ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

BEAR WARRIORS UNITED, INC.; THE SWEETWATER COALITION OF VOLUSIA COUNTY, INC.; DEREK LAMONTAGNE, AN INDIVIDUAL; AND BYRON WHITE, AN INDIVIDUAL,

Petitioners,

v.

FLORIDA DEPARTMENT OF TRANSPORTATION AND ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Respondents.
_____/

DOAH Case No. 23-1512

SJRWMD F.O.R. No. 2023-06

FINAL ORDER

The Division of Administrative Hearings, by its designated Administrative Law Judge, the Honorable E. Gary Early ("ALJ"), held a formal administrative hearing in the above-styled case on October 23 – 27, 2023. The hearing transcript, in five volumes, was filed on November 29, 2023. The Proposed Recommended Orders ("PROs") were due on December 19, 2023. All three parties filed timely PROs.

On January 29, 2024, the ALJ submitted a Recommended Order to the St. Johns River Water Management District ("District"). Also on January 29, 2024, the ALJ submitted an Amended Recommended Order (amended as to permitting agency in Recommendation), a copy of which is attached as Exhibit "A" ("R.O."). The R.O. contains findings of fact and conclusions of law regarding Environmental Resource Permit ("ERP") application 103479-2 to construct and operate, including a stormwater management system, a 74.13-acre project known as Pioneer Trail

/ I-95 Interchange ("Interchange" or "Project"). Exceptions to the R.O. were due by February 13, 2024. Petitioners Bear Warriors United, Inc., the Sweetwater Coalition of Volusia County, Inc., Derek Lamontagne, and Bryon White (collectively, the "Petitioners"), along with Respondents Florida Department of Transportation ("Applicant" or "FDOT"), and District staff filed timely exceptions to the R.O.[1] Responses to the parties' exceptions were due by February 23, 2024. The Applicant timely filed responses to the Petitioners' exceptions. District staff filed timely responses to the Petitioners' and Applicant's exceptions.

On February 23, 2024, Petitioners filed a Motion for an Extension of Time for Filing Response(s) to Respondents' Exceptions to (Amended) Recommended Order, requesting until February 27, 2024, in which to file their responses to exceptions ("Motion for Extension of Time"). On February 27, 2024, both the District and the Applicant filed Responses in Opposition to Petitioners' Motion for Extension of Time. Also on February 27, 2024, Petitioners filed their Responses to Respondents' Exceptions. On February 29, 2024, the Applicant filed a Motion to Strike Petitioners' Responses to Exceptions ("Motion to Strike"). Petitioners' Motion for Extension of Time is granted and the Applicant's Motion to Strike is denied.[2]

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[1] Citations to the Recommended Order will be designated by "R.O." at page or paragraph (¶) number (e.g., R.O. at 13; R.O. at ¶ 12). Citations to page numbers in the transcript of the formal administrative hearing will be designated by the transcript page(s) and lines; (e.g., T. 234:7-24). References to a party in a citation will be shown as "Pet.", "App.", or "Dist." for the Petitioners, Applicant, and District, respectively. Citations to exhibits admitted by the ALJ will be made by identifying the party that entered the exhibit followed by the exhibit number (e.g., Joint Exhibit 2 would appear as Jt. Ex. 2). Citations to the parties' exceptions will be referred to "Pet./App./Dist. Except. at", "Pet/App./Dist. Response to Pet./App./Dist. Except. at", followed by the page number.

[2] Respondents argue in their respective Responses in Opposition that Petitioners failed to show good cause for the extension request. However, granting Petitioners' Motion for Extension of Time does not prejudice either Respondent, especially given that the filing of responses to exceptions is optional, only serves as an advisory function, and does not preserve any arguments for appeal. Moreover, Petitioners' Responses do not assert additional arguments in support of their exceptions or appear to have used the delay to incorporate unauthorized surrebuttal to Respondents'

This matter then came before the Assistant Executive Director of the District pursuant to paragraph 373.079(4)(a), Florida Statutes, for final agency action and entry of a Final Order.[3]

I. STATEMENT OF THE ISSUE

The general issue before the District is whether to adopt the Recommend Order as the District's Final Order for the ERP, or to reject or modify the Recommended Order in whole or in part, in accordance with paragraph 120.57(1)(l), Florida Statutes. The specific issue is whether ERP application number 103479-2 ("Permit") meets the conditions for issuance of a permit as set forth in part IV of chapter 373, Florida Statutes, and chapter 62-330, Florida Administrative Code ("Fla. Admin. Code" or "F.A.C."), and Environmental Resource Permit Applicant's Handbook Volume I (General Environmental) (December 22, 2020) ("A.H., Vol. I") and Volume II (for use within the geographic limits of the St. Johns River Water Management District) (June 1, 2018) ("A.H., Vol. II"). The ALJ recommended denial of the Permit. (R.O. at 54).

II. STANDARD OF REVIEW

A. Nature of an Agency's Review of a Recommended Order

The rules regarding an agency's consideration of exceptions to a recommended order are well established. Paragraph 120.57(1)(l), Florida Statutes ("Fla. Stat."), governs an agency's actions in reviewing and ruling upon exceptions to a recommended order. The ALJ, not the agency, is the fact finder. *Goss v. Dist. Sch. Bd. of St. Johns Cnty.*, 601 So .2d 1232, 1235 (Fla. 5th DCA

exceptions. Due to the gravity of the issues in this case, the District grants Petitioners' Motion for Extension of Time and has given Petitioners' Responses to Respondents' Exceptions consideration in the writing of this Final Order.

[3] The District's Governing Board has, pursuant to the legislative mandate contained in section 373.079(4)(a), Fla. Stat., delegated to the Executive Director the authority to take final agency action on permit applications under Part IV of Chapter 373, Fla. Stat., unless the proposed final order prepared by the designated Governing Board advisor recommends that the permit be denied. *See* Dist. Policy 120, ¶ (8) (03/08/22). The Executive Director has further delegated this authority in the instant case to the Assistant Executive Director pursuant to District Policy 120.

1992); *Heifetz v. Dep't of Bus. Regul.*, 475 So. 2d 1277, 1281-82 (Fla. 1st DCA 1997). A finding of fact may not be rejected or modified unless the agency first determines from a review of the entire record that (1) the finding of fact is not based upon competent substantial evidence or (2) that the proceedings on which the finding of fact was based did not comply with the essential requirements of law. *See* §120.57(1)(l), Fla. Stat. In its review, the District must be guided by the true nature of the finding, not its title. "The mere fact that what is essentially a factual determination is labeled a conclusion of law, whether labeled by the hearing officer or the agency, does not make it so, and the obligation of the agency to honor the hearing officer's findings of fact cannot be avoided by categorizing a contrary finding as a conclusion of law." *See Kinney v. Dept. of State*, 501 So. 2d 1277 (Fla. 5th DCA 1987); *Pillsbury v. State, Dep't of Health & Rehab. Servs.,* 744 So. 2d 1040, 1041-42 (Fla. 2d DCA 1999); *Goin v. Comm'n on Ethics*, 658 So. 2d 1131 (Fla. 1st DCA 1995); *Herrin v. Volusia Cnty*., et al. No. 11-2527GM (Fla. DEO March 29, 2012) (Final Order No. DEO-12-021) (Conclusions of law labeled as findings of fact, and findings labeled as conclusions, will be considered as a conclusion or finding based upon the statement itself and not the label assigned).

B. Competent Substantial Evidence

"Competent substantial evidence" is such evidence as is sufficiently relevant and material that a reasonable mind would accept such evidence as adequate to support the conclusion reached. *Perdue v. TJ Palm Assoc., Ltd*., 755 So. 2d 660 (Fla. 4th DCA 1999). The term "competent substantial evidence" relates not to the quality, character, convincing power, probative value or weight of the evidence, but refers to the existence of some quantity of evidence as to each essential element and as to the legality and admissibility of that evidence. *Scholastic Book Fairs v.*

Unemployment Appeals Comm'n, 671 So. 2d 287, 289 (Fla. 5th DCA 1996); *Nunez v. Nunez*, 29 So. 3d 1191, 1192 (Fla. 5th DCA 2010).

If a finding is supported by any competent substantial evidence from which the finding could be reasonably inferred, the finding cannot be disturbed. *Freeze v. Dep't. of Bus. Regul., Div. of Alcoholic Beverages & Tobacco,* 556 So. 2d 1204 (Fla. 5th DCA 1990); *Berry v. Dep't of Env't Regul.,* 530 So. 2d 1019 (Fla. 4th DCA 1998). *See also Save Our Creeks, Inc. and Env't Confederation of SW Fla., Inc. v. Fla. Fish and Wildlife Conservation Comm'n and Dep't of Env't Prot*., No. 12-3427 (Fla. DOAH July 3, 2013) (Recommended Order); No. 12-3427 (Fla. DEP Jan. 15, 2014) (Final Order). The agency may not reweigh evidence admitted in the proceeding, may not resolve conflicts in the evidence, may not judge the credibility of witnesses or otherwise interpret evidence anew. *Goss*, 601 So. 2d at 1235; *Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co*., 18 So. 3d 1079, 1088 (Fla. 2d DCA 2009); *Rogers v. Dep't of Health*, 920 So. 2d 27, 30 (Fla. 1st DCA 2005); *Brown v. Crim. Just. Standards & Training Comm'n*, 667 So. 2d 977 (Fla. 4th DCA 1996).

The issue is not whether the record contains evidence contrary to the findings of fact in the recommended order, but whether the finding is supported by competent substantial evidence. *Fla. Sugar Cane League v. State Siting Bd*., 580 So. 2d 846 (Fla. 1st DCA 1991). Finally, the District is precluded from making additional or supplemental findings of fact. *Fla. Power & Light Co. v. State Siting Bd*., 693 So. 2d 1025, 1026-27 (Fla. 1st DCA 1997); *See also N. Port Fla. v. Consol. Minerals*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994); *Boulton v. Morgan*, 643 So. 2d 1103 (Fla. 4th DCA 1994) (agency may not make supplemental findings of fact on an issue where the hearing officer has made no findings); *Cohn v. Dep't Pro. Regul.*, 477 So. 2d 1039 (Fla. 3d DCA 1985)

(agency has no authority to make supplemental findings on matters susceptible of ordinary proof; if missing findings are critical to resolve the issue, the agency should remand).

C. Essential Requirements of Law

A reviewing agency may also reject or modify a finding of fact if it determines from a review of the entire record, and states with particularity in the order, that the finding is based on a proceeding that did not comply with the "essential requirements of law." *See* § 120.57(1)(l), Fla. Stat. As stated by Judge Benton, in his concurring opinion in *Fla. Power & Light Co.*, 693 So. 2d at 1028, citing to the 1996 amendment to the Administrative Procedure Act:

> Except in the most extreme cases - those where "the proceedings did not comply with essential requirements of law"- the Administrative Procedure Act (APA) precludes an agency's changing an ALJ's finding of fact on any basis other than the lack of substantial competent evidence to support it. Among the revisions to the APA which will apply on remand, *see Life Care Ctrs. of Am. v. Sawgrass Care Ctr.*, 683 So. 2d 609 (Fla. 1st DCA 1996), is language intended to foreclose altogether evidentiary rulings in a final order entered after entry of a recommended order.

Id. See also Putnam Cnty. Env't Council, Inc. v. Dep't Env't Pro. & Georgia-Pacific Corp., No. 01-2442 at *5 (Fla. DEP Aug. 6, 2002) (Final Order) (holding that, based on a review of the record, the DOAH proceeding did not constitute an *extreme case* where procedural and evidentiary rulings of the ALJ adverse to the Petitioners were so "*egregious*" as to violate the "essential requirements of law" within the purview of §120.57(1)(1), Fla. Stat.) (emphasis added); *C.f. State Dep't of Fin. Serv. v. Mistretta*, 946 So. 2d 79, 80 (Fla. 1st DCA 2006) (holding that ALJ who sua sponte raised and decided the issue of default after the final hearing without giving parties an opportunity to present evidence and/or argument departed from the essential requirements of law by denying due process). Therefore, an agency may not reject or modify a finding of fact that is based on a proceeding that did not comply with the "essential requirements of law" except in the most extreme case.

D. Subject Matter Jurisdiction

With respect to conclusions of law in the recommended order, the agency may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretations of administrative rules over which it has substantive jurisdiction, provided the reasons for such rejection or modification are stated with particularity and the agency finds that such rejection or modification is as, or more reasonable than, the ALJ's conclusion or interpretation. *See* §120.57(1)(l), Fla. Stat.

The agency lacks subject matter jurisdiction to overturn an ALJ's rulings on procedural and evidentiary issues. *Barfield v. Dep't of Health*, 805 So. 2d 1008, 1012 (Fla. 1st DCA 2001) (the agency lacked jurisdiction to overturn an ALJ's evidentiary ruling); *Lane v. Dep't of Env't Prot.*, Nos. 05-1609, 05-1610, 05-1611. 05-1612, 05-1613, 05-1981 at FO (Fla. DOAH May 11, 2007, Fla. DEP August 2007) (the agency has no substantive jurisdiction over procedural issues, such as whether an issue was properly raised, and over an ALJ's evidentiary rulings); *Lardas v. Dep't of Env't Prot.,* No. 05-0458 at FO (Fla. DEP Oct. 24, 2005) (Final Order) (evidentiary rulings of the ALJ concerning the admissibility and competency of evidence are not matters within the agency's substantive jurisdiction).

The agency's authority to modify a recommended order is not dependent on the filing of exceptions. *Westchester Gen. Hosp. v. Dep't of Health and Rehab. Serv.*, 419 So. 2d 705 (Fla. 1st DCA 1982). However, when exceptions are filed, they become part of the record before the agency. *See* §120.57(1)(f), Fla. Stat. Under paragraph 120.57(1)(k) of the Florida Statutes, and Florida Administrative Code Rule 28-106.217(1), any party may file written exceptions to a recommended order with the agency responsible for rendering final action. Paragraph 120.57(1)(k) of the Florida

Statutes provides that an agency need not rule on an exception to a recommended order if the exception does not:

a) "clearly identify the disputed portion of the recommended order by page number or paragraph,"

b) "identify the legal basis for the exception, or"

c) "include appropriate and specific citations to the record."

A party filing an exception must specifically alert the agency to any perceived defects in the Administrative Law Judge's (ALJ) findings, and in so doing the party must cite to specific portions of the record as support for the exception. *Dep't of Env't Prot. v. S. Palafox Prop., Inc.,* No. 14-3674, 2015 WL 3525201 at *11 (Fla. Dep't Env't Prot. May 29, 2015) (holding that the remainder of petitioner's exception contained additional argument and no record citations; therefore, the exception was denied for failing to meet the requirements of section 120.57(1)(k), Florida Statutes.). Thus, an exception that simply refers to or attempts to incorporate by reference another exception fails to comply with the statutory requirements of paragraph 120.57(1)(k), and need not be ruled on. § 120.57(1)(k), Fla. Stat.

III. EXCEPTIONS AND RESPONSES

The Administrative Procedure Act provides the parties to an administrative hearing with an opportunity to file exceptions to a recommended order. *See* §§ 120.57(1)(b) and (k), Fla. Stat. The purpose of exceptions is to identify errors in a recommended order for the agency to consider in issuing its final order. As discussed above in Section II (Standard of Review), the agency may accept, reject, or modify the recommended order within certain limitations. When the agency considers a recommended order and exceptions, its role is like that of an appellate court in that it reviews the sufficiency of the evidence to support the ALJ's findings of fact and, in areas where

the District has substantive jurisdiction, the correctness of the ALJ's conclusions of law. In an appellate court, a party appealing a decision must show the court why the decision was incorrect so that the appellate court can rule in the appellant's favor. Likewise, a party filing an exception must specifically alert the agency to any perceived defects in the ALJ's findings, and in so doing the party must cite to specific portions of the record as support for the exception. *Rood v. Hecht & Dep't of Env't Prot*., No. 98-3879 (Fla. DOAH March 10, 1999) (Recommended Order); No. 98-3879 (Fla. DEP April 23, 1999) (Final Order); *Kenneth Walker & R.E. Oswalt d/b/a Walker/Oswalt v. Dep't of Env't Prot.,* No. 96-4318BID (Fla. DOAH Dec. 16, 1996) (Recommended Order); No. 96-4318BID (Fla. DEP March 11, 1997) (Final Order); *Worldwide Inv. Grp., Inc. v. Dep't of Env't Prot.*, No. 97-1498 (Fla. DOAH May 7, 1998) (Recommended Order); No. 97-1498 (Fla. DEP June 19, 1998) (Final Order). To the extent that a party fails to file written exceptions to a recommended order regarding specific issues, the party has waived such specific objections. *Env't Coal. of Fla., Inc. v. Broward Cnty.,* 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991).

