

**MEMORANDUM OF UNDERSTANDING BETWEEN THE  
ST. JOHN'S RIVER WATER MANAGEMENT DISTRICT AND  
THE UNITED STATES OF AMERICA**

In the fall of 1998 through the spring of 1999 hundreds of migratory and endangered birds died in and near the northern shore of Lake Apopka. During this time period, hundreds of additional birds ingested quantities of pesticides that potentially impacted their future reproductive output. The mortality and potential impact on reproductive output will be herein sometimes referred to as the 1998-1999 Lake Apopka Avian Mortality Incident or the Incident. It is the position of the United States that these deaths constituted violations of the Migratory Bird Treaty Act (MBTA), 16 U.S.C. § 703, 707(a), and with regard to certain specimens, violations of the Endangered Species Act (ESA), 16 U.S.C. §§ 1538, 1540, and/or the Bald and Golden Eagle Protection Act (BGEPA), 16 U.S.C. § 668(a), for which the St. John's River Water Management District (District) is criminally responsible. The District disputes any criminal liability. This Memorandum of Understanding (MOU) is made for the purpose of resolving the United States' criminal investigation into this avian mortality event as it pertains to the District. In addition, it is also the position of the United States that the District is liable to the United States under Section 107(a)(1), (2) and (4)(C) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9607(a)(1), (2) and (4)(C), for injury to, destruction of, or loss of natural resources belonging to, managed by, controlled by, or appertaining to the United States associated with the 1998-1999 Lake Apopka Avian Mortality Incident (the Lake Apopka Natural Resource Damages). The District disputes any civil liability. This MOU is also made for the purpose of resolving the District's liability for the Lake Apopka Natural Resource Damages.

**I. The Endangered Species Act**

For each project identified on the attached list "A," the District will establish its compliance with the ESA through one of the following processes, which it will select as appropriate:

- A. For projects where an agency of the federal government will take "agency action" within the meaning of the ESA the District will contact the federal action agency and request that it consider whether consultation with United States Fish and Wildlife Service (USFWS) pursuant to Section 7 of the ESA is required. If the federal action agency determines that consultation is required, the District will participate in formal or informal consultation, in conformance with 50 C.F.R. Part 402. If the federal agency determines that no consultation is required, *i.e.* that the agency action in question will not affect any listed species, the District will provide documentation of that determination to the USFWS, Jacksonville

Ecological Services Field Office, Attn. Field Office Supervisor, within 30 days of receiving that determination from the federal agency, or prior to commencing any action on the ground, whichever comes first.

B. For projects in which there is no federal action agency, or in which there is action taken by the District that is not addressed in a consultation initiated by the federal action agency, the District will use the following procedure in determining whether it will seek an incidental take permit from USFWS under Section 10 of the ESA.

1. The District will use the best available information to conduct a biological analysis (similar to the analysis conducted by a federal agency under Section 7). The District will provide USFWS a copy of this biological analysis and afford USFWS 60 days to comment thereon. The District will then complete the biological analysis after consideration of USFWS comments, if any, and provide a copy of the completed biological analysis to the USFWS within 60 days of receiving any USFWS comments, or prior to commencing any action on the ground. The District's final biological analysis shall include a statement as to whether or not the District intends to seek an incidental take permit related to that action pursuant to Section 10 of the ESA. If USFWS comments state that a taking, as defined under the ESA, is anticipated and the District nevertheless determines that it will not seek a Section 10 permit, the provisions set forth below at Section IV will not apply to that taking.
2. The District will comply with all regulatory processes relating to Section 10 of the ESA for all projects where, in the District's judgment, the biological analysis indicates that a taking, as defined in the ESA, of a threatened or endangered species is anticipated to occur as a result of the District's activities.
3. The District recognizes that it has an ongoing responsibility to comply with the ESA and its implementing regulations and will revisit or initiate a Section 10 permit request as necessary pursuant to the ESA and 50 C.F.R. Part 402.

## **II. The Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act**

For each project identified on the attached list "B," the District will address issues arising under the MBTA and BGEPA through the following processes:

