ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

BEAR WARRIORS UNITED, INC.,
THE SWEETWATER COALITION
OF VOLUSIA COUNTY, INC.,
DEREK LAMONTAGNE, an individual, and
BRYON WHITE, an individual,

Petitioners,

v.

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

Respondents.
_____/

DOAH Case No. 23-1512

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

RESPONDENT ST. JOHNS RIVER WATER MANAGEMENT DISTRICT'S EXCEPTIONS TO RECOMMENDED ORDER

Respondent, St. Johns River Water Management District ("District"), by and through its undersigned attorneys, hereby files these Exceptions to the Amended Recommended Order ("R.O."), entered by the Division of Administrative Hearings ("DOAH") Administrative Law Judge ("ALJ") in this matter on January 29, 2024.[1]

The District takes exception to the ultimate conclusion of law ("COL") that the proposed project ("Project") is not clearly in the public interest, as the balancing test in section 373.414(1)(a), Florida Statutes ("F.S."), has been applied. The analysis set forth below includes a discussion of exceptions to specific COLs and findings of fact ("FOF") relevant to the public

[1] Citations to the Recommended Order are indicated by the abbreviation "R.O.," followed by the abbreviation "FOF" or "COL" and paragraph number, *e.g.*, "R.O., COL 211." The Environmental Resource Permit Applicant's Handbook, Volume I, will be cited as "A.H., Vol. I," and the Permit Information Manual, Volume II, will be cited as "A.H., Vol. II."

interest test analysis. Additionally, although not within the District's substantive jurisdiction, the District notes an exception to the COL that the Petitioners met their ultimate burden of persuasion, for the purpose of preserving any potential appellate rights.

I. Standards of Review for DOAH Recommended Orders

A. Findings of Fact

"Factual issues susceptible of ordinary methods of proof that are not infused with policy considerations are the prerogative of the hearing officer as the finder of fact." *Heifetz v. Dep't of Bus. Reg.*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). Section 120.57(1)(l), F.S., provides that an agency reviewing a recommended order may not reject or modify the findings of fact of an ALJ, "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law." § 120.57(1)(l), F.S.; *Charlotte Cnty. v. IMC Phosphates Co.*, 18 So. 3d 1089, 1092 (Fla. 2d DCA 2009).

Florida law defines "competent substantial evidence" as such evidence as is sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. *DeGroot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957); *Gulf Coast Elec. Co-op v. Johnson*, 727 So. 2d 259, 262 (Fla. 1999). A reviewing agency may not reweigh the evidence, attempt to resolve conflicts therein, or judge the credibility of witnesses, as evidentiary matters are within the province of the ALJ as the "fact finder." *Rogers v. Dep't of Health*, 920 So. 2d 27, 30 (Fla. 1st DCA 2005); *Heifetz*, 475 So. 2d at 1281. Absent a complete lack of any competent substantial evidence in the record supporting a factual finding, the agency is without authority to disturb the factual findings of the ALJ, even if there exists competent substantial evidence in the record that

supports a contrary finding. *Charlotte Cnty.*, 18 So. 3d at 1092; *Peace River/Manasota Regional Water Supply Auth. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1088 (Fla. 2d DCA 2009); *Arand Constr. Co. v. Dyer*, 592 So. 2d 276, 280 (Fla. 1st DCA 1991); *Collier Med. Ctr. v. State, Dep't of Health and Rehab. Svcs.*, 462 So. 2d 83, 85 (Fla. 1st DCA 1985).

B. Conclusions of Law

Section 120.57(1)(l), F.S., authorizes an agency to reject or modify an administrative law judge's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." *See Barfield v. Dep't of Health*, 805 So. 2d 1008 (Fla. 1st DCA 2001). An agency's review of the legal conclusions in a recommended order is restricted to those that concern matters within the agency's field of expertise. *See, e.g.*, *Charlotte Cnty.*, 18 So. 3d 1089; *G.E.L. Corp. v. Dep't of Envt'l Prot.*, 875 So. 2d 1257, 1264 (Fla. 5th DCA 2004).

If an ALJ improperly labels a conclusion of law as a finding of fact, the label should be disregarded, and the item treated as though it were properly labeled. *See, e.g.*, *Battaglia Prop., Ltd. v. Fla. Land & Adjudicatory Comm'n*, 629 So. 2d 161, 168 (Fla. 5th DCA 1993) ("[N]either the agency nor the court is bound by the labels affixed to findings of fact and conclusions of law."). An agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction and expertise. *Pub. Employees Relations Comm'n v. Dade Cnty. Police Benevolent Ass'n*, 467 So. 2d 987, 989 (Fla. 1985).