In addition to filing exceptions, the parties have the opportunity to file responses to exceptions filed by other parties. *See* Fla. Admin. Code R. 28-106.217(2). The responses are optional and are meant to assist the agency in evaluating and ultimately ruling on exceptions by providing legal argument and citations to the record.

IV. RULING ON EXCEPTIONS

A. Ruling on Petitioners' Exceptions

Petitioners' Exception No. 1 (Proffer)

In their Exception No. 1, Petitioners take exception to the exclusion of exhibits and "Project files" that they believe should have been included in the record; specifically, Petitioners' Exhibits

42, 296, 1095, 1114, 1138-1150, 1201-1203, and "all agency official Project files from their website(s). . ." Petitioners assert that their exhibits 296, 42, 1095, 1114, and 1138-1150 were unable to be uploaded to the DOAH electronic portal due to "size limitations," but that these exhibits should nonetheless be included in the record. Petitioners also request that additional consideration be given to their *Motion for Extension of Time to File Exhibits* that was heard and decided by the ALJ on the first day of the final hearing, and request electronic links to documents be accepted in lieu of the documents themselves as to Petitioners' exhibits 1201, 1202, and 1203.

Petitioners fail to identify a legal basis for their exception as required by section 120.57(1)(k), Fla. Stat., so the District need not rule on it. § 120.57(1)(k), Fla. Stat. Nevertheless, as District staff point out in their Response to Petitioners' Exceptions, Petitioners' Exception No. 1 appears to re-argue their *Motion for Extension of Time to File Exhibits*, an evidentiary matter that the ALJ heard and decided on the first day of the final hearing. T. 35-38. In addition, Petitioners' Exhibits 42, 1095, and 1114 were accepted by the ALJ as a proffer; however, the ALJ did not allow Petitioners' Exhibit 1138 through 1150 (T. 1853-1856). The District does not have substantive jurisdiction to overturn the ALJ's evidentiary rulings. § 120.57(1)(l), Fla. Stat.; *Barfield*, 805 So. 2d at 1009 (holding that the agency lacked substantive jurisdiction to displace the ALJ's evidentiary rulings as to whether documents were inadmissible hearsay). For these reasons, Petitioners' Exception No. 1 is rejected.

Petitioners' Exception No. 2 (FOF 22)

In their Exception No. 2, Petitioners take exception to FOF 22 which states "[i]n 2005, the Interchange was added to the Transportation Organization list of projects contending that it "incorrectly identifies and gives unnecessary credence to the timeline of the Project, as it was not officially added until 2013." Petitioners fail to state a legal basis for their exception; therefore, the

District need not rule on it. § 120.57(1)(k), Fla. Stat. Nevertheless, a review of the record finds no competent substantial evidence to support a finding that the Project was added to the Transportation Organization list in 2005. *See* T. 71, 96 (testimony reflects the Project was added to the Transportation Organization list sometime after 2005). Rather, the evidence in the record supports that the Project was added to the Transportation Organization list in 2013. *See* T. 186. Accordingly, Petitioners' Exception No. 2 is accepted and FOF 22 is modified to read: "In 2013 ~~2005~~, the Interchange was added to the Transportation Organization list of projects."

Petitioners' Exception No. 3 (FOF 27)

Petitioners' Exception No. 3 takes exception to the part of FOF 27 that "the Partial Cloverleaf design alternative for the Project had "the highest public support/preference" and "impacts [to wetlands] were minimized to the extent practicable". Petitioners again do not assert a legal basis for this exception; rather, they argue that those parts of FOF 27 identified above are incorrect based on evidence and testimony. When ruling on an exception to a finding of fact, the issue is not whether the record contains evidence contrary to the finding of fact, but whether the finding is supported by competent substantial evidence. See *Fla. Sugar Cane League,* 580 So. 2d 846. As stated in Section II.b, above, it is within the ALJ's province to consider the evidence presented and weight the credibility thereof. *Brogan v. Carter*, 671 So. 2d 822, 823 (Fla. 1st DCA 1996); *Heifetz*, 475 So. 2d at 1281. If a finding of fact is supported by competent substantial evidence, it cannot be overturned. *Id.* There is competent substantial evidence in the record to support FOF 27 (*See* Jt. Ex. 25; T. 1361-62); therefore, it cannot be disturbed. Thus, Petitioners' Exception No. 3 to FOF 27 is rejected.

Petitioners' Exception No. 4 (Motion in Limine)

In Petitioners' Exception No. 4, Petitioners take exception to the ALJ's granting of the following motions on the first day of the hearing: (1) Respondent, St. Johns River Water Management District's, Motion in Limine to Exclude Irrelevant, Immaterial, and Potentially Confusing Evidence, filed October 12, 2023; (2) Respondent, Florida Department of Transportation's, Motion in Limine filed October 17, 2023; and (3) Respondent, Florida Department of Transportation's, Motion in Limine filed October 18, 2023. (R.O. at 4-5). As a basis for their exception, Petitioners contend that the ALJ's rulings "unduly prejudiced Petitioners and their ability to introduce evidence and provide expert testimony".

All of these evidentiary arguments were appropriately addressed and denied by the ALJ during the hearing. *See* T. 20-21 (ALJ ruling on *Motion in Limine* regarding proposed new rules); 305-07 (ALJ explaining his Order of Prehearing Instructions); 402-410 (ALJ disallowing testimony that was not provided by Petitioners' experts at their depositions); 1866-67 (ALJ again denying Petitioners' request to allow late undisclosed testimony).

Petitioners' exception fails to "clearly identify the disputed portion of the recommended order by page number or paragraph" as required by section 120.57(1)(k), Fla. Stat. For this reason, the District need not rule on it. *See Boundy v. School Bd. of Miami-Dade Cnty.*, 994 So. 2d 433 (Fla. 3d DCA 2008); *All Aboard Florida*, Case No. 16-6165, 2017 WL 2918050, at *6; *S. Palafox Prop.*, Case No. 14-3674, 2015 WL 4410468, at *11. Nonetheless, the District is without authority to disturb the ALJ's evidentiary rulings, such as those decided during the final hearing on the *Motions in Limine* raised in Petitioners' fourth exception. *Pets' Except.* at 5-6. § 120.57(1)(l), Fla. Stat.; *Barfield*, 805 So. 2d at 1012 (holding that the agency lacked substantive jurisdiction to displace the ALJ's evidentiary rulings as to whether documents were inadmissible hearsay); *Lane*,

Nos. 05-1609, 05-1610, 05-1611. 05-1612, 05-1613, 05-1981 (Fla. DEP August 2007) (Final Order) (the agency has no substantive jurisdiction over procedural issues, such as when an issue was properly raised, and over an ALJ's evidentiary rulings); *Lardas*, No. 05-0458 (Fla. DEP Oct. 24, 2005) (Final Order) (evidentiary rulings of the ALJ concerning the admissibility and competency of evidence are not matters within the agency's substantive jurisdiction). Based on the foregoing, Petitioners' Exception No. 4 is rejected.

Petitioners Exception No. 5 (FOF No. 38, COL No. 133)

In their Exception No. 5, Petitioners takes exception to FOF 38, that the "stormwater ponds create mathematically more storage capacity than currently exists on the Project site," on the basis that it is "unclear in its assessment of [the] Project site" and that it "erroneously concludes that storage will increase when current site holding capacity numbers were not assessed." Petitioners further argue that, therefore, COL 133, which finds that a preponderance of the evidence demonstrates that the Project will meet the 25-year, 24-hour design storm is also "faulty." Petitioners cite the testimony of one of their expert witnesses, Dr. Cho, in support of their view that the Project would increase flooding, in an attempt to have the District reweigh the evidence.

There is competent substantial evidence in the record to support FOF 38, and that the Project is designed to meet the 25-year, 24-hour storm event in support of COL 133. *See* T. 1161-62; 1236-37; 1529-30; Jt. Ex. 5, 7, 11. *See also* FOFs 51, 52. As a result, the District is without the authority to disturb these factual findings. *Brogan*, 671 So. 2d at 823; *Heifetz*, 475 So. 2d at 1281. The District also cannot reweigh expert testimony in order to reach a different conclusion. *Gross*, 819 So. 2d at 1004; *Fla. Ch. of Sierra Club v. Orlando Util. Comm'n* , 436 So. 2d 383, 388-89 (Fla. 5th DCA 1983).

Importantly, Petitioners did not take exception to FOFs 51 and 52, which find that the Project meets the 25-year, 24-hour design storm event, the 100-year, 24-hour design storm event, and that the "increase in storage volume provided stormwater management capacity in excess of that required." R.O. at 17, ¶¶ 51-52. These factual findings form the basis for COL 133, which concludes that a preponderance of the competent substantial evidence shows that the Project will meet the 25-year, 24-hour design storm event. R.O. at 38, ¶ 133. Having failed to take exception to these factual findings, Petitioners have waived any objection to these findings. *Env't Coal. of Fla.*, 586 So. 2d at 1213. This exception also fails to propose a conclusion of law that is "as or more reasonable" than COL 133. § 120.57(1)(l), Fla. Stat. Based on the foregoing, Petitioners' Exception No. 5 is rejected.

Petitioners Exception No. 6 (FOF No. 39, COL No. 140)

Petitioners' Exception No. 6, takes exception to the portion of FOF 39 which finds that FDOT's six floodplain compensating storage ponds will provide adequate floodplain storage to offset impacts to the 100-year floodplain, on the basis that the language in the R.O. uses the affirmative "*will* … provide compensating treatment" when, as Petitioners argue, "it is simply proposed to happen." *Pets' Except.* at 8. Petitioners also take exception to COL 140, which finds that Petitioners failed to meet their burden of proof to show that the Project would be ineffective to reduce post-development loading of impairment parameters [nutrients] to levels less than those in the pre-development conditions, on the basis that testimony was "wrongfully disallowed by the ALJ." *See id.* Finally, Petitioners argue that a portion of Dr. Cho's testimony as to wetland functions was overlooked. *Id.*

First, Petitioners exception to FOF 39 fails to provide an adequate legal basis for the exception and, thus, the District need not rule on it. § 120.57(1)(k), Fla. Stat.; *Indian River Farms*,

Case No. 16-6165, 2017 WL 2918050, at *6 ("Without an asserted legal basis for challenging the finding of fact and without any citations to the record that refute the finding of fact, this Agency need not rule on this exception."). Nevertheless, FOF 39 is supported by competent substantial evidence. *See* T. 1529-30. Because there is competent substantial evidence in the record to support FOF 39, the District cannot disturb this finding. *Brogan*, 671 So. 2d at 823; *Heifetz*, 475 So. 2d at 1281.

Next, Petitioners' exception to COL 140 incorporates the arguments in Petitioners' Exception Nos. 4 and 5, which are rejected, and again seeks to have the District overturn an evidentiary ruling by the ALJ. The District lacks substantive jurisdiction over the ALJ's evidentiary rulings, such as judging the credibility of witnesses, resolving conflicts, and deciding the admissibility of evidence. *See Peace River/Manasota*, 18 So. 3d at 1088; *Barfield*, 805 So. 2d at 1009; *Goss*, 601 So. 2d at 1234-35. Conclusion of Law 140 is based on FOFs 68, 75, and 76, to which Petitioners did not take exception, and FOF 74, which is supported by competent substantial evidence. T. 1529-30; 379:12-13; 381:25-382:06; 505:02-08; 1054:23-1055:11. The District is without authority to disturb the ALJ's factual findings that are supported by competent substantial evidence in the record. *Health Care and Ret. Corp. of Am. v. Dep't of Health & Rehab. Servs.*, 516 So. 2d 292, 296 (Fla. 1st DCA 1987). As to Dr. Cho's testimony regarding wetland functions, "[s]imply because some evidence is disregarded, that does not mean that the findings themselves are not based on other substantial, competent evidence, which the finder in his judgment relied upon." *Fla. Ch. of Sierra Club*, 436 So. 2d at 388-89. This exception also fails to propose a conclusion of law that is "as or more reasonable" than COL 140. § 120.57(1)(l), Fla. Stat. Petitioners' Exception No. 6 is rejected.

Petitioners Exception No. 7 (FOF No. 49, FOF No. 59)

In Exception No. 7, Petitioners argue that there is "no credible evidence" to support the finding in FOF 49 that the Interconnected Pond Routing ("ICPR") model is "accepted and reliable", and that FOF 59 is "wrong in its assumption" that the Project is reasonably expected to be capable of performing and functioning as designed. *Pets' Except.* at 8. In support of this exception, Petitioners cite the testimony of their expert, Dr. Barile, to argue that increasing rainfall events show that "old models for stormwater calculations will no longer be sufficient." *Id.* at 8-9. Petitioners then argue that the ALJ erroneously disallowed discussion of new stormwater rules not yet in effect. *Id.*

"[A]n agency may reject a finding only if there was *no* competent substantial evidence to support it." *Brogan*, 671 So. 2d at 823 (emphasis in original); *Health Care and Ret. Corp.*, 516 So. 2d at 296. Here, there is competent substantial evidence in the record to support the finding that the ICPR model is accepted and reliable. *See* T. 1159-60; 1526; 1573. Likewise, there is also competent substantial evidence in the record to support FOF 59 that the Project was designed by a State of Florida registered professional engineer and that it is capable of performing and functioning as designed. *See* T. 1154; 1532-33.

It would be impermissible for the District to reweigh the testimony of the experts. It is the function of the ALJ to weigh all the evidence, judge credibility of witnesses, draw permissible inferences, and make factual findings supported by competent substantial evidence. *Goss*, 601 So. at 1234-35. "Simply because some evidence is disregarded, that does not mean that the findings themselves are not based on other substantial, competent evidence, which the finder in his judgment relied upon." *Fla. Ch. of Sierra Club*, 436 So. 2d at 388-89.

Moreover, Petitioners did not take exception to FOF 68, which specifically addresses Dr. Barile's testimony regarding increased rainfall and finds that,

> Mr. Vavra credibly testified that if rainfall increases for a period, that increase will result in phosphorus figures at the same ratio for the pre- and post-development calculations. Thus, even though higher levels of rainfall may increase pre-development levels of total phosphorus in the runoff, the system as designed will be capable of providing the same degree of treatment and storage, thereby resulting in a comparable post-development reduction in the pre-development levels of phosphorus.

R.O. at 20, ¶ 68. The ALJ in this case weighed the experts' testimony and made a specific finding that increased rainfall would not substantially affect the level of phosphorus treatment from the stormwater system, but Petitioners take no exception to that finding of fact. To the extent a party fails to write written exceptions to a recommended order regarding specific issues, the party has waived such objections. *Env't Coal. of Fla.*, 586 So. 2d at 1213.

Finally, the District is without the substantive jurisdiction to overturn the ALJ's evidentiary rulings on the *Motions in Limine*. § 120.57(1)(k), Fla. Stat.; *Barfield*, 805 So. 2d at 1009 (holding that the agency lacked substantive jurisdiction to displace the ALJ's evidentiary rulings as to whether documents were inadmissible hearsay). For the foregoing reasons, Petitioners' Exception No. 7 is rejected.

Petitioners' Exception No. 8 (FOF 62)

Petitioners' Exception No. 8 takes exception to the last sentence of FOF 62, which finds that "[t]he Project will not contribute to iron, copper, or Enterococci." R.O. at 19, ¶ 62. Petitioners contend that that portion of the FOF 62 "ignores the fact that roads and vehicles can and do expel almost all metal pollutants" and that the finding was based at least partially on their experts being "wrongfully denied the chance to counter" the evidence.

The exception does not allege that there is no competent substantial evidence to support the portion of the finding at issue, nor does it "include appropriate and specific citations to the record" contrary to section 120.57(1)(k), Fla. Stat. Thus, the agency need not rule on it. Nevertheless, for the reasons set forth in the ruling on District's Exception No. III.B.1 (*Dist. Except.* at pgs. 18-19), below, Petitioners' Exception No. 8 related to the portion of FOF 62 that states "the project will not contribute to iron [or] copper" is accepted as there is no competent substantial evidence in the record that the project "is not expected to be a source of iron or copper." Rather, there is competent substantial evidence to support that roadway projects *do* contribute to iron and copper. *See* T. 1669:04-06; 429:09-16.