- A. The District will develop an Avian Protection Plan (APP) to identify any potential takings, as defined under the MBTA, of migratory birds that might occur as a result of each such District project and to identify steps the District can take to eliminate or minimize such takings.
- B. The District will submit the proposed APP(s) to USFWS, Jacksonville Ecological Services Field Office, Attn. Field Office Supervisor, under an agreed upon timetable, which will not exceed: (1) 180 days from the date of execution of this MOU or, (2) if the proposed APP is for a project or projects that all were added to the appended list after execution of this MOU, 180 days from the date the last project covered by the proposed APP was added to the appended list.
- C. Within 180 days of receipt of each proposed APP, USFWS will either approve the proposed APP, which approval will not be unreasonably withheld or unreasonably conditioned, or provide the District with written comments addressing the substance of the proposed APP. If USFWS fails to act within 180 days of receipt of a proposed APP, that proposed APP will be considered approved by USFWS.
- D. If the District and USFWS are unable to agree upon the appropriate terms of an APP, it is agreed that they will submit the proposed APP and USFWS's comments to Dr. Tom Custer of the USGS Biological Survey, who will then select an independent expert (or experts) to perform a peer review of the proposed APP and USFWS's comments. The peer reviewer(s) will either endorse the proposed APP or recommend such alternatives to the proposed APP as it considers to be reasonable, practicable, and based upon the application of sound scientific principles and information. The cost of such peer review, not to exceed \$10,000 per disputed project and a collective total of \$50,000 (which the District may elect to exceed), will be borne by the District. Upon receipt of the peer review, the District and USFWS will review in good faith their positions in light of the assessment contained in the peer review. If the District and the USFWS remain unable to agree upon the APP, with or without (if the monetary cap is exceeded) the peer review process, the District must implement, at its option, either its proposed APP or such APP as the peer reviewer considers to be reasonable, practicable, and based upon the application of sound scientific principles and information. For the purposes of Subsection IV.C., an "approved APP" is one expressly approved by the USFWS, one that is de facto approved due to a lack of comment from the USFWS within 180 days of receiving the proposed APP, or one that the peer reviewer chosen by Dr. Custer states in writing is reasonable, practicable, and based upon the application of sound scientific principles and information.

### III. St. John's River Water Management District Activities

To publicly demonstrate the District's regret and acceptance of partial responsibility regarding the loss of avian wildlife that occurred at Lake Apopka and the District's commitment to prevent a similar occurrence in the future, the District will undertake the following actions:

- A. The District will compensate Uncle Donald's Farm, Audubon Society Birds of Prey Center, and the Suncoast Seabird Sanctuary for their documented, out-of-pocket costs of responding to the 1998 Lake Apopka avian mortality and injury event in the following amounts, respectively: (1) \$7,045.00; (2) \$38,287.00; and (3) \$44,780.96. The parties recognize that the District already has voluntarily paid the Audubon Society Birds of Prey Center \$8,000 in direct reimbursement and thus will pay only a further \$30,287.00 to the Center.
- B. The District will conduct a conference on avian mortality issues associated with environmental restoration as experienced at the North Shore Restoration Area. This conference will address legal, scientific, and programmatic issues. The District will invite representatives of every Florida Water Management District and Florida Department of Environmental Protection, and will take all reasonable steps to encourage attendance by such representatives. Federal agencies, including the Natural Resources Conservation Service, the U.S. Army Corps of Engineers, and the U.S. Environmental Protection Agency, as well as private environmental consulting firms that did work related to the North Shore Restoration Area, also will be invited to attend the conference. The District will distribute to each invitee, whether or not they attend, the conference materials which will include educational materials provided by USFWS-LE. The District will provide to USFWS documentation of the attendance at this conference, a copy of the materials distributed, and documentation of that distribution.
- C. The District will cooperate with USFWS to establish a joint Working Group. This Working Group will meet every six months for the purpose of furthering the efforts set forth in Sections I and II and enhancing the professional relationships between the two agencies. This working group will operate for the term of this MOU and may be extended thereafter upon the mutual consent of the parties.
- D. To the extent that it has not already done so, the District will provide training for all employees involved in the design and implementation of the projects identified on the attached lists "A" and "B" regarding the legal obligations created by the ESA, MBTA, and BGEPA. This training will include a description of the

prohibitions of each statute, their consultation and permitting requirements, and information for contacting USFWS. In addition, the District will include in such training a description of the District's obligations under this MOU. The District will keep a record of the employees who have been trained (whether trained prior or pursuant to this MOU), the dates of the training and identities of the trainers, and a copy of the materials provided in the training. This information will be made available to the USFWS upon request.

- E. The District agrees to undertake the following three activities and to maintain adequate records of those undertakings for inspection by the USFWS.
1. In coordination with the appropriate County health authorities, create and implement a five-year program to monitor pesticide levels in fish in Lake Apopka.
  2. In accordance with the guidelines set forth in the Florida Fish and Wildlife Conservation Commission, Bureau of Wildlife Diversity Conservation Project Proposal #92921001000, monitor wood stork populations within the SJRWMD for a period of five years. The District's monitoring obligations with respect to one of these populations, namely the rookery located in Matanzas Marsh, is set forth in greater detail in Subsections VI. F. and VI.G. below.
  3. Develop and implement, in coordination with the USFWS, active management plans for threatened or endangered species on a minimum of 200 acres of SJRWMD property on which threatened or endangered species are found. Management plans for species on the Matanzas Marsh property (as described in Subsection V.C. below) shall not be used to satisfy this requirement.