II. Introduction to the Public Interest Test Exceptions

The public interest test of section 373.414(1)(a), F.S., appears in rule 62-330.302(1), F.A.C., and is explained in sections 10.2.3 through 10.2.3.7 of ERP Applicant's Handbook ("A.H."), Volume I. The public interest test has seven criteria (called "factors" in the rules) and is a balancing test that takes into account the positive, negative, and neutral effects of a regulated activity. Veronika Thiebach et al., *Environmental Resource Permits – Environmental Criteria*,

Florida Environmental and Land Use Law, Chp. 9.13 at 9.13-13, The Florida Bar (June 2014). The positive benefits of one or more factors may outweigh the negative impacts of other factors, or the negative effects of one or more factors may outweigh the positive impacts of other factors. *Id*.

Under the public interest test, an applicant is not required to show a public need, a net environmental benefit, or prove the absence of negative impacts. *1800 Atlantic Dev. v. State of Florida, Dep't of Environmental Reg.*, 552 So. 2d 946, 957 (Fla. 1st DCA 1989), review denied, 562 So. 2d 345 (Fla. 1990) ("We hold, therefore, that the applicant 1800 Atlantic need not show any particular need or net public benefit as a condition of obtaining the permit"). In this case, the ALJ's interpretation of "clearly in the public interest" appears to require more than simply an overall positive balance of the seven public interest factors. Instead, the ALJ required "'extra' environmental enhancement measures not already required by rule," which is error under *1800 Atlantic*. R.O. at 52, Fn.6.

Although proof of compliance with the public interest test involves underlying factual determinations, the ultimate determination of whether those facts establish such compliance is a policy matter resolved by the reviewing agency. *Fla. Power Corp. v. DER*, 638 So. 2d 545, 546 (Fla. 1st DCA 1994) ("DER determined that the public interest in the extent of the impact on the environment from this destruction of the forest was a policy matter for its determination and not a question of fact to be resolved by the hearing officer. We agree and affirm the agency's final order.") (case decided under prior section 403.918(2)); *DOT v. SJRWMD*, DOAH Case No. 94-1501 (SJRWMD 1996) (SJRWMD reversed hearing officer's recommendation to issue permit to DOT for transportation project in OFW because the "weight to be accorded to the factors in

§408.918(2), F.S." (now 373.414(1)) "in determining compliance with 'clearly in the public interest' test are questions of law and policy reserved to this agency, not the hearing officer").

The District believes the portion of COL 175 that the proposed project is not "clearly in the public interest" is in error for three reasons. First, COL 175, and the conclusions in paragraphs 92.B., 92.D., 93, 106, 107, and 172-174 related to the first factor of the public interest test, are contrary to multiple findings of fact. Second, some of the findings of fact related to applying the factors to water quantity and water quality criteria and weighing the factors were not supported by competent substantial evidence. Third, and most importantly, the public interest balancing test has been misapplied by inaccurately weighing and applying the seven public interest factors using an unsupported interpretation of "clearly in the public interest."

III. The Findings of Fact Related to Water Quantity and Water Quality do not Support the Ultimate Conclusion of Law that the Project is not Clearly in the Public Interest.

The District takes exception to the ultimate conclusion of law that the Project does not meet the public interest test, references to which exist throughout the R.O., but which is directly summarized in the underlined portions of COL 175 below.

> 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. Thus, application for Environmental Resource Permit No. 103479-2 should be denied.

The District's exceptions relate to the first factor in the public interest test, which is whether the activity will adversely affect the public health, safety, or welfare or the property of others. *See*

§ 373.414(1)(a)1.; F.S., Rule 62-330.302(1)(a)1., F.A.C.; Sec. 10.2.3(a), A.H., Vol. I. To consider this factor, section 10.2.3.1, A.H., Vol. I, provides the following, in pertinent part:

> 10.2.3.1 Public, Health, Safety, or Welfare or Property of Others
>
> In reviewing and balancing the criterion regarding public health, safety, welfare and the property of others in section 10.2.3(a), above, the 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;
>
> ***
>
> (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;
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> ***

Thus, the District takes exception to the underlined portions of the following paragraphs, which will be discussed in detail below.