The remainder of the exception is an evidentiary argument regarding the proper scope of Petitioners' experts' testimony during the final hearing. The District is without the authority to revisit the ALJ's evidentiary rulings. § 120.57(1)(k), Fla. Stat.; *Barfield*, 805 So. 2d at 1009 (holding that the agency lacked substantive jurisdiction to displace the ALJ's evidentiary rulings as to whether documents were inadmissible hearsay).

Accordingly, the last sentence in FOF 62 is modified to read "The Project will ~~not~~ contribute to iron, copper, but will not contribute to ~~or~~ Enterococci." The remainder of Petitioners' exception no. 8 is rejected.

Petitioners Exception No. 9 (FOF No. 63)

Petitioners' Exception No. 9 takes exception to the last sentence of FOF 63, which provides that "[t]he evidence indicates that maintenance is a feature of the Permit, and is within the capabilities of DOT to perform," arguing that it "lacks basis in the evidence," and that Petitioners' experts provided contrary testimony. *Pets' Except.* at 10-11. Through this exception, Petitioners are asking the District to reweigh the evidence.

The agency cannot disturb the ALJ's factual findings that are supported by competent substantial evidence. *Brogan*, 671 So. 2d at 823; *Heifetz*, 475 So. 2d at 1281. There is competent substantial evidence in the record to support the challenged portion of FOF 63, that the Applicant has the capability to perform maintenance, and that maintenance is a feature of the Permit. *See* Jt. Ex. 1 at 6, ¶ 16; 7, ¶ 22. *See also* T. 63; 1087-89. *See also* FOF 60.

Petitioners did not take exception to FOF 60. R.O. at 18, ¶ 60 (finding that the Applicant "has a 'robust' highway maintenance program that looks at everything, including erosion and vegetation," and that "DOT has the capability to ensure that the maintenance obligations imposed by the terms and conditions of the Permit will be met."). The ALJ considered the testimony presented and made a specific finding that the Applicant has the capability to perform the maintenance required under the Permit, yet Petitioners take no exception to this finding of fact. To the extent a party fails to write written exceptions to a recommended order regarding specific issues, the party has waived such objections. *Env't Coal. of Fla.*, 586 So. 2d at 1213. Further, Petitioners ask the District to consider the testimony of Mr. Brower, Dr. Anderson, and Dr. Cho. The District cannot reweigh expert testimony in order to reach a different conclusion. *Gross*, 819 So. 2d at 1004 ("The Board is not permitted to reject or modify the findings made by the ALJ because it disagrees with the ALJ's findings, and it may not weigh the credibility of the witnesses and draw a different conclusion."); *Fla. Ch. of Sierra Club*, 436 So. 2d at 388-89 ("Simply because some evidence is disregarded, that does not mean that the findings themselves are not based on other substantial, competent evidence, which the finder in his judgment relied upon.").

The District lacks substantive jurisdiction over the ALJ's evidentiary rulings, such as judging the credibility of witnesses, resolving conflicts, and the weight given to certain evidence.

See Peace River/Manasota, 18 So. 3d at 1088; *Barfield*, 805 So. 2d at 1009; *Goss*, 601 So. 2d at 1234-35. Petitioners' Exception No. 9 is therefore rejected.

Petitioners Exception No. 10 (FOF No. 65, 69, 70, and 73)

In Exception No. 10, Petitioners take exception to FOFs 65, 69, 70 and 73. With regard to FOF 65, Petitioners again contend that there is no "credible" evidence to support the part of the finding that the Harper method is reliable, arguing that this part of the finding is contrary to their expert's testimony. *Pets' Except.* at 11. Petitioners also take exception to FOF 69, which finds that the Project "will provide greater removal of phosphorus than currently exists, which will result in a net improvement of water quality in the receiving waters," arguing that the modeling "does not take into account existing wetlands [*sic*] benefits." *Pets' Except.* at 12. Next, Petitioners take exception to the portions of FOFs 70 and 73 that "justif[y] the BMP Trains model as valid simply for being 'commonly used and accepted' by others when testimony and current water problems in Florida undermine that validity." *Id.*

Petitioners then argue that Mr. Vavra's modeling calculations did not include "the effects of disturbing and indeed destroying wetlands or forests as part of land clearing, or account for the benefits and ability of wetlands to treat [p]hosphorus," and that increased rainfall "must make a difference in the result calculated." *Id.* at 13. Petitioners also argue that the ALJ's finding in FOF 73 that compensating treatment will offset the impacts from the constrained areas "does not and should not mean 'equally offset.'" *Id.* Finally, Petitioners again raise the evidentiary argument that their experts "were wrongfully barred" from testifying as to the calculations and models. *Id.* at 14.

As to Petitioners' exceptions to FOFs 65, 70, and 73,[4] Petitioners fail to cite any appropriate and specific citations to the record regarding the Harper Method or the BMP Trains

[4] FOF 73 does not mention the BMP Trains model.

model in support of this exception. Therefore, the District need not rule on it. § 120.57(1)(k), Fla. Stat. Nevertheless, there exists competent substantial evidence in the record to support these findings. See T. 1172; 1634-35. Since there exists competent substantial evidence in the record to support the findings in FOF 65 and 70, they cannot be disturbed by the District. *Brogan*, 671 So. 2d at 823; *Heifetz*, 475 So. 2d at 1281.

As to FOF 69, District engineer Ms. Cook explained during the final hearing that the treatment function of the existing wetlands is not quantified, because District criteria already require a certain level of treatment from stormwater ponds in order to meet the rules. T. 1605. The ALJ also explained that the benefits of the existing wetlands are understood, but the issue for determination is whether the Project, as designed, meets the District's rules and criteria for permit issuance:

> I think we can all agree wetlands have a beneficial purpose, but that's not what we're here to decide. I'm here to decide whether this project proposed by the Department of Transportation meets the standards of the Water Management District. This is not a philosophical exposition on the environment. … And that's why we have these rules that are numeric criteria for the most part to make that decision as to whether the benefits of the wetland are being adequately dealt with when those wetlands are removed. Otherwise, if the wetlands didn't have any benefit or serve any purpose, you'd just go in and you'd lay concrete and you'd walk away. But that's not how it works.

T. 1606-1608. The ALJ memorialized this in FOF 76. R.O. at 22, ¶ 76 ("Much of the testimony in opposition to the stormwater system was directed not to whether it would function as designed, but rather to the belief that it is preferable to keep rain in natural areas 'rather than just flushing down into the canals.' However, as has been stated previously, the issue is not what is preferable or even desirable. The issue is whether the Project, as proposed and designed by DOT, meets the standards for issuance of an ERP permit."). Petitioners do not take exception to FOF 76.

The record demonstrates that the ALJ considered Petitioners' argument during the final hearing as to the loss of wetland functions and did not agree that the modeling calculations must include "the effects of disturbing and indeed destroying wetlands … or account for the benefits and ability of wetlands to treat [p]hosphorus." *See id.* The ALJ also considered Petitioners' arguments regarding increased rainfall in Volusia County, and made specific findings (FOFs 68 and 75, to which Petitioners also did not take exception) that even with higher levels of rainfall, the stormwater management system would provide "the same degree of treatment and storage, thereby resulting in a comparable post-development reduction in the pre-development levels of phosphorus." R.O. at 20, ¶ 68. The ALJ also specifically found in FOF 67 that the calculations showed a 29% reduction in phosphorus from pre-development to post-development. R.O. at 19-20, ¶ 67. Petitioners failed to take exception to FOFs 67, 68, 75 and 76; therefore, any objections to these specific findings are waived. *Env't Coal. of Fla., Inc. V. Broward Cty.,*586 So. 2d 1212 1213(Fla. 1st DCA 1991). Additionally, the District is not authorized to reweigh the evidence. *Gross*, 819 So. 2d at 1004; *Fla. Ch. of Sierra Club*, 436 So. 2d at 388-89. As a result, Petitioners' Exception No. 10 to FOFs 65, 69, 70 and 73 is rejected.

Petitioners' next exception to FOF 73, which finds that compensating treatment would offset impacts from constrained areas, also lacks citations to the record, so the District need not rule on it. § 120.57(1)(k), Fla. Stat. However, there is competent substantial evidence in the record to support it. See T. 1585. Therefore, the District cannot disturb this finding. *Brogan,* 671 So. 2d at 823; *Heifetz*, 475 So. 2d at 1281.

Finally, as to Petitioners' argument that their experts "were wrongfully barred" from testifying to the calculations, the District is without authority to revisit the ALJ's evidentiary rulings. § 120.57(1)(k), Fla. Stat.; *Barfield*, 805 So. 2d at 1009. The ALJ addressed this evidentiary

issue during the final hearing and allowed Petitioners to proffer expert testimony during the final hearing in areas where testimony was limited. T. 406-07; 410; 576-77; 274-287; 309-353; 490-492; 605-607; 1035-36. The District is without jurisdiction to disturb these evidentiary rulings. § 120.57(1)(k), Fla. Stat.; *Barfield*, 805 So. 2d at 1009. Based on the foregoing, Petitioners' Exception No. 10 is rejected in its entirety.

Petitioners Exception No. 11 (FOF No. 74)

In Exception No. 11, Petitioners take exception to FOF 74, claiming that the finding that Petitioners did not run any models or perform any calculations to demonstrate non-compliance with any District standard is "patently false." *Pets' Except.* at 14. Petitioners then cite portions of the final hearing transcript where their experts were allegedly "cut off" or "restricted" in their testimony. *Id.*

There is competent substantial evidence in the record to support FOF 74. All of Petitioners' experts that were potentially qualified[5] to perform modeling calculations testified that they had not. T. 379:12-13; 381:25-382:06; 505:02-08; 1054:23-1055:11. The District is without authority to disturb the ALJ's factual findings that are supported by competent substantial evidence in the record. *Health Care and Ret. Corp.*, 516 So. 2d at 296. Additionally, the ALJ allowed Petitioners to proffer expert testimony and exhibits. R.O. at 6. The District is without jurisdiction to revisit these evidentiary rulings. § 120.57(1)(k), Fla. Stat.; *Barfield*, 805 So. 2d at 1009. Accordingly, this exception is rejected.

[5] Petitioners' remaining expert, Mr. Collins, was accepted as an expert in transportation planning management, traffic studies and comprehensive plan analysis and was not qualified to perform modeling calculations for stormwater nutrients. T. 263: 16-19.

Petitioners Exception No. 12 (FOF No. 84 and 85)

In Petitioners' Exception No. 12, Petitioners argue that FOFs 84 and 85 should be rejected because stating that the Uniform Mitigation Assessment Method ("UMAM") "scores calculated herein are correct is wrong because of testimony (and lack of testimony from Respondents) to indicate sufficient analysis was not done nor verified." *Pets' Except.* at 14.

Petitioners appear to argue that there is no competent substantial evidence to support the finding in FOF 84 of the number and type of UMAM credit needed as mitigation for the Project because the Applicant did not offer testimony from the person who prepared the "initial wetland scorings" and other wetland-related documents for the Permit application. In a permit challenge case such as this, under section 120.569(2)(p), Fla. Stat., the Applicant and the District need only submit the permit application and the agency's staff report or notice of intent to approve the permit to meet their *prima facie* case demonstrating entitlement to a permit. § 120.569(2)(p), Fla. Stat. Subsequently, the petitioner initiating the permit challenge has the burden of ultimate persuasion and has the burden of going forward to prove the case in opposition to the permit through the presentation of competent substantial evidence. *Id*. In this case, the UMAM scores were submitted as part of the Applicant's and District's *prima facie* case. *See* Jt. Ex. 23; T. 53-54. Thus, the burden was on the Petitioners to dispute the UMAM scores. The ALJ found that "[n]o witness disputed the UMAM scores that formed the basis for the mitigation …" (R.O. at 24, ¶ 85), and Petitioners do not contend otherwise.

Moreover, the District cannot disturb findings of fact unless there is no competent substantial evidence in the record to support them. *Health Care and Ret. Corp.*, 516 So. 2d at 296. Notably, Petitioners did not object to the admission of Joint Exhibit 23, which contains the UMAM scores. T. 52-54. Because Petitioners made no contemporaneous objection to that exhibit, they

have waived any objection. *Tri-State Systems, Inc. v. Dep't of Transp.*, 500 So. 2d 212, 215 (Fla. 1st DCA 1986), *rev. denied*, 506 So. 2d 1041 (1987). Even if an objection had been made, the District lacks authority to rule on the admissibility of evidence. *See Barfield*, 805 So. 2d at 1009. Through this exception, Petitioners also attempt to re-argue their position during the final hearing and argument contained in their PRO. *See Pets' PRO* at 20. It would be improper for the District to reweigh evidence regarding the UMAM values. *Gross*, 819 So. 2d at 1004; *Fla. Ch. of Sierra Club*, 436 So. 2d at 388-89. Accordingly, Petitioners' Exception No. 12 is rejected.

Petitioners Exception No. 13 (FOF No. 87)

Petitioners' Exception No. 13 takes exception to the portion of FOF 87 describing the wetlands in the mitigation bank as "high quality" and "protected in perpetuity". However, Petitioners do not argue that there is no competent substantial evidence to support FOF 87; rather they base their exception on testimony of Ms. Shadix. *Pets' Ex.* at 16. *See id.*; *Health Care and Ret. Corp.*, 516 So. 2d at 296 (agency cannot disturb findings of fact unless there is no competent substantial evidence in the record to support them). Competent substantial evidence exists in the record supporting FOF 87. *See* T. 1366-68; 1457; 1476-77; 1782-83. Again, Petitioners seek to have the District reweigh the evidence presented at final hearing. The ALJ cites the testimony of Mr. Drauer in support of FOF 87, and specifically states, "[h]is opinion is accepted."

The District may not reweigh evidence, resolve conflicts in the evidence, or judge the credibility of witnesses. *Brown*, 667 So. 2d at 979 (citing *Heifetz*, 475 So. 2d at 1281). Thus, Exception No. 13 is rejected.

Petitioners Exception No. 14 (FOF No. 88)

Petitioners' Exception No. 14 takes exception to the portion of FOF 88 which finds that the proposed mitigation is adequate to offset wetland impacts within the Halifax River basin, where

the Project is located. Petitioners argue that this finding "ignores the intent of the rule, the hydrology of the area, and the evidence and testimonies provided." *Pets' Except.* at 16. While Petitioners acknowledge that the ALJ considered Petitioners' experts' testimony that the mitigation banks are not located within the Spruce Creek sub-basin, Petitioners continue to dispute that "this can only be addressed in a different forum." *Id.* As the ALJ noted in the R.O., Petitioners' argument is essentially a rule challenge to the District's mitigation banking rules. R.O. at 24, ¶ 85 ("However, this case is not a rule challenge, and the validly promulgated mitigation rule must be applied as written."). Nonetheless, Petitioners continue to argue that the mitigation banks are not hydrologically connected to Spruce Creek, citing the testimony of Dr. Anderson and Dr. Cho that they believe the mitigation is inadequate. *Pets' Except.* at 17-19.

This exception fails to identify a legal basis in support. As a result, the District is not required to rule on it. § 120.57(1)(k), Fla. Stat.; *Boundy*, 994 So. 2d 433; *All Aboard Florida*, 2017 WL 2918050, at *6; *S. Palafox Prop., Inc.*, 2015 WL 4410468, at *11. Nonetheless, this finding is supported by competent substantial evidence. T. 1774; 1780; 1785-86.

Further, Petitioners' citation to subsection 373.4136(6)(a)5., Fla. Stat., does not support their position. *See Pets' Except.* at 19. Subsection 373.4136(6)(a)5., Fla. Stat., provides that the water management district shall consider whether a proposed mitigation bank can reasonably offset certain types of wetland impacts within a specified geographic area when determining the boundaries of a mitigation service area. § 373.4136(6), Fla. Stat. Both mitigation banks here, Farmton North Mitigation Bank and Lake Swamp Mitigation Bank, underwent permitting through the District and were determined to reasonably offset impacts within the Halifax River basin, in accordance with the District's established Regional Watersheds for Mitigation Banking. A.H., Vol. II, App'x A.; T. 1774:15-25. Petitioners did not take exception to the finding in FOF 85 that "[n]o

witness disputed … that the mitigation bank service areas included the regional Halifax River watershed of which Spruce Creek is a part." R.O. at 24, ¶ 85. Petitioners, therefore, have waived any argument that the proposed mitigation does not meet District rules. *Env't Coal. of Fla.,* 586 So. 2d at 1213 (Fla. 1st DCA 1991).