F. The District and the United States recognize the following:

1. Certain organochlorine compounds located on the properties within the Lake Apopka North Shore Restoration Area that were flooded in the second half of 1998, including dieldrin, toxaphene and DDT and its metabolites, were primary causative factors in, or the cause of, the deaths of many migratory birds in and near the Lake Apopka North Shore Restoration Area in the fall of 1998 and spring of 1999.
2. The District made some decisions that were material factors resulting in

the bird mortality that occurred in late 1998 and early 1999 at the Lake Apopka North Shore Restoration Area. The District maintains that it only became aware in hindsight that these decisions were material factors resulting in the bird mortality. It is the position of the United States that the District possessed sufficient information prior to making those decisions to know that the decisions would result in takings as defined by the ESA, MBTA and BGEPA.

3. The District is committed to ensuring that its activities will not contribute to similar occurrences in the future and the District and USFWS wish to work closely together and with others in using the best possible scientific information and practices to achieve that goal.
  4. At no time did the investigation of this matter prevent or prohibit the District from undertaking any mitigation or restoration efforts that would otherwise comply with federal wildlife statutes and regulations.
  5. The District and USFWS believe this MOU will help to prevent future avian mortality and will enhance the USFWS's capacity to ensure compliance with all applicable wildlife protection statutes.
- G. The District agrees to create, and maintain for a period of five years from the expiration of this MOU, records of dead and injured birds protected by the ESA, MBTA and/or BGEPA that are found on its projects contained on lists "A" and "B" appended to this MOU. The District agrees to provide USFWS notice via telephone message or email (contact number and email address to be provided by the USFWS) of any such mortalities or injuries within one working day of becoming aware of the event, including the apparent circumstances. The District further agrees to notify the USFWS, at a number that the USFWS will provide, within 24 hours of receiving credible information that a significant mortality event of birds protected by the ESA, MBTA or BGEPA has occurred on projects covered by this MOU. The parties understand a "significant mortality event" to encompass mortalities of protected birds in numbers that would indicate a problem of concern to both the District and the USFWS that is not already addressed in any applicable incidental take statement. To facilitate District compliance with this provision, the District will establish, maintain, and notify its employees of, a reasonable internal process for reporting such information.
- H. The District agrees to create, and maintain for a period of five years from the expiration of this MOU, records of its actions in accordance with the procedures

and plans set forth above. The District further agrees to make such records available to USFWS upon request.

**IV. Criminal Enforcement and Forbearance: ESA, MBTA, BGEPA**

- A. Enforcement Action During Interim Processes. For any project covered by Sections I or II of this MOU where the District has not yet completed the processes described in Sections I or II above, and it is determined by the USFWS that the District's activity being reviewed has caused a taking, as defined under the ESA, of threatened or endangered species, or a taking, as defined under the respective statutes, of birds protected by the MBTA or the BGEPA, if, in the judgment of the United States, the District is and has been proceeding under the MOU in good faith, provided timely notification to the USFWS of any such known or reasonably anticipated takings, and responds in good faith and in consultation with the USFWS to correct or minimize those conditions during the period prior to completion of the processes set forth in Sections I or II above, then the United States agrees to exercise its discretionary authority not to prosecute the District criminally for any such taking.
  
- B. Enforcement Action Upon Completion of ESA Processes. For any project included on the attached list "A" where the District has completed the processes set forth in Section I above, and the USFWS determines thereafter that the District's activities covered by these processes have caused a taking, as defined under the ESA, of threatened or endangered species protected by the ESA which was not authorized by an incidental take permit, if, in the judgment of the United States, the District provides timely notification to the USFWS of any such takings, immediately reinitiates or initiates consultation or Section 10 processes, and responds in good faith, and in consultation with the USFWS, to correct or minimize those takings, then the United States agrees to exercise its discretionary authority not to prosecute the District criminally for any such taking, except in the circumstances described in the final sentence of I.B.1. above.
  
- C. Enforcement Action Upon Completion of MBTA/BGEPA Processes. For any project included on the attached list "B" where the District has completed the processes set forth in Section II above and an APP is in place, if the USFWS determines that the District's activities covered by the APP have caused a taking, as defined under the respective statutes, of birds protected by the MBTA or BGEPA, if, in the judgment of the United States, the District is in compliance with an approved APP for the activity in question, has provided timely notification to the USFWS of any such takings, and responds in good faith, and in

consultation with the USFWS, to correct or minimize those takings, then the United States agrees to exercise its discretionary authority not to prosecute the District criminally for any such taking.