> 62. Spruce Creek has been designated as impaired for phosphorus, dissolved oxygen ("DO"), iron, copper, and Enterococci. There is an adopted Total Maximum Daily Load ("TMDL") for waterbody identification (WBID) number 2674A, the location in Spruce Creek that ultimately receives discharges from the Project via the Unnamed Canal, that requires a reduction of total phosphorus, and a reduction of biochemical oxygen demand ("BOD") to address the DO impairment. <u>The Project will not contribute to iron, copper</u>, or Enterococci.
>
> 92.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." <u>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." His testimony is accepted. A preponderance of the evidence establishes that the factors in this subparagraph are</u>

neutral for purposes of determining whether the Project is "clearly in the public interest."

92.D. "The applicant is proposing to increase the roadway crown of Pioneer Trail to provide improved roadway resiliency and reduce the risk of flooding." The evidence failed to demonstrate that impacts resulting from the Project would alleviate flooding or other environmental effects on the property of others. As indicated previously, the reduction in flooding from raising the crown of Pioneer Trail is limited to the surface of the roadway. It does not reduce or affect flooding on the Project site or to off-site properties. This factor is neutral, as was confirmed by the testimony of Mr. Drauer, which is accepted.

93. As will be discussed in the Conclusions of Law, evidence that the Interchange will establish an alternate route for hurricane and disaster evacuation, and improve emergency response times does not constitute "an improvement to public safety *with respect to environmental conditions*" as set forth in A.H. Vol. I, section 10.2.3.1(a). Post-development discharges from the stormwater system will be improved to the degree required by rule. The reduction in the impairment parameters is a positive factor, though marginally so, since the evidence was not compelling that Spruce Creek, at the point of its impairment designation, would see any measurable effect from the reduction in impairment parameters at the point of the discharge of stormwater to the Unnamed Canal. The evidence that the Project is clearly in the public interest is essentially at equipoise, with the slightest of a tip to the positive solely as a result of DOT's compliance with the District's water quality rules.

106. Taking into account the TSR and the competent, substantial evidence adduced at the hearing, the bases for the conclusion that the Project is clearly in the public interest boil down to two factors. The first, related to traffic safety, is that it is intended to provide an alternate route for hurricane and disaster evacuation via I-95, and enhances traffic incident response times, with the Interchange being roughly between a 7.5 mile stretch between SR 44 and SR 421. The second is that stormwater that currently drains to the Unnamed Canal will benefit from enhanced water quality treatment and an incremental reduction in levels of phosphorus, BOD, iron, and copper for which Spruce Creek is impaired, a reduction required by rule since the Unnamed Canal is an OFW, though not itself subject to an impairment designation.

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.

171. Footnote 6. The undersigned recognizes the conclusion in *Goldberg v. South Florida Water Management District*, Case No. 16-1018 (Fla. DOAH Nov. 8, 2016; Fla. SFWMD Jan. 10, 2017), that non-environmental safety measures could be considered in the public interest balancing test. Judge Canter's well-reasoned and subsequently issued analysis calls that into question. However, even without the traffic safety measures discussed in *Goldberg*, the applicant for that ERP exceeded the bare minimum standards required by rule in order to meet the public interest test, including providing water quality enhancement projects such as the installation of baffle boxes, reestablishment of oxbows in the North Fork of the St. Lucie River, and dredging of unsuitable sediments in a tributary; providing greater mitigation to provide habitat and improve water quality than was required; and providing enhanced public recreational access to the river. There are no similar "extra" environmental enhancement measures not already required by rule provided by DOT in this case.

172. As set forth in the Findings of Fact, the only remaining element of the Project having any benefit to the environment is the reduction of the impairment parameters for which Spruce Creek is designated as impaired. All other factors are neutral, or are not environmental factors.

173. Discharges to the Unnamed Canal (which is not designated as impaired) will flow downstream to the point at which Spruce Creek is designated as impaired. The "positive" factor of a post-development reduction of the concentration of the Spruce Creek impairment parameters to the Unnamed Canal is one required by the District's water quality rules. There was no competent, substantial evidence to demonstrate to what extent, or whether, the waters of Spruce Creek would experience any measurable reduction in concentrations of the impairment parameters, only that the post-development concentration of those parameters from the stormwater management system to the receiving waters of the Unnamed Canal would be reduced.

174. How the public interest scale is to be balanced is not defined. It is not a mathematical formula. To the extent it includes a qualitative element, the sole remaining "environmental" element provided to meet the "public interest" test is not compelling. The reduction in the impairment parameters were those required by rule 62-330.301(2), DOT has done the bare minimum to qualify for the Permit. That element of simple regulatory compliance is not sufficient to establish that the Project is "clearly in the public interest."