The District is not authorized to reweigh the evidence to reach a different conclusion. *See Peace River/Manasota*, 18 So. 3d at 1088; *Barfield*, 805 So. 2d at 1009; *Goss*, 601 So. 2d at 1234-35. As a result, Petitioners' Exception No. 14 is rejected.

Petitioners Exception No. 15 (FOF No. 95)

Petitioners' Exception No. 15 takes exception to the last sentence in FOF 95 that "[t]here are no public conservation lands or lands under perpetual conservation or agricultural easement on both sides of I-95 or Pioneer Road for a wildlife crossing feature." *Pets' Except.* at 20. Petitioners appear to focus on the first half of this sentence, pointing out that there are lands under conservation easement nearby, and ignore the important modifier at the end of the sentence "for a wildlife crossing feature." Petitioners cite the testimony of one of their expert witnesses, Dr. Anderson, in support of their view that there are preserved lands, in an attempt to have the District reweigh the evidence. For additional support, Petitioners also rely on exhibits that either were not admitted (Petitioners' Exhibits 1048 – 1050) or were admitted for a very limited purpose (Petitioners' Exhibit 88). T. 846:06-07, 847:11-23, 848:18-19, 849:04-08; and T. 840:08-24.

There exists competent substantial evidence in the record to support FOF 95 that "[t]here are no public conservation lands or lands under perpetual conservation or agricultural easement on both sides of I-95 or Pioneer Road for a wildlife crossing feature." Jt. Ex. 2; FDOT Ex. 7, 11; T. 1382:23-1383:06; 1385:09-1387:12; 1388:04-11, 1720:22-1721:12; see also FOF 96. As a result, the District is without the authority to disturb these factual findings. *Brogan*, 671 So. 2d at 823;

Heifetz, 475 So. 2d at 1281. The District also cannot reweigh expert testimony in order to reach a different conclusion. *Gross*, 819 So. 2d at 1004; *Fla. Ch. of Sierra Club*, 436 So. 2d at 388-89.

Petitioners also allude to an objection to FOF 19 as "inaccurate," but fail to explain how anything in that paragraph is inaccurate.[6] Thus, the District need not rule on any objection to FOF 19. § 120.57(1)(k), Fla. Stat.; *see Boundy*, 994 So. 2d 433; *Indian River Farms Water Control Dist. v. All Aboard Florida Operations, LLC*, Case No. 16-6165, 2017 WL 2918050, at *6 (Fla. SJRWMD June 27, 2017) (holding that "[w]ithout an asserted legal basis for challenging the finding of fact and without any citations to the record that refute the finding of fact, this Agency need not rule on this exception"); *Dep't of Env't Prot. v. S. Palafox Prop., Inc.*, Case No. 14-3674, 2015 WL 4410468, at *11 (Fla. DEP May 29, 2015) (finding that the remainder of petitioner's exception contained more argument and no record citations; therefore, the remainder of the exception was denied for failing to meet the requirements of § 120.57(1)(k), Fla. Stat.). To the extent a party fails to file written exceptions to a recommended order regarding specific issues, the party has waived such specific objections. *Env't Coal. of Fla., Inc.*, 586 So. 2d at 1213. Based on the foregoing, Petitioners' Exception No. 15 is rejected.

Petitioners Exception No. 16 (FOF No. 96)

Petitioners' Exception No. 16 takes exception to FOF 96, arguing that "[t]he Finding of Fact in RO Paragraph # 96 that the Project will not affect the Doris Leeper Spruce Creek Preserve" failed to consider certain evidence provided by Petitioners. In support of this exception, Petitioners rely on Petitioners' Exhibits 18 and 307. Petitioners' Exhibit 18 was entered into evidence over objection for standing purposes only. (T. 692:06-693:12).

[6] Notwithstanding, there is competent substantial evidence in the record supporting FOF 19. *See* T. 1786.

It appears that the main issue of contention to Petitioners' is the first sentence of FOF 96 in which the ALJ found "The evidence that the Project would affect the Doris Leeper Preserve was not persuasive." However, it is within the ALJ's province to consider the evidence presented and weight the credibility thereof. *Brogan*, 671 So. 2d at 823; *Heifetz*, 475 So. 2d at 1281.

Finding of Fact 96 is supported by competent substantial evidence in the record. T. 955; 1452:7-18; 1082-83; 1815. As a result, the District is without the authority to disturb these factual findings. *Brogan*, 671 So. 2d at 823; *Heifetz*, 475 So. 2d at 1281. The District also cannot reweigh expert testimony in order to reach a different conclusion. *Gross*, 819 So. 2d at 1004; *Fla. Ch. of Sierra Club*, 436 So. 2d at 388-89. Petitioners' Exception No. 16 is therefore rejected.

Petitioners Exception No. 17 (FOF No. 99)

In their Exception No. 17, Petitioners take exception to the portion of FOF 99 finding that the Project would have no measurable adverse impact on recreational values in Spruce Creek or its tributaries, arguing that this part of FOF 99 ignores testimony and evidence offered by several Petitioners and Petitioners' expert, John Baker. *Pets' Except.* at 23. Through this exception, Petitioners are attempting to have the District reweigh the evidence. However, there is competent substantial evidence in the record to support the finding in FOF 99 that the Project would not affect recreational values, because the Project area is not navigational and is not used for boating or commercial fishing. Jt. Ex. 2; T. 1782:07-10. As a result, the District is without the authority to disturb these factual findings. *Brogan*, 671 So. 2d at 823; *Heifetz*, 475 So. 2d at 1281. The District also cannot reweigh expert testimony in order to reach a different conclusion. *Gross*, 819 So. 2d at 1004; *Fla. Ch. of Sierra Club*, 436 So. 2d at 388-89. As a result, Petitioners' Exception No. 17 is rejected.

Petitioners Exception No. 18 (FOF No. 102)

Petitioners' Exception No. 17 takes exception to the portion of FOF 102 that the "current condition and relative value of functions of the affected wetlands is, at best, moderate" on the basis that it ignores testimony and evidence that they are of higher value. As support, Petitioners rely on testimony from Petitioners' expert Dr. Cho, in an attempt to have the District reweigh the evidence.

There exists competent substantial evidence in the record to support the finding in FOF 102 that the current condition and relative value of functions of the affected wetlands is moderate. *See* Jt. Ex. 2; T. 1785:20-1786:06; 1844:15-1845:02. As a result, the District is without the authority to disturb these factual findings. *Brogan*, 671 So. 2d at 823; *Heifetz*, 475 So. 2d at 1281. The District also cannot reweigh expert testimony in order to reach a different conclusion. *Gross*, 819 So. 2d at 1004; *Fla. Ch. of Sierra Club*, 436 So. 2d at 388-89. Thus, Petitioners' Exception No. 18 is rejected.

Petitioners Exception No. 19 (FOF No. 100)

Petitioners' Exception No. 19 takes exception to the second sentence of FOF 100 that "[a]lthough there will be permanent loss of wetlands, such loss will be offset through mitigation" disputing the finding that the proposed mitigation will fully offset the permanent impacts of the Project. In support of this exception, Petitioners rely on testimony from Petitioners' experts Dr. Anderson and Dr. Cho to argue that the construction work itself will release an unspecified amount of phosphorus, in an attempt to have the District reweigh the evidence. Notably, the ALJ sustained objections to both Dr. Anderson and Dr. Cho offering an opinion about whether there is a net improvement for total phosphorus, because neither offered an opinion on that subject at their depositions. T. 402:02-410:19 (Dr. Anderson), 574:10-577:06 (Dr. Cho).

There exists competent substantial evidence in the record to support the finding in FOF 100 that proposed mitigation will fully offset the proposed permanent impacts of the Project. Jt. Ex. 2 at 6, 9; T. 99:12-25; 1780:08-16; 1810:09-13. There also exists competent substantial evidence in the record to support the findings regarding phosphorus, in FOF 67, 69, and 72, that the Project will result in a net improvement for total phosphorus discharged. Jt. Ex. 2, 8; T. 1170:11-1172:21, 1620:12-1621:14; 1637:05-10. As a result, the District is without the authority to disturb these factual findings. *Brogan*, 671 So. 2d at 823; *Heifetz*, 475 So. 2d at 1281. The District also cannot reweigh expert testimony in order to reach a different conclusion. *Gross*, 819 So. 2d at 1004; *Fla. Ch. of Sierra Club*, 436 So. 2d at 388-89. Additionally, Petitioners did not take exception to FOFs 67 or 72 regarding the net improvement for total phosphorus. Having failed to take exception to these related factual findings, Petitioners have waived any objection to the findings in FOF 100 as to water quality. *Env't Coal. of Fla.*, 586 So. 2d at 1213. Therefore, Petitioners' Exception No. 19 is rejected.

Petitioners Exception No. 20 (FOF No. 101)

Petitioners' Exception No. 20 takes exception to FOF 101, disputing the finding that there "was no evidence of significant historical or archaeological resources on or near the Project." In support of this exception, Petitioners rely on Petitioners' Exhibit 142 and testimony from Mr. Baker, to argue that "historic 'Old King's Road' is present on or near the Project site, and at minimum runs through neighboring Spruce Creek Preserve and several Project-adjacent parcels." *Pets' Except.* at 25. Notably, Mr. Baker was not qualified as an expert in any field and thus did not demonstrate expertise in history or archaeology. T. 114:03-13.

There is competent substantial evidence in the record to support the finding in FOF 101. Jt. Ex. 2 at 7, 12; Jt. Ex, 23, at 207-09; T. 1783:07-1785:06. The District is without the authority to

disturb the ALJ's factual findings. *Brogan*, 671 So. 2d at 823; *Heifetz*, 475 So. 2d at 1281. The District also cannot reweigh expert testimony in order to reach a different conclusion. *Gross*, 819 So. 2d at 1004; *Fla. Ch. of Sierra Club*, 436 So. 2d at 388-89. As a result, Petitioners' Exception No. 20 is rejected.

Petitioners' Requested Relief in Conclusion

In the Conclusion section of Petitioners' Exceptions, Petitioners "request that all agencies help in establishing a name for the "Unnamed Canal" – which to locals is called either Black Creek, Hawks Cypress Creek, or the Left Trail Tributary of Spruce Creek." *Pets' Except.* at 26. Such a request goes beyond the scope of FDOT's permit application and is outside the scope of the District jurisdiction here after ruling on exceptions (to grant the permit, deny the permit, or grant the permit with modified conditions). § 120.57(1)(k)-(l), Fla. Stat. As a result, Petitioners' requested relief in its Conclusion is rejected.

B. Rulings on Applicant's and District's Exceptions

Applicant's Exception No. 1 (COLs 173 and 175 – Burden of Proof) and District's Exception No. IV (pgs. 35-38) (COL 107 – Burden of Proof)

In Applicant's Exception No. 1 and in Exception No. IV of the District's Exceptions (*Dist. Except*. at pgs. 35-38), the Applicant and the District take exception to footnote 9 in COL 173 which suggests that after the Applicant established its *prima facie* case (as noted on page 5 and COL 124), Petitioners met their burden of ultimate persuasion under section 120.569(2)(p), Fla. Stat., and rebutted the Applicant's *prima facie* case (as to the positive public interest benefits of the project). In addition, the Applicant takes exception to COL 173 and contends that COL 173 should be modified to reflect that the Applicant met its burden of proof and the Petitioners did not meet their burden of ultimate persuasion.

In support of its exception to footnote 9 in COL 173, the District argues that there is no citation to any specific witness testimony or evidence that purportedly carried Petitioners' burden of ultimate persuasion under section 120.569(2)(p), Fla. Stat. to rebut the Applicant's *prima facie* case, and that there is no competent substantial evidence in the record to support such a conclusion.

Further, the District states that it is raising this exception in an abundance of caution to preserve it for a potential appeal, correctly acknowledging that the agency lacks subject matter jurisdiction to overturn an ALJ's rulings on the sufficiency of evidence and whether a party met its burden of proof under section 120.569(2)(p), Fla. Stat. *See Barfield,* 805 So. 2d at 1008, 1012 (the agency lacked jurisdiction to overturn an ALJ's evidentiary ruling); *Lane,* Nos. 05-1609, 05-1610, 05-1611. 05-1612, 05-1613, 05-1981 (Fla. DEP August 2007) (Final Order) (the agency has no substantive jurisdiction over procedural issues, such as whether an issue was properly raised, and over an ALJ's evidentiary rulings); *Lardas*, o. 05-0458 (Fla. DEP Oct. 24, 2005) (Final Order) (evidentiary rulings of the ALJ concerning the admissibility and competency of evidence are not matters within the agency's substantive jurisdiction).

Based on the foregoing, the Applicant's Exception No. 1 and the District's Exception No. IV (*Dist. Except*. at pgs. 35-38) to footnote 9 in COL 173 are rejected.

Applicant's Exception No. 4 (FOF 105)

In its Exception No. 4, FDOT takes exception to FOF/COL 105 that the seventh public interest test factor of section 10.2.3.7, A.H., Vol. I. was "neutral," rather than positive. FDOT contends that the ALJ incorrectly concluded the seventh public interest factor was neutral, based on the findings of fact in FOFs 102 through 105 and COL 165 that the Project, along with FDOT's proposed mitigation "will provide greater long term ecological value to the area than the value currently provided by the wetlands that will be impacted by construction of the project." FDOT

Ex. at 12, ¶ 32 (citing R.O. at 46, ¶ 165). Mitigation of greater long term ecological value was provided to meet the "out provision" in section 10.2.1.2(b), A.H., Vol. I, such that the applicant would not be required to implement practicable design modifications to reduce or eliminate impacts. *See* R.O. at 46 ¶ 165. While there is nothing in the rule that precludes mitigation provided to meet the "out provision" from also being considered under the seventh public interest factor (*Fla. Power Corp. v. Dep't of Env't Regul.*, 638 So. 2d 545, 546 (Fla. 1st DCA 1994)), the District does not find that merely meeting the requirement for the "out provision" in section 10.2.1.2(b) is sufficient in and of itself to assign it a greater weight under the public interest test.[7] The Applicant's argument in this case is not as or more reasonable than that of the ALJ. Therefore, Applicant's Exception No. 4 is rejected.

Applicant's Exception No. 5 (COL 107)

In Applicant's Exception No. 5, FDOT takes exception to COL 171 and states that the ALJ erred by not considering hurricane evacuations and other environmental emergencies when analyzing whether its project was clearly in the public interest test. In COL 171 the ALJ determined that "hurricane evacuation and traffic incident management are non-environmental factors that are not appropriate factors for determining whether the Project is 'clearly in the public interest'" pursuant to subsection 373.414(1)(a)1., Fla. Stat., subsection 62-330.302(1)(a)1., F.A.C., and subsection 10.2.3.1(a), A.H., Vol. I. R.O. at 47-52, ¶¶ 169-171.

The District is not bound by the ALJ's conclusions of law on matters within its substantive jurisdiction and has an obligation to correct any errors in conclusions of law contained in the recommended order. *See Harloff v. City of Sarasota,* 575 So. 2d 1324, 1327-28 (Fla. 2d DCA

[7] *See* discussion of assignment of positive, negative, and neutral weights in the District's ruling on Applicant's Exception No. 6 and the District's Exception no. III.C. (*Dist. Except*. at pgs. 23-29 and 31-34).

1991). For the reasons discussed in detail below, the District concludes that hurricane evacuation is an aspect of hurricane preparedness that is appropriately considered under section 10.2.3.1(a), A.H., Vol. I, when determining whether a project is clearly in the public interest.

The seven-factor public interest test first appeared in the Warren S. Henderson Wetlands Protection Act of 1984. The title to chapter 84-79, Laws of Florida, provides that "[i]t is the policy of this state to establish reasonable regulatory programs which provide for the preservation and protection of Florida's remaining wetlands to the greatest extent practicable, consistent with private property rights and the balancing of other state vital interests, …" With the passage of the act, the seven factors of the public interest test as restated in COL 166 were created. *See* §403.918(2)(a) (Supp. 1984). Although moved from Chapter 403 to Chapter 373, the statutory language of the seven factors has remained unchanged for the last 40 years.