**V. Natural Resource Damages**

- A. The Secretary of the Department of the Interior ("DOI"), acting through the USFWS, is designated as a natural resource trustee under Section 107(f) of CERCLA, 42 U.S.C. § 9607(f), and, as a designated trustee is authorized to act on behalf of the public to assess and recover damages for the injury, loss or destruction of natural resources caused by releases of hazardous substances and, further, to use such damages to restore, rehabilitate, replace, or acquire the equivalent of the affected resources and services. DOI asserts that natural resource losses and injuries occurred as a result of the 1998-1999 Lake Apopka Avian Mortality Incident. On or about August 2002, the District and USFWS, as authorized representative of the Secretary of DOI, began a cooperative assessment of natural resource losses and injuries from the Incident, as well as began preliminary restoration planning.
- B. The USFWS has, with input from the District, prepared a draft Damage Assessment and Restoration Plan ("DARP"), which it intends to make available for public comment. This draft DARP quantifies the injury to natural resources associated with bird mortality as well as potential reproductive effects associated with the exposure of birds to pesticides. In addition, the draft DARP evaluates projects which could potentially provide compensation for the resource injury and sets forth the compensation project preferred by the USFWS.
- C. Early in the preparation of the DARP, the USFWS determined that it would be essential to identify a project or projects that would provide compensation to the public for injury to the endangered wood stork. Before the draft DARP was completed, an opportunity arose to purchase an undeveloped 8,465 acre tract of land in St. Johns County, Florida (the Matanzas Marsh property) that contained one of the two largest wood stork colonies in Northeast Florida. Because immediate action was required to obtain the property, the District coordinated the purchase of the land prior to completion of the DARP. The District undertook this action with the understanding that the United States was not obligated to determine that purchase of the Matanzas Marsh property and protection of the wood stork colony would satisfy the District's obligation to restore natural resources lost, injured or destroyed as a result of the Incident.

- D. In the draft DARP, USFWS has determined that protection of the Matanzas Marsh property and active management of the Matanzas Marsh property for wood storks provides appropriate compensation to the public for the injuries to natural resources associated with the 1998-1999 Lake Apopka Avian Mortality Incident. The parties also recognize that such perpetual management will benefit other avian species. Therefore, USFWS is entering into this MOU with the District to ensure that the Matanzas Marsh property will be appropriately managed so that natural resource losses and injuries are restored to the public.

**VI. Actions Taken and/or to Be Taken by the District to Offset the Natural Resource Damages**

- A. The District coordinated the purchase of the Matanzas Marsh property for a price of approximately \$40,000,000. The District purchased a 25 percent undivided interest in the property for approximately \$10,000,000. The Board of Trustees of the Internal Improvement Trust Fund of the State of Florida purchased a 75 percent undivided interest for approximately \$30,000,000.
- B. The District hereby represents and warrants that it will ensure that the existing wood stork colony on the Matanzas Marsh property will be perpetually maintained and managed as wood stork habitat, according to a Wood Stork Management Plan (WSMP) that will be developed by the District and reviewed and approved by USFWS. The District has obtained binding promises from the trustees of the Internal Improvement Trust Fund of the State of Florida obligating that entity, as partial owner, to maintain and manage the wood stork colony on the Matanzas Marsh property in the same manner for perpetuity. These representations and warranties and the obligation to manage the wood stork colony shall survive the expiration of this MOU and this MOU may be entered into the land records in the appropriate County as evidence that the existing wood stork colony must continue to be appropriately managed and maintained in accordance with the terms and conditions set forth in this MOU and relevant USFWS guidelines.
- C. Within one hundred ninety (190) days of the date this MOU becomes effective, or within thirty (30) days of the date on which the United States notifies the District pursuant to Subsection VIII.G. that it does not intend to withdraw from the natural resource damage provisions, whichever date is earlier, the District shall pay DOI (1) \$14,776.30 to fund an update of the existing USFWS Habitat Management Guidelines for the Woodstork in the Southeast Region, prepared by John C. Ogden and dated January 1990 (the "Guidelines"); and (2) \$10,450.00 to fund a

study of eggshell thinning being conducted by the University of Florida. Payment shall be made according to instructions provided by USFWS thirty (30) days prior to the date payment is due.

- D. The existing wood stork colony shall be managed according to the WSMP. The USFWS and the District shall meet annually, upon USFWS or District request, at a mutually agreeable time, to review the WSMP and to inspect the wood stork habitat to determine whether any modifications to the WSMP are necessary or appropriate. The District shall adopt the recommendations of the USFWS regarding management actions, as the USFWS has specific expertise and jurisdiction over wood storks.
- E. The WSMP shall be based upon the Guidelines, as hereinafter updated, and consideration of site-specific conditions. The WSMP shall include the management activities identified in Exhibit 1 to this MOU, which shall take precedence over the Guidelines in the event of any conflict, provided, however, that USFWS and the District may mutually agree at any time to modify any of the management activities in Exhibit 1 or the WSMP.
- F. The District will prepare a Monitoring Plan to track the reproductive success of the wood storks in the colony. The plan will be provided to USFWS for review and approval. Once the approved Monitoring Plan is completed, the District shall implement the Monitoring Plan until such time as the average productivity in the colony is greater than 1.5 chicks per nest per year for three successive years, or 20 years from the date this MOU becomes effective, whichever comes first.
- G. The Monitoring Plan shall include, but shall not be limited to, the provisions set forth in Exhibit 2.
- H. The District shall prepare a summary report of its monitoring results annually and submit it to the USFWS within 60 days of the end of the nesting season.
- I. Protection of the colony site and compliance with restrictions and other aspects of the wood stork Management Plan must continue even if the site is not used by wood storks in a given year or years.
- J. Within one hundred ninety (190) days of the date this MOU becomes effective, or within thirty (30) days of the date on which the United States notifies the District pursuant to Subsection VIII.G. that it does not intend to withdraw from the natural resource damage provisions, whichever date is earlier, the District shall pay DOI

\$26,868.11 to reimburse the costs incurred by DOI in connection with its natural resource damage assessment.