174. Footnote 7. As suggested by Mr. Drauer, simple compliance with regulatory requirements warrants consideration as a neutral factor in a "public interest" determination.

174. Footnote 8. It stands to reason that if simple regulatory compliance is, *ipso facto*, sufficient to establish that a proposed ERP is "clearly in the public interest," the public interest test is superfluous, having no real effect on whether a permit is to be issued or denied. Caselaw suggests that is not the intent of the public interest test over the years of its application by DEP, the water management districts, and the courts.

A. The Factual Findings Demonstrate that the Applicant Went Above the "Bare Minimum" and Provided More Water Quality and Water Quantity Treatment Than Required.

1. More than Minimal Water Quality Improvement: Exceptions to paragraphs 93, 106, 107, 171, and 172-175.

a. More than minimal reduction in Total Phosphorus.

First, the Applicant went above and beyond what is required by the District's water quality and impairment rules, which require only a "net improvement" for impaired parameters (e.g., a 1% reduction in an impaired parameter). The Applicant demonstrated that when compared to its current condition, the proposed Project would cause a 29% reduction in total phosphorus discharged to the receiving waters (Unnamed Canal, an OFW), which is intermittent and flows into the ultimate receiving waters–Spruce Creek, an impaired water. *See* FOF 67; Jt. Ex. 2 at 3; T. 1170:8 -1171:25, 1616:8 – 1617:3.

District staff treated the Project as a "direct discharge" to Spruce Creek, an "impaired water," as required by rule. Jt. Ex. 2 at 3; T. 1170:8-1171:25, 1616:8-1617:3. An "impaired water" "means a water body or water body segment that does not meet its applicable water quality standards as set forth in Chapters 62-302 and 62-4, F.A.C., … due in whole or in part to discharges of pollutants from point or nonpoint sources." § 2.0(a)51., A.H., Vol. I. By rule, "[d]ischarges of pollutants that cause or contribute to such impairment are subject to meeting net improvement requirements, as discussed in section 10.2.4.5 of this Volume and Volume II." § 1.4.2., A.H., Vol. I. A "direct discharge" means "a discharge without prior opportunity for mixing and dilution

sufficient to prevent a lowering of the existing ambient water quality." § 2.0(a)26., A.H., Vol. I. Two such examples of a "direct discharge" "without an adequate opportunity for mixing and dilution to prevent significant degradation" are:

> (1) Discharge without entering any other water body or conveyance prior to release to the Class I, Class II, Outstanding Florida Water….
> (2) Discharge into an intermittent watercourse which is a tributary of a Class I, Class II, Outstanding Florida Water… .

§ 2.0(1)(f)(1)-(2), A.H., Vol. II. In this case, the discharge to Unnamed Canal (which itself is an OFW) arguably meets the first example of a "direct discharge" and clearly meets the second example (as an "intermittent watercourse") based on multiple findings of fact that Unnamed Canal is "ephemeral[2]" and a tributary of Spruce Creek (FOF 89):

> FOF 14: "An *ephemeral* watercourse known as the Unnamed Canal runs from a tributary of Spruce Creek through the Project area and further south."
>
> FOF 34: "The Unnamed Canal at the Project site to its intersection with Spruce Creek is an *ephemeral* stream, which is dry during much of the year."
>
> FOF 89: "Portions of the Project are within or discharge to the *ephemeral* Unnamed Canal, an OFW that is a tributary of Spruce Creek."
>
> FOF 98: "The Unnamed Canal is *ephemeral*, its course being dry for most of the year, and flowing north towards Spruce Creek only in response to rainfall. "

FOF 64, 69, 71, and 72 describe the "net improvement" requirements found in 62-330.301(2), 62-330.301(1)(e), F.A.C., A.H., Vol. II, sections 4.0 and 4.1, and A.H., Vol. I, sections 10.2.4.5 and 10.3.1.4, and as recommended by the total maximum daily load ("TMDL") and Final Order of Verified Impaired Waters for Spruce Creek. Dist. Ex. 13 at 50 of 99; Jt. Ex. 16; T. 1620:1-20. District expert David Miracle, P.E., testified that the "net improvement" requirements found in the Florida Administrative Code and the Applicant's Handbooks, Volume I and II, are not

[2] "Ephemeral" is defined as "lasting a very short time; short-lived; transitory: The poem celebrates the ephemeral joys of childhood." See https://www.dictionary.com/browse/ephemeral

quantified by rule. T. 1623:25-1624:05. In other words, *there is no required minimum percentage reduction for impairment parameters.* T. 1623:25-1624:05. As a result, if the Applicant's Project had proposed a 0.01% measurable reduction in total phosphorus discharged, then that could meet the "net improvement" requirement, which would be closer to "the bare minimum" and "simple compliance" with the District's water quality rules as described in COL 174 and Footnotes 7-8. Such a small percentage reduction would more closely fit the characterizations contained in COL 174 and Footnotes 7-8.