From its beginning, courts have held that, in considering the impacts and improvement to the "public health, safety, or welfare, or property of others" under the public interest test, the District cannot consider non-environmental impacts or improvements. *Miller v. State, Dep't of Env't Regul.*, 504 So. 2d 1325, 1327 (Fla. 1st DCA 1987); *Grove Isle Ltd. v. Dep't of Env't Regul.*, 454 So. 2d 571, 574-75 (Fla. 1st DCA 1984); *see also Council of Lower Keys v. Charley Toppino & Sons, Inc.*, 429 So. 2d 67, 68 (Fla. 3d DCA 1983). However, the courts and agencies have also stated that the context of what constitutes an environmental impact/improvement must be broadly construed. *Riverside Club Condo. v. Adventure Constr. and Canvas*, *Inc.*, 9 F.A.L.R. 6207, 6216 (Fla. DER 1987); *Coscan Fla., Inc. v. Metro. Dade Cnty.*, Nos. 87-2520 and 87-2610, 1990 WL 750284 at 31-32 (Fla. DOAH Jan. 23, 1990) (Recommended Order); (Fla. DER Mar. 9, 1990) (Final Order) (could consider access for firefighting equipment because fire would foreseeably result in water pollution); *Protect Key West and the Fla. Keys, Inc. v. Monroe Cnty.*, No. 08-3823

at ¶ 96 (Fla. DOAH Apr. 20, 2009) (Recommended Order); (Fla. SFWMD Jun. 12, 2009) (Final Order) (could consider improvement of runway safety area at airport as reducing impacts to wetlands and surface waters by preventing an aircraft from overshooting or undershooting into wetlands and surrounding waters); *Tsolkas v. Gulfstream Nat. Gas Sys., LLC*, No. 07-3151 at ¶¶ 103 – 107 (Fla. DOAH Feb. 8, 2008) (Recommended Order); (Fla. DEP Mar. 19, 2008) (Final Order), *aff'd* 14 So. 3d 1076 (Fla. 4th DCA 2009) (could consider safety measures, such as wall thickness, when permitting pipeline due to risk of significant damage to environment if pipeline exploded); *Collier Cattle Corp. v. S. Fla. Water Mgmt. Dist.*, No. 97-1682 at ¶ 44 (Fla. DOAH Jun. 25, 1998) (Recommended Order); (Fla. DEP Aug. 4, 1998) (Final Order) (finding proposed activity did not adversely affect public health, safety, or welfare because extending the hydroperiod of a federal refuge reduced time the turf is dried out and provides protection against risk of fire caused by excessive drainage).

While what constitutes an environmental matter may be broadly construed, there are limits. The following matters have been found by ALJs and agencies to be non-environmental and, thus, these impacts or improvements are not analyzed under the public interest test:

1. Private Property Civil Issues (trespass, unauthorized uses of easements): *Miller*, 504 So. 2d at 1327; *Miller v. Woodland Lake Prop. Owners, Inc.*, No. 85-0236 at ¶ 28 (Fla. DOAH Oct. 11, 1985) (Recommended Order); *Vanwagoner v. Dep't of Transp.*, No. 95-3621 at ¶ 9 (Fla. DOAH Feb. 16, 1996) (Recommended Order); (Fla. DER Apr. 14, 1996) (Final Order); *Ryan v. Spang*, No. 86-0992 at ¶ 5 (Fla. DOAH Jul. 18, 1986) (Recommended Order); (Fla. DER Aug. 14, 1986) (Final Order).

2. Economic Impacts on Business: *Mandarin Landing Assoc., Ltd. v. Dep't of Transp.*, No. 85-0614 at COL ¶ 4 (Fla. DOAH Sept. 13, 1985) (Recommended Order on Motion to Dismiss); (Fla. DER Oct. 31, 1985) (Final Order on Motion to Dismiss).

3. Light from Vehicular Headlights: *Greene v. Taylor Cnty. Comm'n*, Nos. 91-4858 and 91-4859 at ¶ 22 (Fla. DOAH Apr. 3, 1992) (Recommended Order); (Fla. DER Apr. 23, 1992) (Final Order).

4. Increased Traffic Flow: *Id.*; *Fla. Bay Initiative, Inc. v. Fla. Dep't of Transp.*, Nos. 95-5525, 95-5527, and 95-5526 at ¶ 219 (Fla. DOAH Apr. 11, 1997) (Recommended Order); Fla. SFWMD Jun. 20, 1997) (Final Order).

5. Traffic Congestion: *Fla. Bay Initiative, Inc. v. Fla. Dep't of Transp.*, Nos. 95-5525, 95-5527, and 95-5526 at ¶ 219 (Fla. DOAH Apr. 11, 1997) (Recommended Order); (Fla. SFWMD Jun. 20, 1997) (Final Order); *Fla. Wildlife Fed'n v. S. Fla. Water Mgmt. Dist.*, No. 04-3084 at ¶116 (Fla. DOAH Dec. 3, 2004) (Recommended Order); (Fla. SFWMD Dec. 8, 2004) (Final Order), *aff'd* 902 So. 2d 812 (Fla. 4th DCA 2005).

6. Quality of Life: *Fla. Wildlife Fed'n v. S. Fla. Water Mgmt. Dist.*, No. 04-3084 at ¶116 (Fla. DOAH Dec. 3, 2004) (Recommended Order); (Fla. SFWMD Dec. 8, 2004) (Final Order), *aff'd* 902 So. 2d 812 (Fla. 4th DCA 2005); *Vanwagoner v. Dep't of Transp.*, No. 95-3621 at ¶ 10 (Fla. DOAH Feb. 16, 1996) (Recommended Order); (Fla. DER Apr. 14, 1996) (Final Order); *Fla. Bay Initiative, Inc. v. Fla. Dep't of Transp.*, Nos. 95-5525, 95-5527, and 95-5526 at ¶ 206 (Fla. DOAH Apr. 11, 1997) (Recommended Order); (Fla. SFWMD Jun. 20, 1997) (Final Order).

7. School Overcrowding: *Fla. Bay Initiative, Inc. v. Fla. Dep't of Transp.*, Nos. 95-5525, 95-5527, and 95-5526 at ¶ 206 (Fla. DOAH Apr. 11, 1997) (Recommended Order); (Fla.

SFWMD Jun. 20, 1997) (Final Order); *Fla. Wildlife Fed'n v. S. Fla. Water Mgmt. Dist.*, No. 04-3084 at ¶ 116 (Fla. DOAH Dec. 3, 2004) (Recommended Order); (Fla. SFWMD Dec. 8, 2004) (Final Order), *aff'd* 902 So. 2d 812 (Fla. 4th DCA 2005).

8. Decreased Property Values: *Miller*, 504 So. 2d at 1327; *Greene v. Taylor Cnty. Comm'n,* Nos. 91-4858 and 91-4859 at ¶ 22 (Fla. DOAH Apr. 3, 1992) (Recommended Order); (Fla. DER Apr. 23, 1992) (Final Order).

9. Potential Reduction in Tax Base: *Mandarin Landing Assoc., Ltd. v. Dep't of Transp.*, No. 85-0614 at COL ¶ 4 (Fla. DOAH Sept. 13, 1985) (Recommended Order on Motion to Dismiss); (Fla. DER Oct. 31, 1985) (Final Order on Motion to Dismiss).

10. Increased Condemnation Costs: *Id.*

11. Boater Conduct (skill, intoxication): *Retreat House, LLC v. Damico*, No. 10-10767 at 28 (Fla. DOAH Oct. 14, 2011) (Recommended Order); (Fla. DEP Jan. 12, 2012) (Final Order).

12. Public Access to Project: *Bayshore Homeowners Assoc., Inc. v. Dep't of Env't Regul.*, No. 84-2639 at ¶¶ 7-8 (Fla. DOAH Feb. 25, 1985) (Recommended Order); (Fla. DER Apr. 11, 1985) (Final Order).

13. Creation of New Jobs: *Port Everglades Auth. V. Dep't of Env't Regul.*, No. 86-0039 at COL ¶ 3, Fn. 7 (Fla. DOAH Feb. 20, 1987) (Recommended Order); Fla. DER Apr. 6, 1987) (Final Order).

14. Happiness of Residents: *Vanwagoner v. Dep't of Transp.*, No. 95-3621 at ¶ 10 (Fla. DOAH Feb. 16, 1996) (Recommended Order); (Fla. DER Apr. 14, 1996) (Final Order); *Fla. Bay Initiative, Inc. v. Fla. Dep't of Transp.*, Nos. 95-5525, 95-5527, and 95-5526 at ¶ 285 (Fla. DOAH Apr. 11, 1997) (Recommended Order); Fla. SFWMD Jun. 20, 1997) (Final Order).

15. Ambiance: *Vanwagoner v. Dep't of Transp.*, No. 95-3621, 1996 WL 405159 at ¶ 10 (Fla. DOAH Feb. 16, 1996) (Recommended Order); (Fla. DER Apr. 14, 1996) (Final Order); *Fla. Bay Initiative, Inc. v. Fla. Dep't of Transp.*, Nos. 95-5525, 95-5527, and 95-5526 at ¶ 285 (Fla. DOAH Apr. 11, 1997) (Recommended Order); (Fla. SFWMD Jun. 20, 1997) (Final Order).

16. Aesthetics: *Vanwagoner v. Dep't of Transp.*, Case No. 95-3621 at ¶ 10 (Fla. DOAH Feb. 16, 1996) (Recommended Order); (Fla. DER Apr. 14, 1996) (Final Order); *Fla. Bay Initiative, Inc. v. Fla. Dep't of Transp.*, Nos. 95-5525, 95-5527, and 95-5526 at ¶¶ 206 and 285 (Fla. DOAH Apr. 11, 1997) (Recommended Order); Fla. SFWMD Jun. 20, 1997) (Final Order).

17. Potential for Increased Crime: *Fla. Bay Initiative, Inc. v. Fla. Dep't of Transp.*, Nos. 95-5525, 95-5527, and 95-5526 at ¶ 206 (Fla. DOAH Apr. 11, 1997) (Recommended Order); (Fla. SFWMD Jun. 20, 1997) (Final Order).

Discussion of Applicant's Handbook, Vol. I

The Florida Department of Environmental Protection and the water management districts developed the statewide portion of the Applicant's Handbook to help persons understand the rules, procedures, standards, and criteria that apply to the ERP program. § 1.0, A.H., Vol. I. The public interest test is set forth in sections 10.2.3 (a) through (g), A.H. Vol. I. The criterion relating to public health, safety, or welfare or the property of others includes four subfactors. *See* §§ 10.2.3(a) and 10.2.3.1, A.H. Vol. I. Section 10.2.3.1, A.H., Vol. I states:

> [T]he Agency will evaluate whether the regulated activity located in, on, or over wetlands or other surface waters will cause:
>
> (a) An environmental hazard to public health or safety or improvement to public health or safety with respect to environmental issues. Each applicant must identify potential environmental public health or safety issues resulting from their project. Examples of these issues include: mosquito control; proper disposal of solid, hazardous, domestic or industrial waste; aids to navigation; *hurricane preparedness* or cleanup; environmental remediation, enhancement or restoration; and similar

> environmentally related issues. For example, the installation of navigational aids may improve public safety and may reduce impacts to public resources[.]

(emphasis added) ("Factor 1"). By its own language, the Applicant's Handbook states that "hurricane preparedness" is an environmental matter to be considered as part of the public interest test.

When adopting the statewide ERP Applicant's Handbook, DEP and the water management districts were directed to rely primarily on the rules of the department and water management districts in effect immediately prior to the effective date of section 373.4131, Fla. Stat. § 373.4131(c), Fla. Stat. As can be seen from the language below, the relevant language from the previous applicant's handbooks was adopted with no changes into the statewide ERP applicant's handbook. *Compare* section 12.2.3.1 of the St. Johns River Water Management District Applicant's Handbook for the Management and Storage of Surface Waters (Dec. 27, 2010) *with* section 10.2.3.1, A.H., Vol. I. Section 12.2.3.1 of the St. Johns River Water Management District Applicant's Handbook for the Management and Storage of Surface Waters (Dec. 27, 2010) stated:

> [T]he District will evaluate, whether the regulated activity located in, on, or over wetlands or other surface waters will cause:
>
> an environmental hazard to public health or safety or improvement to public health or safety with respect to environmental issues. Each applicant must identify potential environmental public health or safety issues resulting from their project. Examples of these type of issues include: mosquito control; proper disposal of solid, hazardous, domestic or industrial waste; aids to navigation; *hurricane preparedness* or cleanup; environmental remediation, enhancement or restoration; and similar environmentally related issues. For example, the installation of navigational aids may improve public safety and may reduce impacts to public resources.

(emphasis added). Notably, the three largest water management districts had identical language in their respective applicant's handbooks for the section discussing hurricane preparedness prior to the adoption of the statewide ERP applicant's handbook. *See also* § 3.2.3.1, Southwest Florida

Water Management District Basis of Review for Management and Storage of Surface Waters ERP Applications (Dec. 29, 2011) and § 4.2.3.1 of South Florida Water Management District Basis of Review for ERP Applications (Jul. 4, 2010). Keeping the identical language when the statewide ERP applicant's handbook was adopted demonstrates that DEP and the water management districts complied with the statutory directive to rely on the rules in effect immediately prior to the effective date of 373.4131 and reaffirms that considering hurricane preparedness is valid under Factor 1 of the public interest test.

Interpretation of the phrase "hurricane preparedness"

Through chapters 373 and 403, Fla. Stat., the legislature authorizes the District to consider public health, safety, and welfare in an environmental context. In interpreting legislative intent, one must look to the plain language of the rule or statute at issue. *Thayer v. State*, 335 So. 2d 815, 816 (Fla. 1979); *Carson v. Miller*, 370 So. 2d 10, 11 (Fla. 1979). Similarly, the District cannot ignore the words "hurricane preparedness" in the rule because that would render them "mere surplusage." S*tein v. Biscayne Kennel Club*, 199 So. 2d 364, 365 (Fla. 1940); *Sierra Club v. Dep't of Env't. Prot.*, 357 So. 2d 737, 742 (Fla. 1st DCA 2023). One must presume that the rulemaking body has inserted the language for a purpose. *Stein*, 199 So. 2d at 364.

Here, the ALJ did not address "hurricane preparedness" in section 10.2.3.1(a), A.H., Vol. I, and did not make definitive findings of fact regarding whether or not "hurricane preparedness" applied to the Applicant's Project or whether it would provide a hurricane evacuation benefit. Instead, the ALJ grouped the Project's hurricane improvements with the general traffic safety considerations before determining that neither was appropriate for consideration under section 10.2.3.1(a), A.H., Vol. I. R.O. at 25-27, 47-52 ¶¶ 90-93, 169-71.

Hurricane evacuation is within the umbrella of "hurricane preparedness." "Hurricane preparedness" is not defined in chapter 373, Fla. Stat., rule 62-330, F.A.C., or the Applicant's Handbook. In such circumstances, subsection 2.0(b), A.H., Vol. I dictates that as an undefined term, it should be given its ordinary and customary meaning. When a hurricane approaches, one of the first steps necessary to ensuring preparedness is to determine the likelihood of the need to evacuate the area being impacted.

Accordingly, hurricanes and hurricane evacuation have been consistently reviewed by ALJs, the Florida Department of Environmental Protection ("DEP"), and the water management districts when considering the impacts or improvements to the "public health, safety, or welfare, or property of others" under the public interest test. *Citizens for Smart Growth, Inc. v. Dep't of Transp.*, Nos. 10-3316, 10-3317, 10-3318 at ¶ 39 (Fla. DOAH Dec. 28, 2010) (Recommended Order); (Fla. SFWMD Feb. 14, 2011) (Final Order) (road and bridge project determined to benefit public health, welfare, and safety by improving hurricane evacuation); *Captiva Civic Assoc., Inc. v. S. Fla. Water Mgmt. Dist.*, No. 06-0805 at ¶ 73 (Fla. DOAH Nov. 8, 2006) (Recommended Order); (Fla. SFWMD Dec. 14, 2006) (Final Order) (comparing existing conditions of project area to provide protection from hurricanes with conditions contemplated by the proposed project); *Vanwagoner v. Dept. of Transp.*, No. 95-3621 at ¶¶ 115-20 (Fla. DOAH Feb. 16, 1996) (Recommended Order); Fla. DER Apr. 14, 1996) (Final Order) (analyzing proposed high-level bridge's impact on resident's ability to evacuate island); *Tsolkas v. Gulfstream Nat. Gas Sys., LLC*, No. 07-3151 at ¶ 108 (Fla. DOAH Feb. 8, 2008) (Recommended Order); Fla. DEP Mar. 19, 2008) (Final Order), *aff'd* 14 So. 3d 1076 (Fla. 4th DCA 2009) (analyzing location and depth of proposed pipeline in order to determine risk of damage from hurricane); *Fla. Bay Initiative, Inc. v. Fla. Dep't of Transp.*, Nos. 95-5525, 95-5527, and 95-5526 at ¶¶ 215, 223-232 (Fla. DOAH Apr. 11, 1997)

(Recommended Order); (Fla. SFWMD Jun. 20, 1997) (Final Order) (recommended order dedicates nearly 15 paragraphs to discussing project's improvements to hurricane evacuation).