- K. Within sixty (60) days following the close of the fiscal year for USFWS, the USFWS shall invoice the District for its actual costs incurred in participating in the future implementation of this MOU through and including every year in which monitoring of the wood stork colony takes place pursuant to Subsection IV.F. The District shall pay such costs plus applicable overhead charges, up to a cap of \$1,500.00 per year. Payment shall be made within thirty (30) days of receipt of the invoice being presented to the District in accordance with instructions provided by USFWS with the invoice.
- L. The District shall make the payment identified in Subsection VI.J. above into the "Lake Apopka Restoration Fund", an account established within the United States Department of the Interior's Natural Resource Damage Assessment and Restoration Account (the "Restoration Account"). The payment shall be made by Electronic Funds Transfer ("EFT") through the United States Treasury Department's Automated Clearing House to the Lake Apopka Restoration Account, in accordance with instructions to be provided by DOI. The addenda record for each such transfer shall be annotated "Lake Apopka Restoration Account" and list the name "St. John's River Water Management District." The District shall provide notice of the payment and a copy of the paperwork documenting the EFT to:

Section Chief  
Environmental Enforcement Section  
U.S. Department of Justice  
P.O. Box 7611  
Washington, DC 20044-7611  
Referencing DOJ Case No. 90-11-3-07917

Department of the Interior  
Natural Resource Damage Assessment and Restoration Program  
Attn: Restoration Fund Manager  
1849 C Street, N.W.  
Mailstop 4449  
Washington, DC 20240

Regional Solicitor's Office  
Department of the Interior  
Attn: Harriet M. Deal  
75 Spring Street, S.W.  
Room 304  
Atlanta, GA 30303.

**VII. Covenant Not to Sue by the United States for CERCLA Natural Resource Damages**

- A. In consideration of the actions to be taken by the District in Section VI of this MOU, and except as specifically provided in Subsection VII.B. of this MOU, the United States covenants not to sue or to take administrative action against the District pursuant to CERCLA for the Lake Apopka Natural Resource Damages. This covenant not to sue may be declared void by the United States should the District commit a material breach of its obligations under Section VI of this MOU.
- B. Reservation of Rights. Notwithstanding any other provision of this MOU, the United States reserves, and this MOU is without prejudice to, its right to institute proceedings for the Lake Apopka Natural Resource Damages should information be received by the United States after it enters into this MOU, and the information indicates that there is injury to, destruction of, or loss of natural resources associated with the 1998-1999 Lake Apopka Avian Mortality Incident of a type or extent unknown to the United States as of the entry of this MOU.

**VIII. Miscellaneous Provisions**

- A. Except as otherwise expressly provided herein, the term of this agreement shall be five years. All obligations set forth in this MOU that extend beyond this five-year period shall survive any expiration of this MOU, and the MOU shall be in full force and effect with respect to the surviving obligations. In any case, expiration of any part of this MOU shall not relieve the District of its obligations for the perpetual management of the Matanzas Marsh property for the benefit of wood storks as set forth in Sections V and VI. These obligations shall survive any expiration of this MOU, and the District agrees that USFWS may enforce these obligations despite the expiration of this MOU with respect to other provisions. If the obligation for perpetual management of the Matanzas Marsh property for the benefit of wood storks as set forth in Sections V and VI is breached by the District, then the USFWS may either seek specific performance of the obligation with respect to the Matanzas Marsh property or seek alternative means of

restoration to replace the restoration agreed to herein. The granting of any covenant not to sue for natural resource damages provided herein shall not preclude the enforcement, through judicial means or otherwise, of the obligations in this paragraph for perpetual management.