However, COL 174, which provides, in part, that the Applicant has done the "bare minimum" in terms of reducing the impairment parameters required by rule, is expressly contrary to FOF 67, which states:

> Calculating the pre-development loading for phosphorus for each basin in the Project area based on its existing land use and calculations of directly connected impervious areas, and comparing that to the calculated post-development loading with the Project in place, it was determined that the wet detention ponds will treat total phosphorus to reduce loading to the receiving waters by 29 percent upon completion. Specifically, post development loading of total phosphorus (4.411 kg/yr) will be less than the pre-development loading of total phosphorus (6.193 kg/yr) to the receiving waters.

The ALJ found that the plans and calculations for the proposed Project demonstrate a 29% reduction in total phosphorus to the receiving waters (Unnamed Canal) which intermittently flows into the ultimate receiving waters—Spruce Creek, an impaired water. *See* FOFs 67, 69, and 72. Even if the Unnamed Canal is intermittent or "ephemeral," a 29% reduction in total phosphorus is significant and exceeds the minimum required amount of nutrient reduction under the net improvement rules where a discharge to the receiving waters (Unnamed Canal) is treated as a "direct discharge" to Spruce Creek (an impaired water). Jt. Ex. 2 at 3; T. 1170:8-1171:25, 1616:8-1617:3.

As noted in FOF 74, the Petitioners did not run any models or perform any calculations to demonstrate non-compliance with the water quality criteria (including net improvement). By the same token, the Petitioners did not offer any evidence to rebut the Applicant's *prima facie* case that a 29% reduction in total phosphorus to the Unnamed Canal provides a significant net improvement to Spruce Creek. *See* FOF 74.

The factual finding in FOF 74, that a 29% reduction in total phosphorus discharged to the Unnamed Canal is sufficient to provide a net water quality improvement for Spruce Creek, is at odds with the conclusion that Applicant's water quality treatment does not provide positive benefit and weigh in favor of "clearly in the public interest."

If District staff had not required the Applicant to treat the Project's discharge to Unnamed Canal as a "direct discharge" to an impaired water (Spruce Creek), then the Applicant would not have needed to demonstrate a net improvement for the Project's applicable pollutants to Spruce Creek. The concepts are mutually exclusive. Either a reduction in total phosphorus discharged to the Unnamed Canal is necessary and sufficient to provide a net water quality improvement to Spruce Creek and the 29% reduction in total phosphorus is significant, or there is effectively not a "direct discharge" to Spruce Creek and net improvement is not required. In the latter case, providing a net improvement when not required would still clearly exceed what the rules require, and would still weigh in favor of "clearly in the public interest."

The ALJ found that Unnamed Canal is a "tributary of Spruce Creek." R.O. at 25 (FOF 89). Ultimately, it does not seem reasonable to accept that there is a connection between the Unnamed Canal and Spruce Creek sufficient to constitute a "direct discharge" that requires the Applicant to provide a net improvement in total phosphorus for Spruce Creek, but to then conclude that the same connection is not sufficient to view the 29% reduction in total phosphorus as providing a

significant enough benefit to Spruce Creek to weigh as a positive factor in favor of "clearly in the public interest."

b. More than required reduction in iron and copper (under FOF 62 view).