Based on the above, the District concludes that the ordinary and customary meaning of "hurricane preparedness" includes hurricane evacuation and the facilitation thereof. The District may, therefore, give consideration to whether a project provides utility for hurricane evacuation when considering whether a project meets the public interest test under subsection 10.2.3.1(a), A.H., Vol. I.

Analysis of Cases Cited by ALJ in the Recommended Order in this Case

The ALJ cites several cases regarding the general proposition that non-environmental factors are not relevant to the public interest test of 373.414, Fla. Stat. The District agrees with the general proposition but concludes that the issue in the instant case is more nuanced. R.O. at 48-52, ¶171. After reviewing the cited recommended orders, agency final orders, and (where applicable) subsequent appellate opinions, the District found that hurricane evacuation was considered when determining whether the specific project met the public interest test. However, those same cases indicate that hurricane preparedness/evacuation is distinguishable from other, "every day" traffic considerations. Effectively, the case law has served to "rule out" several traffic and traffic planning considerations as being non-environmental in nature but has not done so specifically as to hurricane preparedness/evacuation. Rather, the case law is either silent as to hurricane preparedness/evacuation or has given it favorable treatment for purposes of the public interest test. A closer examination of those cases specifically referencing hurricane evacuation is discussed below.

The Second DCA's opinion in *Save Anna Maria, Inc. v. Department of Transportation*, states that agency review of the public interest criteria is limited to environmental impacts and that

the agency cannot consider non-environmental factors. 700 So. 2d 113, 116 (Fla. 2d DCA 1997). However, reviewing the final order of the case helps explain what were considered non-environmental improvements or impacts. In its final order, DEP rejected the ALJ's conclusions of law stating that the "happiness" of the residents and the impact of the project's design on ambiance and aesthetics were valid considerations under the public interest test. *Vanwagoner v. Dep't of Transp.*, No. 95-3621, 1996 WL 405159 at 10 (Fla. DOAH Feb. 16, 1996) (Recommended Order); (Fla. DER Apr. 14, 1996) (Final Order). Notably, the final order specifically determined that emergency evacuation is an appropriate consideration when evaluating Factor 1. *Id.* at 11.

Additionally, the final order for one of the recommended orders cited in *Goldberg*, styled as *Florida Bay Initiative, Inc. v. Florida Department of Transportation*, makes a compelling argument for why hurricane evacuation should be considered under the public interest test. 19 F.A.L.R. 3731-33 (Fla. SFWMD 1997); *see also* No. 16-1018 R.O. (Fla. DOAH Nov. 8, 2016) (Recommended Order); (Fla. SFWMD Dec. 23, 2016) (Final Order). In *Florida Bay Initiative*, the petitioners' exception number 7 essentially asked South Florida Water Management District (SFWMD) to not consider public safety factors when analyzing the public interest test. *Id.* at 3731. In its final order, SFWMD rejected that argument, stating:

> Petitioners claim we should give a resounding response of "So what!" to the following findings of Judge Arrington:
>
> Dr. Robert Sheets, former director of the National Hurricane Center, testified that the failure to make improvements to the roadway would be "unconscionable." Dr. Sheets and Billy Wagner, the Director of Emergency Management for Monroe County, presented very compelling and very persuasive testimony that this project is essential for hurricane evacuation purposes. (R.O. ¶ 228) (Emphasis added.)
>
> If we were to make such a ruling, this would place FDOT in a very untenable position. If a local government came to FDOT with a traffic safety concern, however serious, and the only resolution to that concern was to make roadway improvements in wetlands, the response of FDOT would be:

> "Sorry, the environmental permitting agency will not allow us to make roadway improvements in wetlands." If FDOT on its own determined a roadway to be unsafe, it would not be able to take the initiative to correct safety problems if they required construction activities in wetlands - even though FDOT might face liability because of maintaining a knowingly hazardous situation.
>
> FDOT is not claiming that in addressing public safety concerns it has unfettered authority to destroy wetlands to solve the concerns. Rather, FDOT claims that such concerns are part of the balancing test; and if the result of the construction would be adverse environmental impacts, that FDOT should have the opportunity to mitigate for these impacts. As the statute states, if FDOT "is unable to otherwise meet" the public interest criteria, we "shall consider measures proposed by or acceptable to the applicant to mitigate adverse effects which may be caused by the project." Section 403.918(2)(b), Fla. Stat. (1991). The public interest statute therefore categorically rejects the fundamental argument of Petitioners that a permit applicant cannot mitigate for wetland impacts made necessary to address public safety concerns.

Id. at 3732-33.

Conclusion as to Hurricane Evacuation

The agency may correct conclusions of law contained in the recommended order that are within its substantive jurisdiction. *See Harloff*, 575 So. 2d at 1327-28. As discussed above, the District rejects the ALJ's interpretation of section 10.2.3.1(a), A.H., Vol. I, to exclude hurricane evacuation from consideration under the public interest test. Instead, the District substitutes an as or more reasonable legal conclusion that hurricane evacuation is appropriately considered under section 10.2.3.1(a), A.H., Vol. I. § 120.57(1)(l), Fla. Stat. Paragraphs 169-171of the R.O. are modified as described herein.

However, the District recognizes that the ALJ did not make findings of fact definitively stating whether or not the Project would provide a hurricane evacuation benefit because he had also interpreted that consideration not to be legally relevant to the public interest test under his interpretation of section 10.2.3.1(a), A.H., Vol. I. *See* FOF 93. The District lacks the ability to

perform supplemental fact finding. § 120.57(1)(l), Fla. Stat.; *Fla. Power & Light Co.*, 693 So. 2d at 1026-27. Thus, the District is constrained to accept the ALJ's conclusions of law giving no weight to the project's (potential) utility for hurricane evacuation as written because a substituted legal conclusion giving the project positive weight would lack underlying factual support in the R.O. and would therefore not be as or more reasonable than the ALJ's existing COLs.

The Applicant's argument that traffic incident management should be considered under the public interest test is inconsistent with caselaw and is rejected. Many cases have expressed that general safety concerns, such as traffic congestion and increased traffic flow, are not considered under the public interest test. *See e.g.*, *Greene v. Taylor Cnty. Comm'n*, Nos. 91-4858 and 91-4859 at ¶ 22 (Fla. DOAH Apr. 3, 1992) (Recommended Order); (Fla. DER Apr. 23, 1992) (Final Order); *Fla. Bay Initiative, Inc. v. Fla. Dep't of Transp.*, Nos. 95-5525, 95-5527, and 95-5526 at ¶ 219 (Fla. DOAH Apr. 11, 1997) (Recommended Order); (Fla. SFWMD Jun. 20, 1997) (Final Order); *Fla. Wildlife Fed'n v. S. Fla. Water Mgmt. Dist.*, No. 04-3084 at ¶ 116 (Fla. DOAH Dec. 3, 2004) (Recommended Order); (Fla. SFWMD Dec. 8, 2004) (Final Order), *aff'd* 902 So. 2d 812 (Fla. 4th DCA 2005). Without more information regarding what comprises traffic incident management – and the factual findings to support it – the Applicant's interpretation is not as or more reasonable than the ALJ's.

While the District agrees with the Applicant as to part of its Exception No. 5, for the reasons stated above, the District is unable to accept it in its entirety. Therefore, the Applicant's Exception No. 5 is granted in part insofar as hurricane preparedness and the project's (potential) utility for hurricane evacuation should have been considered under section 10.2.3.1(a), A.H., Vol. I. This ruling is as or more reasonable than that of the ALJ. Applicant's Exception No. 5 is denied in part insofar as the Applicant requests that the District make additional or supplemental findings of fact

and is denied in part insofar as Applicant requests that the District reject the ALJ's COLs giving neutral weight to the project's (potential) hurricane evacuation benefits.

District Exception No. III.B.1. (pgs. 18-19) and Petitioners' Exception No. 8 (FOF 62)

In the District's Exception No. III.B.1 (*Dist. Except*. at pgs. 18-19), the District takes exception to a portion of the last sentence of FOF 62 in the R.O. to the extent that it states that the Project will not contribute to iron or copper as not being supported by competent substantial evidence. The District's Exception would instead acknowledge that the Applicant's Project will contribute to iron and copper (and, as further discussed in District Exception No. III.A.1.b., that the Project is further expected to provide a net improvement as to iron and copper.)

The District acknowledges that page 3 of the Technical Staff Report ("TSR") dated September 25, 2023 (Jt. Ex. 002C and 002D), includes a statement supporting the finding that the Project would not be expected to contribute to iron or copper. However, the TSR was further revised on October 6, 2023, to correct that statement. See Jt. Ex's 002 and 002E. Thus, that statement in Joint Exhibits 002C and 002D does not rise to the level of being "competent substantial" evidence because it is not sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. *Perdue*, 755 So. 2d 660. It was undisputed by both Petitioners' and the District's experts at the final hearing that the Project was expected to contribute to iron and copper. T. 1669:04-06; 429:09-16. Finally, the ALJ indicates elsewhere that he did not intend to find that the Project would not contribute to iron and copper because he subsequently went on to analyze and determine whether the Project met the District's net improvement requirements as to iron and copper. As a result, there is no potential error in FOF 62 as having contributed to the outcome of this case and that it is more in the nature of a clerical error to be corrected. Accordingly, District's Exception No. III.B.1., is accepted and the last

sentence of FOF 62 is modified to read: "The Project will ~~not~~ contribute to iron, copper, but will not contribute to ~~or~~ Enterococci."

A portion of Applicant Exception No. 3 and District Exception No. III.B.2 (pgs. 19-20) (92.B.)

In a portion of Applicant's Exception No. 3 and the District's Exception No. III.B.2. (*Dist. Except*. at pgs. 19-20), the Applicant and the District take exception to the portion of FOF 92.B that quotes Mr. Drauer as not being supported by competent substantial evidence because it is inconsistent with Mr. Drauer's trial testimony. The Applicant and District then further request that the District give additional weight to the Project under section 10.2.3.1(c), A.H., Vol. I, in a manner consistent with the Applicant and the District's requested modifications to the R.O.'s recitation of Mr. Drauer's testimony.

The District agrees that a portion of FOF 92.B. appears to misquote Mr. Drauer's testimony as reflected by page 1390 of the hearing transcript. There is no competent substantial evidence in the record that Mr. Drauer can be accurately quoted as having said the statement "meet[ing] the water quantity criteria in the Applicant's Handbook, Volume 2, [] would mean that factor would be neutral" during his testimony. Rather, Mr. Drauer's testimony in full was that "In fact, I believe the project does meet the water quantity criteria in the Applicant's Handbook, Volume 2, which would mean that factor would be neutral, *at a minimum*." T. 1390:14-17 (emphasis added).

The ALJ in two instances included brackets in his variation of Mr. Drauer's statement as quoted in FOF 92.B.: the first changes the word "meet" to "meeting" and the second omits the word "which." Neither bracketed change appears to reflect an intent by the ALJ to reject or condition his subsequent acceptance of this portion of Mr. Drauer's testimony, as indicated by the following sentence in FOF 92.B. Instead, the ALJ appears to have made the changes to Mr. Drauer's testimony utilizing brackets to improve the flow of the sentence in its entirety without

changing its underlying meaning, which is an accepted convention common in legal writing. However, the District is also mindful of the fact that the ALJ did not utilize an ellipses in FOF 92.B. (as would typically be included) to indicate that the trailing portion of Mr. Drauer's testimony, "at a minimum," was omitted.

This portion of Applicant's Exception No. 3 and the District's Exception No. III.B.2 (*Dist. Except*. at pgs. 19-20) is accepted in part to the extent that it allows for a more faithful version of Mr. Drauer's quoted testimony to be memorialized in this Order. However, in the District's view, and as explained more fully below in the ruling on a portion of Applicant's Exception No. 3 and the District's Exception No. III.A.2. (*Dist. Except*. at pgs. 15-18), the ALJ's legal conclusion giving a neutral weight to the Applicant's compliance with the District's water quantity criteria under section 10.2.3.1(c), A.H., Vol. I, is being left undisturbed for the reasons stated therein. This portion of the Applicant and the District's exceptions are therefore rejected.

Accordingly, paragraph 92.B of the R.O. is modified to read:

> B. "The surface water management system was designed to comply with all criteria necessary to preclude flooding of offsite properties, adverse drainage of surface waters, and degradation of water quality in downstream waters." Each of those are the minimum elements necessary to obtaining an ERP. As stated by Mr. Drauer, "meet[ing] the water quantity criteria in the Applicant's Handbook, Volume 2, [ ] would mean that factor would be neutral, at a minimum." His testimony is accepted. A preponderance of the evidence establishes that the factors in this subparagraph are neutral for purposes of determining whether the Project is "clearly in the public interest."

Applicant Exception Nos. 2 and 3 and District Exception Nos. III. (pgs. 5-9), III.A.1.a. (pgs. 9-13), III.A.1.b. (pgs. 13-14), and III.A.2 (pgs. 15-18). (FOFs 62, 92.B, 92.D., 93, 106, 107, COLs 171, 172-175)

In Applicant Exception Nos. 2 and 3 and the District's Exception Nos. III. (*Dist. Except*. at pgs. 5-9), III.A.1.a. (*Dist. Except*. at pgs. 9-13), III.A.1.b. (*Dist. Except*. at pgs. 13-14), and

III.A.2. (*Dist. Except*. at pgs. 15-18), the Applicant and the District take exception to the ALJ's ultimate conclusion of law in COL 175 that the Project is not clearly in the public interest on the grounds that it and several of the ALJ's subordinate legal conclusions are inconsistent with the ALJ's findings of fact. The Applicant and District argue that the ALJ's legal conclusion does not follow from the ALJ's factual findings because the ALJ made several factual findings that the project would provide "extra" water quality and water quantity benefits but did not take those "extra" benefits into account when making his conclusions of law. As a result, the Applicant and District argue that the District should substitute the ALJ's legal conclusions that the factors discussed in sections 10.2.3.1(a) and (c), A.H., Vol. I, should be substituted for alternate legal conclusions determining that those factors weigh positively. These arguments will be addressed separately.

(Water Quality) Applicant Exception No. 2 and District Exception Nos. III.A.1.a. (pgs. 9-13) and III.A.1.b. (pgs. 13-14)(FOFs 93, 106, 107, COLs 171, 172-175)

First, in the Applicant's Exception No. 2 and the District's Exception Nos. III.A.1.a. (*Dist. Except*. at pgs. 9-13) and III.A.1.b. (*Dist. Except*. at pgs. 13-14), the Applicant and District take exception to the portions of the R.O. indicating that the Project was not given credit for providing "extra" water quality benefit beyond the extent already required by rule. In support, the Applicant and District observe that the Project "directly discharges" to an "impaired water," thus requiring a "net improvement" under the District's rules.[8] The Applicant and District then further observe that

[8] The District's Exception No. III.A.1.b. (*Dist. Except*. at pgs. 13-14), further observes that the ALJ made a finding in FOF 62 that the Project will not contribute to iron or copper, which, if correct, would by extension mean that the Project is not actually required to demonstrate a net improvement as to iron and cooper. The District argues that if FOF 62 were correct, net improvement as to iron and copper should have been considered as an "extra" benefit for purposes of the public interest test because Applicant would not have actually had to comply with the District's net improvement criteria and did so anyway. The District granted the District's

although the rules require net improvement, the District's rules do not specify a minimum required magnitude of that net improvement such that, to use the District's example, even a 0.01% measurable reduction in loading for a given pollutant from the pre-development to post-development condition could constitute a net improvement sufficient to satisfy the rule criteria. The Applicant and District conclude by noting that the ALJ made findings of fact that the Project would lead to a 29% reduction in total phosphorous (1.782 kilograms per year) while nevertheless making other findings of fact and conclusions of law characterizing this 29% reduction as being "the bare minimum to qualify for the [permit]."[9] Ultimately, the Applicant and District argue that in light of the above, the ALJ's conclusions of law in FOFs 93, 106, 107 (as re-characterized by the Applicant[10] and the District) and COL 174 that the Project's compliance with the District's water quality rules weighed "slightly" or "barely" positive should be substituted with an as or more reasonable conclusion of law that the Project's compliance with the District's water quality rules weighs more positively in the District's public interest test analysis.

