncompliance with local planning and land development requirements. See, e.g., *Taylor v. Cedar Key Sewage Dist.*, 590 So.2d 481 (Fla. 1st DCA 1991); *Council for the Lower Keys v. Toppino*, 429 So.2d 67 (Fla. 3rd DCA 1983). On the other hand, the case does not mean that growth management issues are irrelevant. As DER did in *Conservancy v. A. Vernon Builders*, 15 F.A.L.R. 292 (DER 1993), which was the final order on remand from *Conservancy, supra* (1991), the agency can take into consideration development restrictions imposed by local government in assessing the potential for secondary impacts of a development. As *Florida Bay Initiative* explains in detail, 19 F.A.L.R. at 3719-3720:

The true significance of *Taylor* and its progeny is that just as it is improper for an environmental agency to deny a permit for noncompliance with growth management laws of another agency, so too is it improper for the environmental agency to use an environmental permit proceeding as a battle ground for a challenge to the adequacy or legality of those laws. . . .

. . . .

This does not mean, however, that we should ignore the existence of the laws, rules and regulation [sic] of other agencies. . . . [The findings] that the County's land development regulations and state oversight act as a limitation on the potential secondary impacts associated with the U.S. 1 roadway improvements . . . have thereby become part of the permit review process.

One very creative effort to expand the meaning of secondary impacts was rejected in *Friends of Matanzas v. DEP*, 729 So.2d 437 (5th DCA 1999). Petitioners challenged DEP's intent to issue a permit to FDOT to construct an extension of a twelve-inch water main for six miles along FDOT right-of-way to serve a rest area on I-95, and a similar extension for a twelve-inch sewer pipe. The court affirmed the Department's denial of the petition for lack of standing. Petitioners had argued, among other things, that the pipes would increase traffic on I-95, thereby increasing growth and rendering hurricane evacuation more difficult, and that the oversized pipes could be used for future development activities. Petitioners argued that the oversized pipes would therefore put pressure on the county to amend the comprehensive plan to allow for more growth. The court held that these impacts lacked sufficient immediacy, and could be addressed in the comprehensive planning process.

Similarly, in *In re Florida Power and Light Company, Manatee Orimulsion Project*, 98 E.R. F.A.L.R. 228 (Siting Board 1998), the Siting Board, while denying the application on other grounds, rejected the argument of petitioner Manasota-88 that the secondary impact doctrine could be applied to impacts associated with the atmospheric deposition of nitrogen from a proposed power plant, holding that the doctrine “does not exist beyond the subject of dredge and fill permitting to point source discharges of wastewater, let alone indirect water pollution discharges from air emissions.” *Id.* at 36.

In *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So.2d 1140 (Fla. 2d DCA 2001), the court upheld a DEP final order rejecting an ERP applicant’s assertion that the doctrine of collateral estoppel should be applied to overrule a recommendation by an administrative law judge to deny an application for a marina on secondary impact grounds. The project had previously been permitted taking into consideration secondary impacts, but the permit had expired. The ALJ apparently agreed with petitioner that “she was not collaterally estopped and the issue was not res judicata because in the intervening time period the rules protecting the environment had been changed and strengthened. *See* Fla. Admin. Code R. 40E-4.301, R. 40E-4.302,” and “that the secondary impacts had to be reevaluated under these changed circumstances.” *Id.* at 1142-1143. It is unclear from review of both the court decision (OGC Case No. 98-1184) and the final order (DOAH Case No. 98-3901 (DEP January 2000)), the extent, if any, to which this case stands for the proposition that implementation of the ERP secondary impact rules have made the rules more stringent for applicants.

### III. Cumulative Impacts

#### A. Statutory Authority

The current cumulative impacts statute, section 373.414(8), Florida Statutes, states in its entirety as follows:

- (a) The governing board or the department, in deciding whether to grant or deny a permit for an activity regulated under this part shall consider the cumulative impacts upon surface water and wetlands, as delineated in s. 373.421(1), within the same drainage basin as defined in s. 373.403(9), of:
  1. The activity for which the permit is sought.
  2. Projects which are existing or activities regulated under this part which are under construction or projects for which permits or determinations pursuant to s. 373.421 or s. 403.914 have been sought.