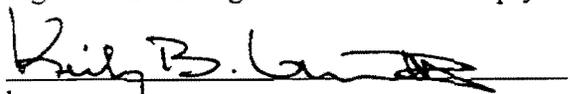
- B. Upon execution of the final MOU, the United States Attorney's Office for the Middle District of Florida and the Wildlife and Marine Resources Section, Environment and Natural Resources Division, U.S. Department of Justice, will exercise their discretionary authority to neither charge the District with any federal criminal offenses, nor pursue civil penalties for violations of the ESA, the MBTA or the BGEPA, that are known to that United States Attorney's Office or the Wildlife and Marine Resources Section at the time of the execution of this agreement related to bird mortality or reproductive impairment. Should, however, the District materially breach any provisions in Sections I through IV of this MOU, including but not limited to failing to act in the manner required for forbearance under Section IV above, the United States may initiate a civil action against and/or criminal prosecution of the District for any such violation.
- C. The District, through its authorized officer, asserts and certifies that it is aware of the fact that the Sixth Amendment to the Constitution of the United States provides that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial. The District also is aware that Rule 48(b) of the Federal Rules of Criminal Procedure provides that the Court may dismiss an indictment, information or complaint for unnecessary delay in presenting a charge to the Grand Jury, filing an information or in bringing a defendant to trial. The District hereby requests that the United States Attorney for the Middle District of Florida and the Wildlife & Marine Resources Section of the U.S. Department of Justice defer any prosecution as described in Subsection VIII.B. above. The District agrees and consents that any delay from the date of the Agreement to the date of the initiation of any such prosecution shall be deemed to be a necessary delay at the request of the District and the District waives any defense to such prosecution on the ground that such delay operated to deny its rights under law, including but not limited to Rule 48(b) of the Federal Rules of Criminal Procedure and its right to a speedy trial under the Sixth Amendment to the Constitution of the United States. The District further expressly waives any defense based on the running of the applicable statute of limitations for any such prosecution and for any proceeding to recover the Lake Apopka Natural Resource Damages and/or the cost of assessing the Lake Apopka Natural Resource Damages for five years from and including the date on which this MOU is executed.

- D. The parties will continue their cooperation regarding the ongoing investigation of the 1998-1999 bird mortality. Although the parties acknowledge that the principal component of avian mortality at the North Shore Restoration Area during 1998 and 1999 has been determined to be organochlorine toxicity, the USFWS will make available to the District, upon request, the remaining bird carcasses. The USFWS also will make available to the District, upon request, any other information it possesses that directly or indirectly relates to said bird mortality that has not been previously provided to the District, to the extent it does not, in the sole judgment of the USFWS, compromise ongoing or future criminal investigations.
- E. This Agreement shall not be interpreted to limit the District's ability or obligation to comply with the ESA, the MBTA, and/or the BGEPA or any other federal laws through any mechanisms that are available or become available or applicable under those statutes or the rules promulgated thereunder, including, but not limited to, Safe Harbor Agreements.
- F. The parties agree that the statements contained in this MOU are made for purposes of resolving the issues between the United States and the District arising from the avian mortality incident near Lake Apopka in 1998-99. Pursuant to Rules 408, 410, and any other applicable Federal Rule of Evidence, this MOU is inadmissible in any future proceeding except that the United States may employ the statements and admissions contained in Subsection III.F., and the District waives any right to oppose the use and admission into evidence of those statements by the United States, in any proceeding described in Subsection VIII.B. or in any proceeding to recover the Lake Apopka Natural Resource Damages. Moreover, this settlement is not intended to independently create any legal rights or entitlements not already held by persons not parties to this MOU.
- G. The District acknowledges that the USFWS intends to seek public comment on the draft DARP. The United States reserves the right to withdraw from the provisions of this MOU relating to natural resource damages (the Natural Resource Damage Provisions) if such public comments disclose facts or considerations which would indicate that the actions set forth in this MOU are not appropriate compensation for the Lake Apopka Natural Resource Damages. The United States shall notify the District in writing as to whether or not it intends to withdraw from the Natural Resource Damage Provisions within one hundred eighty (180) days of the close of the period for receipt of public comments. Failure to provide such notice shall be deemed a waiver of the right to withdraw.

If the United States notifies the District of its intention to withdraw from the Natural Resource Damage Provisions, all such provisions, including, *inter alia*, Section V (Natural Resource Damages), Section VI (Actions to be Taken by the District), Section VII (Covenant Not to Sue), and Subsection VIII.A., as well as that portion of the last sentence of Subsection VIII.C., regarding natural resource damages, shall be deemed null and void as of the date the District receives such notification from the United States. The United States' withdrawal from the Natural Resource Damage Provisions shall have no impact on the remainder of the provisions of this MOU, all of which shall remain in full force and effect. If the United States notifies the District of its intention to withdraw from the Natural Resource Damage Provisions, the District expressly waives any defense based on the running of the applicable statute of limitations for any proceeding to recover the Lake Apopka Natural Resource Damages and/or the cost of assessing the Lake Apopka Natural Resource Damages for one year from and including the date on which the District received the United States' notice of withdrawal. In addition, Subsection VIII.F. shall remain in full force and effect in the event that the United States withdraws from the Natural Resource Damage Provisions.

H. Should the United States exercise the reservation of rights described in Subsections VII.B. or VIII.G. above, no provision of this MOU shall be interpreted as an admission of any liability by the District for natural resource damages.