The Applicant and District's argument that the water quality benefits of the Project may not have been given sufficient credit by the ALJ is well-taken but, for the reasons stated below, the District rejects the Applicant's Exception No. 2 and the District's Exception Nos. III.A.1.a. and III.A.1.b.

Exception No. III.B.1. Consequently, the District declines to give the Project "extra" credit for applying with the applicable rule criteria in a vacuum while simultaneously (incorrectly) determining that those rule criteria do not apply to these circumstances.

[9] The ALJ did not make a finding of fact that the Project would provide a particular percentage reduction in iron or copper.

[10] Applicant's desire to recharacterize FOF 107 as a conclusion of law is inferred from their statement in Paragraph 19 of their exceptions that their proposed amendments to FOF 107 are as more reasonable than the ALJ's, which is the standard applicable to conclusions of law and not to findings of fact.

The Applicant and the District argue that the ALJ's statements in FOFs 93 (specifically, to the word "marginally" in the third sentence and the entirety of the fourth sentence), 106, and 107 (to the word "barely" in the third sentence) are mislabeled conclusions of law. The District agrees that these statements are conclusions of law. Therefore, the District may substitute the ALJ's statements in FOFs 93, 106, 107, and COL 174 that the Project's compliance with the water quality rules should be given minimal positive weight with alternate legal conclusions if they are as or more reasonable than the ALJ's. *See* § 120.57(1)(l), Fla. Stat. However, the District declines to do so for the reasons below and the reasons discussed in the District's ruling on Applicant's Exception No. 6 and the District's Exception No. III.C. (*Dist. Except*. at pgs. 23-29 and 31-34).

The ALJ's decision to give minimal positive weight to Applicant's compliance with the District's water quality rules appears to be explained in the second and third sentences of FOF 93 and in COL 173. The second and third sentences of FOF 93 and the entirety of COL 173 are findings of fact, which cannot be disturbed absent a lack of competent substantial evidence in the record. § 120.57(1)(l), Fla. Stat. The ALJ indicates he would have given this factor more weight if the evidence had shown that a reduction in impairment parameters at the Project's point of discharge into the Unnamed Canal would have been causally linked to a reduction in impairment parameters in Spruce Creek at its point of impairment.[11] Similarly, the ALJ chose not to make findings of fact as to the potential benefits, if any, that may be experienced in Spruce Creek at its point of impairment associated with the increase in net water quality improvement for total

[11] The District observes that this finding appears to relate to the ALJ's evaluation of whether the Applicant's Project was clearly in the public interest and that for purposes of satisfying the District's water quality criteria, the Applicant was under no obligation to demonstrate a reduction in impairment parameters in Spruce Creek at its point of impairment.

phosphorous from (a theoretical) 0.01% to 29%.[12] Finally, the ALJ also determined that the Unnamed Canal is ephemeral, meaning that any benefits experienced by Spruce Creek at its point of impairment would presumably be intermittent. The District cannot reweigh the evidence or make the supplemental findings of fact necessary for it to reach a different conclusion. *Goss*, 601 So. 2d at 1235; *Fla. Power & Light Co.*, 693 So. 2d at 1026-27.

Accordingly, the Applicant's Exception No. 2 and the District's Exception Nos. III.A.1.a. (*Dist. Except*. At pgs. 9-13) and III.A.1.b. (*Dist. Except*. At pgs. 13-14) are rejected to the extent described herein. The District adopts the ALJ's conclusion of law that the Applicant's compliance with the District's water quality rules weighs minimally positive for purposes of the public interest test. The "weight" assigned to each factor is also addressed below in the District's rulings on Applicant's Exception No. 6 and the District's Exception No. III.C. (*Dist. Except*. at pgs. 23-29 and 31-34).

(Water Quantity) A portion of Applicant Exception No. 3 and District Exception No. III.A.2. (pgs. 15-18) (FOFs 92.B., 92.D., 93, 106, 107, COLs 171, 172, 174, 175)[13]

Second, in the Applicant's Exception No. 3 and the District's Exception No. III.A.2. (*Dist. Except*. at pgs. 15-18), the Applicant and District take exception to portions of the ALJ's R.O. that do not give the Project "extra" credit as to its water quantity benefits despite also including findings of fact that the Project provides more water quantity treatment than the minimum amount required by rule. Specifically, the Applicant and District argue that in these circumstances the District's

[12] As well as the benefits, if any, that may be experienced in Spruce Creek at its point of impairment as to iron and copper associated with the increases in water quality improvement from their theoretical minimum quantities of net improvement to the (unspecified) amounts that they will actually be improved by the Project.

[13] While the heading on page 15 of the District's Exception No. III.A.2. indicates that it is taking exception to FOFs 93 and 106, and COLs 171, 172 and 175, the District does not specifically address any of these FOFs or COLs; therefore, the District need not rule on them. § 120.57(1)(k), Fla. Stat.

water quantity rules only require that the Project's post-development peak rate of discharge not exceed the pre-development peak rate of discharge for the 25-year, 24-hour storm event. The ALJ made findings of fact that this requirement was met, as well as that the Project provides additional treatment for the 100-year, 24-hour storm event and an additional one foot of freeboard in certain portions of the system. Therefore, the Applicant and District argue that the ALJ's legal conclusion made under section 10.2.3.1(c), A.H., Vol. I, that Applicant's compliance with the District's water quantity criteria weighed neutrally for purposes of the public interest test should be substituted with an alternate legal conclusion giving it positive weight.

The Applicant argues that the word "barely" in FOF 107 is a mislabeled conclusion of law. The District argues similarly as to the third sentence of FOF 92.B and the last sentence of FOF 92.D. The District agrees. These sentences (or portions thereof) are the ALJ's conclusions of law regarding the weight that Applicant's compliance with the District's water quantity criteria should be given under section 10.2.3.1(c), A.H., Vol. I. As a result, the District may substitute the ALJ's statements in FOFs 92.B, 92.D., and 107 that the Project's compliance with the water quantity rules weighs neutrally for purposes of section 10.2.3.1(c), A.H., Vol. I, with alternate legal conclusions if they are as or more reasonable than the ALJ's. *See* § 120.57(1)(l), Fla. Stat.

The ALJ's decision to give section 10.2.3.1(c), A.H., Vol. I, neutral weight is explained in the second, third, and fourth sentences of FOF 92.D., which states that the ALJ gave neutral weight to this sub-factor because the evidence failed to determine that the Project would benefit the *property of others*. Effectively, the ALJ determined that the portions of Applicant's Project that overtreat for the 100-year, 24-hour storm event would only serve to benefit the Applicant's own property and that there would not be any effects to the property of others to which he could ascribe positive credit under section 10.2.3.1(c), A.H., Vol. I.

However, the Applicant's overtreatment for the 100-year, 24-hour storm event also provides potential environmental benefits that the District believes should have been analyzed under section 10.2.3.1(a), A.H., Vol. I, in addition to section 10.2.3.1(c), A.H., Vol. I. Raising the roadway crown to prevent (onsite) flooding as to the roadway during a flood event is an "improvement to public health or safety with respect to environmental issues" that should have been considered under section 10.2.3.1(a), A.H., Vol. I. This sub-factor, unlike the one in section 10.2.3.1(c), A.H., Vol. I, does not rely on the onsite/offsite distinction, so the Applicant's overtreatment of its own property promotes storm event resiliency, which has important public health and safety benefits accruable to the general public, is appropriately considered under the plain language of section 10.2.3.1(a), A.H., Vol. I. Raising the roadway crown to prevent the onsite flooding of a portion of the interstate highway system is distinguishable from the hurricane evacuation and the traffic safety factors discussed in the R.O. The facts found by the ALJ are adequate for the District to make this substituted legal conclusion under section 10.2.3.1(a), A.H. Vol. I. *See* FOF 92.D. This substituted legal conclusion is as or more reasonable than the ALJ's legal conclusion.

Based on the foregoing, the Applicant's Exception No. 3 and the District's Exception No. III.A.2. (*Dist. Except*. at pgs. 15-18) are denied as to section 10.2.3.1(c), A.H., Vol. I, and are accepted as to section 10.2.3.1(a), A.H., Vol. I. The District gives the Project's overtreatment for stormwater quantity impacts as to the Applicant's own property additional positive weight under section 10.2.3.1(a), A.H., Vol. I. However, the "weight" assigned to each factor is also addressed below in the District's rulings on Applicant's Exception No. 6 and the District's Exception No. III.C. (*Dist. Except*. at pgs. 23-29 and 31-34).

District Exception No. III.B.3 (pgs. 20-22) (FOF 107).

In its Exception No. III.B.3 (*Dist. Except.* at pgs. 20-22), the District takes exception to the portion of the third sentence of FOF 107 stating "Respondents assert that, mathematically". The District argues that the concept that the District's public interest test is "mathematically" balanced is incorrect and that attribution of this argument to the Respondents rather than the Petitioners is not supported by competent substantial evidence.

First, the portion of the District's exception that disputes that the attribution of the argument that the District "mathematically" balances the seven public interest criteria to the Respondents is accepted. There is no competent substantial evidence in the record that this has been either the District or Applicant's position in this case. *See e.g.*, T. 1786:16-1787:01, 1802:10-22; *Dist. PRO* at ¶ 71, *App. PRO* at ¶ 68, 99 (arguing that the public interest test is not mathematically balanced).

Next, the portion of the District's exception asserting that, as a point of fact, the District did not apply the public interest test in a mathematical fashion in the instant case is also accepted. There is no competent substantial evidence that the District's permit review team applied the public interest test in a "mathematical" manner in the instant case. Rather, the District's expert witness on the subject, Ms. Martin, explained that the public interest test is a balancing criteria that she did not apply numerical values to. T. 1786:16-1787:01. Exception No. III.B.3 (*Dist. Except.* at pgs. 20-22), recommends that the District modify FOF 107 to be consistent with Ms. Martin's testimony that the District uses a balancing test to determine whether a project is clearly in the public interest and does not use percentages or a mathematical equation.

Accordingly, District's Exception III.B.3 (*Dist. Except.* at 20-22) is accepted and FOF 107 is modified to read:

> 107. The public interest balancing test is just that, a balance. There is no strict formula for determining when a project is clearly in the public interest, and when it is not. ~~Respondents assert that, mathematically, there are more positive outcomes (one factor~~

~~barely) than negative outcomes (no factors), with six of the seven criteria being neutral.~~ A further discussion of the balancing test is contained in the Conclusions of Law.

A portion of Applicant's Exception No. 6 and District Exception No. III.C.3 (pgs. 29-31) (COL 171 fn. 6).

In a portion of the Applicant's Exception No. 6 and in the District's Exception No. III.C.3. (*Dist. Except*. at pgs. 29-31), the Applicant and the District argue that the ALJ incorrectly required the Applicant to provide "extra" environmental benefits in order for its Project to be "clearly in" the public interest. Specifically, the Applicant and the District argue that requiring an "extra" environmental benefit is contrary to the holding in the case of *1800 Atl. Dev. v. Dep't of Env't Regul.*, 552 So. 2d 946 (Fla. 1st DCA 1989), *rev. denied*, 562 So. 2d 345 (Fla. 1990). The Applicant and the District further argue that if this aspect of the ALJ's analysis is rejected, the findings of fact in the R.O. indicate that the permit should be issued.

The issuance of a permit must be based solely on compliance with applicable permit criteria. *See e.g., Vill. of Key Biscayne v. Dep't of Env't Prot.*, 206 So. 3d 788, 791 (Fla. 3d DCA 2016); *Council of Lower Keys*, 429 So. 2d at 68; *Taylor v. Cedar Key Special Water and Sewerage Dist.*, 590 So. 2d 481, 481 (Fla. 1st DCA 1991). Rather, a permit applicant is only required to provide the District with reasonable assurance that the activity that significantly degrades or is within an OFW will be clearly in the public interest. § 373.414(1)(a), Fla. Stat.; *Metro. Dade Co. v. Coscan Fla. Inc*, 609 So. 2d 644, 648 (Fla. 3d DCA 1992).

A project is not required to demonstrate that it is needed or that it will provide a net public benefit for the project to be clearly in the public interest. *1800 Atl. Dev.*, 552 So. 2d at 957; *see also Watershed Coal., Inc. v. Sabal Trail Transmission, LLC*, No. 15-4975 at ¶ 66 (Fla. DOAH Dec. 11, 2015) (Recommended Order) (the same); *Fla. Power Corp. v. Dep't of Env't. Regul.*, No. 91-2148 (Fla. DER Feb. 19, 1992) (DER final order reflecting the same). In *1800 Atlantic*

Developers, a Department of Environmental Regulation (DER) final order denied an application for a dredge and fill project to renourish a private beach. *Id.* at 947. On appeal, the 1st DCA held that the applicant "was not obligated to show a need or necessity for the dredging and filling in the sense of benefitting the public or the environment" to demonstrate that its project was clearly in the public interest. *Id.* at 957. In other words, the applicant in *1800 Atlantic Developers* was not required to provide DER with reasonable assurances that there was a need for the project or that a net public benefit would result from the project to obtain a permit. *Id.* Rather, the applicant was only required to show that the project would be carried out in a manner that would not materially degrade water quality and in a manner that was clearly in the public interest. *Id.* Therefore, the 1st DCA determined that DER had erroneously required the applicant to prove the creation of a net environmental benefit to demonstrate that its project was clearly in the public interest. *Id.* The 1st DCA further held that suggestions in DER's final order that this showing is necessary simply because a project is in an OFW go beyond the statutory provisions and have no basis in the law. *Id.*

The ALJ in the instant case appears to have taken the same position as DER in *1800 Atlantic Developers* as demonstrated by COLs 171 fn. 6 and 173-175. However, this reasoning appears to be inconsistent with the 1st DCA's holding that case. The District is not bound by conclusions of law within its substantive jurisdiction and has an obligation to correct any errors in conclusions of law contained in the recommended order. *See Harloff,* 575 So. 2d at 1327-28.

A reviewing agency may not require that an applicant demonstrate that its project will create a net environmental benefit to be clearly in the public interest. However, a reviewing agency may require a greater "quantum of assurance" that a project will comply with the applicable criteria in scenarios where a project must be clearly in the public interest for a permit to issue. *WWALS*

Watershed Coal., Inc. v. Sabal Trail Transmission, LLC, No. 15-4975 at ¶ 66 (Fla. DOAH Dec. 11, 2015) (Recommended Order); (Fla. DEP Jan. 15, 2016) (Final Order); *see also Angelo's Aggregate Materials, Ltd. v. Dep't of Env't Prot.*, No. 09-1543 at ¶ 135 (Fla. DOAH Jun. 28, 2013) (Recommended Order); (Fla. DEP Sept. 16, 2013) (Final Order) (The quantum of assurance that is deemed reasonable by the Department should depend on the potential harm.). The ALJ in *WWALS Watershed Coalition* specifically noted that the project was clearly in the public interest because the applicant clearly demonstrated compliance with all applicable regulatory criteria. No. 15-4975 at ¶ 69 (Fla. DOAH Dec. 11, 2015) (Recommended Order); (Fla. DEP Jan. 15, 2016) (Final Order). Put another way, an applicant is only required to provide reasonable assurance that it satisfies the conditions for issuance to obtain a permit, but the specific showing needed to provide reasonable assurances may be more intensive when particularly sensitive water resources such as an OFW are at issue.