3. Activities which are under review, approved, or vested pursuant to s. 380.06, or other activities regulated under this part which may reasonably be expected to be located within surface waters or wetlands, as delineated in s. 373.421(1), in the same drainage basin as defined in s. 373.403(9), based upon the comprehensive plans, adopted pursuant to chapter 163, of the local governments having jurisdiction over the activities, or applicable land use restrictions and regulations.
- (b) If an applicant proposes mitigation within the same drainage basin as the adverse impacts to be mitigated, and if the mitigation offsets these adverse impacts, the governing board and department shall consider the regulated activity to meet the cumulative impact requirements of paragraph (a). However, this paragraph may not be construed to prohibit mitigation outside the drainage basin which offsets the adverse impacts within the drainage basin.

B. *Cumulative Impact Rules*

WMD Rule 40X-4.302(1)(b) requires as a condition of permit issuance that regulated activities “will not cause unacceptable cumulative impacts upon wetlands and other surface waters,” and refers to the applicable cumulative impact provisions in the WMD’s BOR or AH for how implement that requirement. The implementing provisions carry forth the 2000 legislative direction, discussed above, that cumulative impacts are considered only where the applicant is not proposing mitigation that will fully offset the project’s impacts, and provide as follows, with occasional variations between the WMDs:

1. Section X.2.8, ERP Basis of Review, states,

Pursuant to paragraph X.1.1(g), an applicant must provide reasonable assurance that a regulated activity will not cause unacceptable cumulative impacts upon wetlands and other surface waters within the same drainage basin as the regulated activity for which a permit is sought. The impact on wetlands and other surface waters shall be reviewed by evaluating the impacts to water quality as set forth in subsection X.1.1(c) and by evaluating the impacts to functions identified in subsection X.2.2. If an applicant proposes to mitigate these adverse impacts within the same drainage basin as the impacts, and if the mitigation fully offsets these impacts, the District will consider the regulated activity to have no unacceptable cumulative impacts upon wetlands and other surface water, and consequently the condition for issuance in section 4.1.1(g), will be satisfied. The drainage basins within the WMD are identified in Appendix X.

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When adverse impacts to water quality or adverse impacts to the functions of wetlands and other surface water, as referenced in the paragraph above, are not fully offset within the same drainage as the impacts, then an applicant must provide reasonable assurance that the proposed system, when considered with the following activities, will not result in unacceptable cumulative impacts to water quality or the functions of wetlands and other surface waters, within the same drainage basin:

- a. projects which are existing or activities regulated under part IV, chapter 373, which are under construction or projects for which permits or determinations pursuant to §§ 373.421 or 403.914 have been sought.
- b. activities which are under review, approved, or vested pursuant to § 380.06, or other activities regulated under part IV, chapter 373, which may reasonably be expected to be located within wetlands or other surface waters, in the same drainage basin, based upon the comprehensive plans, adopted pursuant to chapter 163, of the local governments having jurisdiction over the activities, or applicable land use restrictions and regulations.

Only those activities listed in paragraphs a. and b. which have similar types of impacts (adverse effects) to those which will be caused by the proposed system will be considered. Whenever mitigation located within the same drainage basin fully offsets the proposed impacts to wetland functions (as described in section 4.2.2) and to water quality, then the regulated activity does not result in unacceptable cumulative impacts within the same drainage basin. The cumulative impact evaluation is conducted using an assumption that reasonably expected future applications with like impacts will be sought, thus necessitating equitable distribution of acceptable impacts among future applications.

2. Section X.2.8.1, ERP Basis of Review, states,

Cumulative impacts are considered unacceptable when the proposed system, considered in conjunction with the past, present and future activities as described in X.2.8 would then result in a violation of state water quality standards as set forth in subsection X.1.1(c) or significant adverse impacts to functions of wetlands or other surface waters identified in subsection X.2.2 within the same drainage basin when considering the basin as a whole.

3. Section X.2.8.2, ERP Basis of Review, states,

Applicants may propose measures such as preservation to prevent cumulative impacts. Such preservation shall comply with the land preservation provisions in subsection X.3.8. If unacceptable cumulative impacts are expected to occur, the applicant may propose mitigation measures as provided for in sections X.3 - X.3.8.

As with secondary impacts, the UMAM methodology discussed above “is not intended to supersede or replace existing rules regarding cumulative impacts.” Fla. Admin. Code R. 62-345.100(4). Unlike with secondary impacts, however, the UMAM rule has no provisions excluding the assessment of cumulative impacts from the measurement methodologies in the rule. Thus, cumulative impacts are included as part of the UMAM calculation. *See, e.g., Diventura v. The Gables at Stuart and S. Fla. Water Mgmt Dist.*, No. 03-2838, 2006 WL 716869, at \*11 note 4 (DOAH Recommended Order March 16, 2006).