The District states, through its duly authorized representative, that the above has been read and explained to him/her. The District understands the conditions and terms of this Agreement and agrees that it will comply with them.

  
by  
St. Johns River Water Management District

8 October 2003  
Date

  
Attorney for  
St. Johns River Water Management District

10-7-03  
Date

APPROVED AS TO FORM AND LEGALITY



Carolyn Adams  
Carolyn Adams  
Chief, Orlando Division  
Middle District of Florida

9.29.03  
Date

Whitney J. Schmidt  
Whitney Schmidt  
Affirmative Civil Enforcement Coordinator  
Middle District of Florida

9-30-03  
Date

Elinor Colburn  
Elinor Colburn  
Senior Trial Counsel  
Wildlife & Marine Resources Section  
Environment & Natural Resources Division  
U.S. Department of Justice

September 25, 2003  
Date

Ann C. Hurley  
Ann C. Hurley  
Trial Attorney  
Environmental Enforcement Section  
Environment & Natural Resources Division  
U.S. Department of Justice

September 22, 2003  
Date

Exhibit 1

The Management Plan shall include the following:

1. Maintenance of the hydrology of any water bodies or wetlands in the wood stork colony and primary and secondary buffer zones as defined below.
2. Establishment of a primary buffer zone surrounding the colony. The buffer zone may be as little as 500 feet if there are strong visual or broad aquatic barriers, but should be between 1000 to 1500 feet if the strong visual or aquatic barriers do not exist. This barrier must extend in all directions from the colony. USFWS and the District will consult to determine the footage of the primary buffer zone.
3. Establishment and compliance with the following year-round restrictions in the primary buffer zone:
  - a. No removal of vegetation or lumbering shall be done in this area, except where beneficial to the wood stork colony, provided that USFWS concurs with such removal of vegetation or lumbering.
  - b. No activity that reduces the area, depth or length of flooding under and surrounding the colony except where water control may be required to maintain the health of both the aquatic woody vegetation and the health of the nesting trees.
  - c. No construction of buildings, additional roadways or improvements on existing roadways, towers, power lines, canals and drainage features.
  - d. Marking the primary buffer zone clearly with "Area Closed" signs.
4. Establishment and compliance with the following additional restrictions in the primary buffer zone during nesting season:
  - a. No unauthorized human entry into the primary buffer zone, except for management activities otherwise approved in the Wood Stork Management Plan. The only entry should be those individuals from USFWS, the District, and those entities of the State of Florida exercising joint ownership and control over the property with the District who are engaged in monitoring the colony and other management activities and others who enter with permission of these entities.
  - b. No increase or irregular patterns by animals, including livestock or pets in the

primary buffer zone.

5. To the extent that the District can control aircraft in the area, no aircraft within 500 feet of the colony.
6. Establish a secondary buffer which ranges outward from the primary buffer 1000 to 2000 feet, or by a distance of 2500 feet from the outer edge of the colony.
7. Establishment and compliance with the following restrictions in the secondary buffer zone during nesting season:
  - a. No alteration in the area hydrology that is likely to adversely impact the primary zone.
  - b. No adverse alteration to other potential nesting or feeding habitats for storks.
  - c. Clear delineation of the secondary buffer zone.
  - d. No increase in human activities beyond existing levels.
  - e. No thinning or harvesting of timber.
8. There shall be no use of herbicides or pesticides on the Matanzas Marsh property within the drainage area of the colony proper, except as necessary to respond to an outbreak or invasion of non-native plants or animals where such use is not detrimental to the wood stork colony, provided that USFWS concurs with such use.
9. To the extent the District can exercise control, there shall be no high-tension power lines on the property within one mile and no tall transmission towers within three miles of the colony.
10. It is recognized that the response to natural disasters, including wildfire, hurricanes, and pest outbreaks may require variance from these restrictions, but subject to approval of USFWS.

## Exhibit 2

The Monitoring Plan shall include the following provisions:

1. The entire nesting season must be monitored. Each season lasts approximately 180 days from the early arrivals and egg laying to fledging of the last nestlings from the nest.
2. Estimates of colony productivity shall be based on calculations of the number of fledglings in individually marked nests from the time the nest is started to the final outcome of the breeding attempt.
3. Individuals implementing monitoring shall allow themselves to be visible when moving through the colony to allow parent birds to slowly move from the nest and avoid panic flushing which might result in the loss of a nestling. Monitors shall keep track of their location and flush birds only once. Monitoring shall be done in the early morning or late afternoon to minimize thermal stress to eggs. Areas with crows shall be avoided to prevent predation by the crows on eggs. Areas where there is high density of other nesting birds shall also be avoided.
4. A minimum of 20-30 nests shall be monitored. When monitoring a sample of nests, a random selection of nests throughout the colony shall be marked to avoid biases or edge versus interior differences in nesting success.
5. When monitoring, biologists shall take a serpentine or zig zag path through the colony checking previously marked nests and marking new nests along the route. Trees can be marked with plastic flagging tape. Individual nests can be marked by taking pictures or drawing the nests in relationship to some stable object.
6. Monitoring of individually marked wood stork nests biweekly shall occur. At each monitoring visit the status of each nest must be noted. Status reports shall use the following recognized abbreviations for observations: "A" is a nest good for adults; "IA" shall mean a nest with incubating adult; "0a" shall mean a nest intact no adults; "OC" shall mean original nest structure gone; "Y" shall mean a nest with calling/visible young but unknown number; XN@WN shall be used to note the number of nestlings (XN) and the number of weeks of their age (WN); "XF" shall mean number of large nestlings of fledging age. Nestlings can be aged from pictures, if necessary.