The ALJ cites the recommended order in *Goldberg v. The City of Port St. Lucie* to support the proposition that an applicant must provide an "extra" environmental benefit to demonstrate that its project is clearly in the public interest test. R.O. at ¶ 171, fn. 6; Case No 16-1018 (Fla. DOAH Nov. 8, 2016) (Recommended Order); (Fla. SFWMD Dec. 23, 2016) (Final Order). In *Goldberg*, the applicant proposed to incorporate a number of water quality enhancement measures into the project, such as installation of baffle boxes, reestablishment of oxbows, and dredging of unsuitable sediments. *Goldberg,* R.O. at ¶ 87. However, *Goldberg* appears to be distinguishable from the instant case because *Goldberg* involved applications for both an ERP and a sovereignty submerged lands (SSL) public easement. *See generally id.* As noted by the ALJ in *Goldberg*, these water quality enhancement measures are more directly related to the requirements to obtain a SSL easement within an aquatic preserve (AP). *See id* at ¶ 87. Notably, a net or "extra" environmental

benefit in the context of SSL in an AP is explicitly contemplated by the public interest assessment criteria codified in rule 18-20.004(2), F.A.C.,[14] whereas it has been specifically disfavored in the context of ERP under *1800 Atlantic Developers*.

Of significant concern from the reviewing agency perspective, adopting the argument that obtaining an "extra" environmental benefit is required would lead to an increased likelihood of litigation in state or federal court as a potential exaction prohibited by the unconstitutional conditions doctrine. *See Koontz v. St. Johns Water Management District*, 570 U.S. 595, 606 (2013). It is unclear how a reviewing agency would determine whether or not "enough" "extra" environmental benefit had been provided without running the risk of being determined to lack the "essential nexus and rough proportionality" required under *Koontz*.

As a result of the foregoing, the District accepts a portion of the Applicant's Exception No. 6 and the District's Exception No. III.C.3. (*Dist. Except*. at pgs. 29-31) to the extent necessary to reject the ALJ's conclusions of law stating that an "extra" environmental benefit is required to demonstrate that a project is clearly in the public interest. The District provides the substitute as or more reasonable conclusion of law that it will continue to follow the holding of *1800 Atlantic Developers*.

For the reasons discussed below, the District rejects the ALJ's interpretation of section 373.414(1)(a), Fla. Stat., to require that an applicant provide "extra" environmental benefits to demonstrate that its project is clearly in the public interest.

(Ultimate Conclusion under the Public Interest Test) Applicant Exception No. 6 and District Exception No. III.C. (pgs. 23-29 and 31-34) (COL 175)

[14] Rule 18-20.004(2), F.A.C., sets forth the public interest assessment criteria applicable to an SSL authorization within an AP, which includes a cost/benefit analysis.

In Applicant's Exception No. 6 and District's Exception No. III.C. (*Dist. Except*. at pgs. 23-29 and 31-34), the Applicant and the District take exception to COL 175 and argue that the District has the discretion to reweigh the factors under the public interest test and to reject the ALJ's ultimate conclusion of law that the Project is not "clearly in" the public interest: Conclusion of Law 175 states:

> 175. But for the public interest test, DOT established that the Project meets all relevant ERP criteria. If this case did not involve an OFW, and if the standard for issuance was whether the Project is not contrary to the public interest, the undersigned would have no hesitation in recommending issuance of the Permit. However, this case does involve an OFW, and the standard is whether the Project is clearly in the public interest. Based on the Findings of Fact as to each element of the public interest test set forth herein, and applying the public interest standards in section 373.414(1)(a), rule 62-330.302(1), and A.H. Vol. I, sections 10.2.3.1 through 10.2.3.7., it is concluded that reasonable assurances have not been provided that the activities to be authorized by the Permit are clearly in the public interest.[9] Thus, application for Environmental Resource Permit No. 103479-2 should be denied.

(footnote omitted). The Applicant and the District further argue that, for the reasons argued in their respective exceptions, the District should exercise its discretion to reject the ALJ's ultimate conclusion of law that the Project is not in the public interest in favor of an as or more reasonable conclusion of law that it is.

The District agrees with the Applicant and the District that on administrative review of an ALJ's recommended order, the agency has the ultimate authority and responsibility for balancing the factors of the public interest test. *See* § 373.414(1)(a), Fla. Stat.; *1800 Atl. Dev.*, 552 So. 2d at 957.

Summary of the Public Interest Test and its Application by the District Under Section 120.57(1)(l), Fla. Stat.

An ERP applicant who proposes to construct a system located in, on, or over wetlands or other surface waters must provide reasonable assurance that the project will "not be contrary to the

public interest, or if such an activity significantly degrades or is within an Outstanding Florda Water [OFW], that the activity will be clearly in the public interest." § 373.414(1)(a), Fla. Stat., Rule 62-330.302(1)(a), F.A.C., and § 10.2.3.1, A.H., Vol. I. The "clearly in the public interest" test for an OFW is more stringent than the "not contrary to the public interest" test for a non-OFW. *See Fla. Keys Citizens Coal. v. 1800 Atl. Dev.*, 8 F.A.L.R. 5564, 5572 (DER Final Order 1986), *rev'd on other grounds*, 552 So. 2d 946 (Fla. 1st DCA 1989), *rev. denied*, 562 So. 2d 345 (Fla. 1990).

Under subsection 373.414(1)(a), Fla. Stat., rule 62-330.302(1)(a), F.A.C., and sections 10.2.3 through 10.2.3.7, A.H., Vol. I, the District shall consider and balance seven criteria in its public interest determination. These seven criteria (including the 4 sub-factors contained within section 10.2.3.1(a)-(d), A.H, Vol I) are:

1. Whether the activity will adversely affect the public health, safety, or welfare or the property of others;

    (a) An environmental hazard to public health or safety or improvement to public health or safety with respect to environmental issues. Each applicant must identify potential environmental public health or safety issues resulting from their project. Examples of these issues include: mosquito control; proper disposal of solid, hazardous, domestic or industrial waste; aids to navigation; hurricane preparedness or cleanup; environmental remediation, enhancement or restoration; and similar environmentally related issues. For example, the installation of navigational aids may improve public safety and may reduce impacts to public resources;

    (b) Impacts to areas classified by the Department of Agriculture and Consumer Services as approved, conditionally approved, restricted or conditionally restricted for shellfish harvesting. Activities that would cause closure or a more restrictive classification or management plan for a shellfish harvesting area would result in a negative factor in the public interest balance with respect to this criterion;

    (c) Flooding or alleviate existing flooding on the property of others. There is at least a neutral factor in the public interest balance with

respect to the potential for causing or alleviating flooding problems if the applicant meets the water quantity criteria in Part III of Volume II; and

(d) Environmental impacts to the property of others. For example, construction of a ditch that lowers the water table such that off-site wetlands or other surface waters would be partly or fully drained would be an environmental impact to the property of others. The Agency will not consider impacts to property values.

2. Whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;

3. Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;

4. Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;

5. Whether the activity will be of a temporary or permanent nature;

6. Whether the activity will adversely affect or will enhance significant historical and archaeological resources under the provisions of s. 267.061; and

7. The current condition and relative value of functions being performed by areas affected by the proposed activity.

§ 373.414(1)(a), Fla. Stat., Rule 62-330.302(1)(a), F.A.C., and §§ 10.2.3 through 10.2.3.7, A.H., Vol. I.

These seven factors are balanced and need not be weighed equally. *Lott v. City of Deltona*, Nos. 05-3662 and 05-3664 at ¶ 30 (Fla. DOAH Mar. 16, 2006) (Recommended Order); (Fla. SJRWMD May 10, 2006) (Final Order). An adverse impact for one of the seven factors does not necessarily mean that the project is contrary to the public interest. *1800 Atl. Dev.*, 552 So. 2d at 957. Rather, all seven factors must be collectively considered to determine whether, on balance, a proposed project satisfies the public interest test. *Id.*

The weight to be accorded each factor in determining compliance with the public interest test are questions of law and policy reserved to the agency, not the ALJ. *See e.g., 1800 Atl. Dev.*, 552 So. 2d at 957; *Kramer v. Dep't of Env't Prot.*, No. 00-2873 at 9 (Fla. DEP Apr. 30, 2002) (Final Order); *Fla. Power Corp.*, 638 So. 2d at 559-60 (affirming agency final order where agency head used the ALJ's findings of fact to reweigh the public interest factors in the ALJ's conclusions of law and determine whether a proposed activity satisfied the public interest test).

However, the agency's final determination must still be based on and be consistent with the applicable underlying factual findings of the ALJ. *1800 Atl. Dev.*, 552 So. 2d at 957; *Kramer*, No. 00-2873 at 19 (Fla. DEP Apr. 30, 2002) (Final Order). The agency cannot overturn findings of fact made by the ALJ that are supported by competent substantial evidence. § 120.57(1)(l), Fla. Stat.; *Heifetz*, 475 So. 2d at 1281-82. Furthermore, rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. § 120.57(1)(l), Fla. Stat.

Ultimate Conclusion

As indicated above, the District agrees that it may reweigh the seven factors of the public interest test and reach an alternate conclusion of law that the Project is "clearly in" the public interest. In this case, the R.O. and many exceptions focused on the assignment of a positive, negative, or neutral "weight" to each factor. The assignment of such a weight to each factor is not a uniform practice among the agencies. Notably, many of the orders from ALJs, DEP, and the water management districts reviewed in the preparation of this final order do not include such assignments of weight. *See e.g.*, *Martin Cnty. v. All Aboard Fla. – Operations, LLC*, Nos. 16-5718, 17-2566 at ¶¶ 98-116 (Fla. DOAH Sept. 29, 2017) (Recommended Order); *Bowers v. St. Johns River Water Management District*, No. 21-0432 at ¶¶ 47-54, 109 (Fla. DOAH Jul. 19, 2021) (Recommended Order). Rather, the focus of the public interest test is on the ultimate findings of

fact relevant to each factor. *See e.g.*, *Fla. Power Corp.*, 638 So. 2d at 556-557. In this case, the focus on the assignment of a "weight" for each factor appears to have obscured the importance of the ultimate findings of fact.

When the ultimate findings of fact relevant to the public interest test are considered in this case, they lead to but one conclusion – there are no adverse impacts under the public interest test factors as a result of the Project. These critical findings follow here:

- Factor 1 - The project will not adversely affect the public health, safety or welfare, but will rather provide some positive benefits.[15] R.O. ¶¶ 67, 92.B., 92.D., 93, 106-07.
- Factor 2 - Insufficient evidence to support a finding of adverse impact to fish and wildlife and listed species. R.O. ¶¶ 94-97.
- Factor 3 - The project will not adversely affect navigation or the flow of water or cause harmful erosion or shoaling. R.O. ¶ 98.
- Factor 4 - The project will have no measurable adverse impact on fishing, recreational values or marine productivity. R.O. ¶ 99.
- Factor 5 - Although there will be permanent loss of wetlands, such loss will be offset through mitigation. The proposed mitigation is permanent in nature. Temporary impacts will recover at the conclusion of the construction. R.O. ¶ 100.
- Factor 6 - There was no evidence of significant historical or archaeological resources on or near the project. R.O. ¶ 101.

[15] Even if characterized as minimal by the ALJ, the Applicant's treatment of phosphorus to reduce loading to receiving waters by 29% is a benefit. Further, as discussed earlier it is also appropriate to give some consideration to the fact that DOT will provide storage volume in excess of what is required by rule (100-year, 24-hour storm event rather than the 25-year, 24-hour storm event).

- Factor 7 - Though onsite wetlands will be affected, the mitigation provided more than offsets the impacts. R.O. ¶¶ 102-105.

The District may not change these ultimate findings of the ALJ unless they are not supported by competent substantial evidence. § 120.57(1)(l), Fla. Stat. Further, the District may not disregard these findings. *Id*.; *see Kanter Real Estate, LLC v. Dep't of Env't. Prot.*, 267 So. 3d 483, 490 (Fla. 1st DCA 2019).

The determination of whether a project is clearly in the public interest is a very fact specific evaluation. Considering there are no adverse impacts utilizing the public interest test factors and that the agency is prohibited from requiring the Applicant to demonstrate a net public benefit or to propose "extra" measures, it is unclear how the Applicant or another similarly situated permittee could demonstrate that a project is clearly in the public interest. A similar situation was addressed in *WWALS Watershed Coalition v. Sabal Trail Transmission, LLC, and Department of Environmental Protection*, where the ALJ recognized that, in light of the holding of *1800 Atlantic Developers*, the "clearly in the public interest" standard simply requires a greater level of assurance that the project will apply with the applicable criteria. No. 15-4975 at ¶ 66 (Fla. DOAH Dec. 11, 2015) (Recommended Order). The ALJ in *WWALS Watershed Coalition* determined that the project was clearly in the public interest because the applicant had clearly demonstrated compliance with all applicable regulatory criteria and that there were no adverse impacts under the public interest test factors. *Id.* at ¶ 69. Here, the ALJ's ultimate findings of fact indicate that DOT demonstrated compliance with all applicable regulatory criteria and that there are no adverse impacts under the seven factors of the public interest test. *See* R.O. ¶¶ 40, 41, 43, 58, 59, 60, 61, 72, 74, 75, 88, 90-107. Thus, the District concludes that this Project is clearly in the public interest.

Throughout this Final Order, the District has made the following determinations, which are restated here so the parameters of its decision are clear:

1. The District rejects the ALJ's conclusions of law that hurricane preparedness is not appropriately considered under section 10.2.3.1(a), A.H., Vol. I, and refrains from making the additional or supplemental finding of fact necessary to give additional positive weight to the Project's potential utility for hurricane evacuation under section 10.2.3.1(a), A.H., Vol. 1. The Project's potential utility for hurricane evacuation was, therefore, not considered in the formulation of this substitute ultimate conclusion of law that the Project is clearly in the public interest.

2. The District adopts the ALJ's conclusions of law that give minimal positive weight to the Project's 29% net improvement as to total phosphorous (and an unspecified amount of iron and copper) and that give neutral weight under section 10.2.3.1(c), A.H., Vol. 1, to the Project's overtreatment for the 100-year, 24-hour storm event. The District also concludes that the Project should be given additional positive weight under section 10.2.3.1(a), A.H., Vol. I, due to its overtreatment for the 100-year, 24-hour storm event. No findings of fact are rejected, modified, or disregarded in reaching this aspect of the District's determination under section 10.2.3.1(a), A.H., Vol. I.

3. The District rejects the ALJ's conclusions of law that "extra" environmental benefit must be provided for a project to be clearly in the public interest.

4. The Recommended Order contains no findings of adverse impact as a result of the Project. In aggregate, the District determines that the Applicant clearly demonstrated compliance with all of the regulatory criteria, including the public interest factors addressed herein, and these factors are enough to render this Project "clearly in" the public interest.

The District therefore grants the Applicant's Exception No. 6 and the District's Exception no. III.C. (*Dist. Except*. at pgs. 23-29 and 31-34). This interpretation is as or more reasonable than that contained in COL 175.

ACCORDINGLY, IT IS HEREBY ORDERED:

The Recommended Order dated January 29, 2024, attached hereto as Exhibit "A" is adopted except as modified by the agency in the rulings on FOFs 27, 62, 92.B, 107 and COL 171 footnote 6, and 175 in Petitioners' Exception Nos. 2 and 8, Applicant's Exception Nos. 3, 5 and 6, and District's Exception Nos. III.A.2., III.B.1, III.B.2, III.B.3, III.C.3. The Applicant's ERP number 103479-2 is hereby issued under the terms and conditions contained in Technical Staff Report dated October 6, 2023, attached hereto as Exhibit "B".

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT

By: _____
Mary Ellen Winkler
Assistant Executive Director

RENDERED this ____ day of March 2024.

By: _____
District Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing has been filed with the Clerk of the St. Johns River Water Management District, and that a true and correct copy of the foregoing was furnished to the following via email delivery on this _____ day of _____, 2024:

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_____

Notice of Rights

1. Pursuant to Section 120.68, Florida Statutes, a party who is adversely affected by final District action may seek review of the action in the district court of appeal by filing a notice of appeal under Rule 9.110, Florida Rules of Appellate Procedure, within 30 days of the rendering of the final District action.

2. A District action or order is considered "rendered" after it is signed on behalf of the District and is filed by the District Clerk.

3. Failure to observe the relevant time-frame for filing a petition for judicial review as described in paragraph 1 will result in waiver of that right to review.

Exhibit “A”
Recommended Order

Exhibit “B”
Terms and Conditions from TSR dated October 6, 2023