C. *Selected Cases*

Perhaps the most extensive analysis of cumulative impacts from an evidentiary standpoint can be found in *Florida Power v. DER, supra*, involving a permit for a power line through a forested wetland. That case recognized that the key cumulative impact question is whether the proposed system, when considered in conjunction with past, present, and future activities, would be the proverbial “straw that breaks the camel’s back.” 638 So.2d at 553. The court upheld DER’s overturning a recommended order that the permit issue. Then Secretary Carol Browner had stated that the hearing officer’s application of a *de minimis* exception to the cumulative impacts doctrine “would completely undercut the purpose of the cumulative impact analysis required by section 403.919,” because it would result in “a piecemeal destruction of a large valuable forested wetland habitat.” *Id.* at 559. Presaging the 2000 amendments, she also stated the project could have been permitted if the applicant had provided sufficient mitigation. *Id.* at 560. The court upheld her rejection of the applicant’s argument “that herbaceous wetlands [that would replace the forested ones] were somehow environmentally equivalent to forested wetlands.” *Id.* at 561.

In the *Conservancy* case, *supra*, the court rejected a final order in which DER had successfully moved to exclude evidence of potential cumulative (and secondary) impacts associated with constructing an underwater sewer main to connect a proposed barrier island development to a mainland treatment facility. This court remanded the case to DER to consider testimony on such impacts. After a rehearing with the evidence included, the permit did issue.

In *In re Florida Power and Light Co., supra*, Manasota-88 also argued that the administrative law judge in a power plant siting case had improperly failed to consider cumulative impacts associated with air emission on air surface water quality standards. As with secondary impacts, as noted above, the Siting Board, at page 38, declined to extend the

cumulative impact doctrine beyond the environmental permitting area and into air or point source discharge permitting.

A detailed analysis of the impact of the 2000 amendments on the cumulative impacts statute can be found in *Sierra Club, supra*. The Club challenged the St. John's River WMD's proposed amendment to section 12.2.8 of its Administrative Handbook to reflect the statutory change, after withdrawing a challenge to a similar provision in the previous AH. The Club argued that the newly created section 373.414(8)(b), Florida Statutes, should be read as a supplemental requirement to subsection (a) rather than a limiting provision. The argument was thus that a cumulative impacts analysis would need to be done prior to consideration of whether the project's impacts would be offset by the proposed mitigation, and that the adequacy of the project's proposed mitigation would then need to be evaluated in light of that initial cumulative impacts analysis. In affirming the final order upholding the new rule, the court agreed with the District's explanation that the new subsection (b) established a "short-cut cumulative impacts assessment procedure" whereby the agency evaluates the mitigation for the project proposed, and if the mitigation offsets the project's adverse impacts within the same drainage basin, then the subsection (a) cumulative impacts test has thereby been met. *Id.* at 691-692. Otherwise, as the court further notes, an applicant would have to offset not only the project's adverse impacts, but also the "cumulative adverse impacts caused by other past, present and future projects." *Id.* at 693.

The most recent judicial evaluation of the cumulative impacts test can be found in *Peace River/Manasota Regional Water Supply Authority v. IMC Phosphates Co*, 18 So.3d 1079, 1088 (Fla. 2nd DCA 2009). Reflecting on the analysis of the statutory change in *Sierra Club*, the court concluded that the exception set forth in subsection (b) "essentially eviscerates the cumulative impacts assessment provided for by" the statute as originally enacted.

*Broward Cty. v. Arthur Weiss and South Florida Water Management District*, DOAH Case No. 01-3373 (DOAH Recommended Order August 27, 2002), *aff'd in relevant part*, (SFWMD Final Order No. 2002-184 FOF ERP, Nov. 14, 2002), involved the evaluation of cumulative impacts offset in part by offsite mitigation at a wetlands bank. There the Administrative Law Judge concurred with the South Florida WMD's cumulative impact analysis based upon functions of wetlands lost, rather than acreage lost. "Unacceptable impacts" would be those that would place the fish and wildlife dependent on the wetland function in jeopardy of collapse, which occurs "when the population is no longer sustainable" and which "could lead to extirpation of the population from the basin." Offsite mitigation is acceptable where it can provide "greater improvement in long term ecological value than just onsite mitigation." *Id.* at 30.