Table 1. A and B Lists

#	Management Area	Acres	County	A List	B List	T/E Species
1	Adams Stormwater Park	175	Indian River	Yes	Yes	wood stork, Florida scrub-jay, indigo snake
2	Broadmoor Marsh Restoration Area	2,982	Brevard	Yes	Yes	wood stork, bald eagle, snail kite
3	Bull Creek Wildlife Management Area	23,470	Osceola	Yes	Yes	wood stork, bald eagle, crested caracara, Florida panther
4	C-1 Retention Area	1,250	Brevard	Yes	Yes	wood stork, bald eagle, indigo snake
5	Chain of Lakes Stormwater Park	62	Brevard	Yes	Yes	wood stork, bald eagle, indigo snake
6	City of Jacksonville Stormwater Park	17	Duval	Yes	Yes	wood stork, indigo snake
7	Emeralda Marsh Conservation Area	7,089	Lake	Yes	Yes	wood stork, bald eagle, indigo snake
8	Fellsmere Water Management Area	3,705	Indian River	Yes	Yes	wood stork, bald eagle, indigo snake, snail kite, crested caracara
9	Fort Drum Marsh Conservation Area	10,740	Indian River	Yes	Yes	wood stork, bald eagle, indigo snake, snail kite, crested caracara
10	Inlet Groves	282	Brevard	Yes	Yes	wood stork
11	Kenansville Lake	2,400	Indian River	Yes	Yes	wood stork, bald eagle, snail kite
12	Lake Apopka Marsh Flow-Way	5,791	Lake	Yes	Yes	wood stork, bald eagle, Florida scrub-jay, snail kite, indigo snake, pygmy fringe-tree
13	Lake Apopka North Shore Restoration Area - Federal Project Area (Unit 2 & Duda)	9,084	Lake/Orange	Yes	Yes	wood stork, bald eagle
14	Lake Apopka North Shore Restoration Area - Unit 1 & Sand Farm	4,373	Lake/Orange	Yes	Yes	wood stork, bald eagle
15	Lake Harris Conservation Area	404	Lake	Yes	Yes	wood stork, bald eagle
16	Lake Jesup Conservation Area North	3,387	Seminole	Yes	Yes	wood stork, bald eagle, indigo snake
17	Lake Jesup Stormwater Park	10	Seminole	Yes	Yes	wood stork, bald eagle
18	Lake Norris Conservation Area	2,228	Lake	Yes	Yes	wood stork, bald eagle
19	Lake Washington Weir	<5	Brevard	No	Yes	
20	Ocklawaha Prairie Restoration Area	8,209	Marion	Yes	Yes	wood stork, bald eagle, snail kite, indigo snake
21	Orange Creek Restoration Area	3,512	Alachua/Marion	Yes	Yes	wood stork, bald eagle, indigo snake
22	Oslo Riverfront Conservation Area	335	Indian River	Yes	Yes	wood stork
23	Palatka Headquarters	34	Putnam	No	Yes	
24	Palm Bay Service Center	11	Brevard	No	Yes	
25	Pine Island Conservation Area	750	Brevard	Yes	Yes	wood stork, bald eagle, indigo snake
26	River Lakes Conservation Area	10,500	Brevard	Yes	Yes	wood stork, bald eagle, indigo snake, crested caracara
27	Sand Lakes Restoration Area	1,900	Indian River	Yes	Yes	wood stork, bald eagle, Florida scrub-jay, snail kite, indigo snake
28	Sawgrass Lake Water Management Area	2,250	Brevard	Yes	Yes	wood stork, bald eagle, indigo snake
29	Six Mile Creek Restoration Area	2,770		Yes	Yes	wood stork, bald eagle, crested caracara, indigo snake
30	Snagg Point (Church)	100	Brevard	Yes	Yes	wood stork, bald eagle
31	St. Johns Marsh Conservation Area	23,233	Brevard	Yes	Yes	wood stork, bald eagle
32	St. Sebastian River State Buffer Preserve	750	Brevard/Indian River	Yes	Yes	wood stork
33	Sunnyhill Restoration Area	4,405	Manon	Yes	Yes	wood stork, bald eagle, indigo snake
34	Three Forks Marsh Conservation Area	13,737	Brevard	Yes	Yes	wood stork, bald eagle, indigo snake
35	Tiger Bay State Forest	11,155	Volusia	Yes	Yes	wood stork, bald eagle, indigo snake, Rugei's pawpaw
36	Tri-County Agricultural Water Treatment Area (Edgefield)	230	Putnam	Yes	Yes	wood stork, bald eagle, indigo snake
37	Tri-County Agricultural Water Treatment Area (Yarborough)	1,103	St. Johns	Yes	Yes	wood stork, bald eagle, indigo snake
38	Wheeler/Me! Life	504	Brevard	Yes	Yes	wood stork