Based on the last sentence of FOF 62[3] and FOF 71 -72, the proposed Project on its surface demonstrates more than minimal water quality improvement for iron and copper:

> 62. Spruce Creek has been designated as impaired for phosphorus, dissolved oxygen ("DO"), iron, copper, and Enterococci. There is an adopted Total Maximum Daily Load ("TMDL") for waterbody identification (WBID) number 2674A, the location in Spruce Creek that ultimately receives discharges from the Project via the Unnamed Canal, that requires a reduction of total phosphorus, and a reduction of biochemical oxygen demand ("BOD") to address the DO impairment. The Project will not contribute to iron, copper, or Enterococci.
>
> 71. The calculations performed by Mr. Miracle showed that the post-development loading of BOD, iron, and copper will be less than the pre-development loading of those impairment parameters, resulting in a net improvement of the water quality in the receiving waters, and providing reasonable assurance that the Project meets the requirements of rule 62-330.301(1)(e), A.H. Vol. II, sections 4.0 and 4.1, and A.H. Vol. I, sections 10.2.4.5 and 10.3.1.4.
>
> 72. Based on the foregoing, DOT's plans and calculations establish that the Project will result in a "net improvement" to total phosphorus, BOD, iron, and copper, as recommended by the TMDLs and Final Order of Verified Impaired Waters, meeting the standards of A.H. Vol. II, sections 4.0 and 4.1, and A.H. Vol. I, sections 10.2.4.5 and 10.3.1.4.

The last sentence of FOF 62 finds that the proposed activity will not contribute iron, copper, or Enterococci bacteria to the basin (which is actually not supported by competent substantial evidence as to iron or copper). But taking FOF 62 at face value, it would mean that the proposed Project demonstrates more than minimal water quality improvement for iron and copper. Under sections 8.2.3 and 10.3.1.4 of A.H., Vol. I, "net improvement" in water quality is only required

[3] As discussed below, the District takes exception to most of the final sentence of FOF 62 (regarding a road project not increasing iron and copper) as not supported by competent substantial evidence.

when a proposed activity will "cause or contribute" to an existing water quality exceedance for the pollutant of concern:

> 8.2.3 Activities Discharging into Waters That Do Not Meet Standards
>
> In instances where an applicant is unable to meet water quality standards because existing ambient water quality does not meet standards, and the activity will cause or contribute to this existing condition, mitigation for water quality impacts can consist of water quality enhancement that achieves a net improvement. In these cases, the applicant must propose and agree to implement mitigation measures that will cause net improvement of the water quality in the receiving waters for those contributed parameters that do not meet water quality standards.

Since FOF 62 finds that the proposed activity (constructing a road) will not increase iron or copper discharges, then under sections 8.2.3 and 10.3.1.4 an applicant would not be required to provide a net improvement in the basin for those pollutants.[4] Given that the proposed Project demonstrates a net improvement for iron and copper, then that would exceed the requirement noted in FOF 62.

Accordingly, regarding the water quality portion of the health, safety, and welfare criterion of the public interest test, the factual findings demonstrate that the Applicant demonstrated more than an "incremental reduction in levels of phosphorus, BOD, iron, and copper" noted in FOF/COL 106 and more than the "bare minimum" reduction in impairment levels noted in COL 174. As discussed in greater detail below, the water quality benefits lead to a more reasonable conclusion that this factor weighs more than "marginally," as stated in FOF/COL 93, or "barely," as stated in FOF/COL 107. These statements from FOF/COL 93, 106, and 107 are mislabeled conclusions of law.[5]

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[4] Again, as discussed below, see the District's exception to the final sentence of FOF 62 (regarding a road project not increasing iron and copper) as not supported by competent substantial evidence.

[5] *See Sierra Club v. Dep't of Envtl. Prot.*, 357 So. 3d 737, 741 (Fla. 1st DCA 2023) ("This Court looks to the substance of the decision in an administrative order to determine whether the decision was a conclusion of law or a finding of fact. *See J.J. Taylor Co. v. Dep't of Bus. & Pro. Regul.,*

2. More than Minimal Water Quantity Improvement: Exceptions to paragraphs 92.B., 92.D., 93, 106, 107, 171, 172, 174, and 175.

Second, the Applicant went above and beyond what is required by the District's water quantity rules, which generally only require that "the post-development peak rate of discharge from the Project site will not exceed the pre-development peak rate of discharge for the 25-year, 24-hour storm, which meets the standards of A.H., Vol. II, section 3.2.1." *See* FOF 51. Instead, the Applicant designed "the ponds to be capable of accommodating runoff generated by *a 100-year, 24-hour storm event*, with one foot of freeboard from the bottom of the maintenance berm surrounding the ponds to the design high water in the ponds. *This increase in storage volume provided stormwater management capacity in excess of that required*." *See* FOF 52. "By so doing, DOT provided added assurance that the ponds would not overtop during storm events." *See* COL 134.[6]

Thus, the District takes exception to the underlined portions of FOF/COL 92.B., 92.D., and COL 172, which state:

> 92.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." 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."

Div. of Alcoholic Beverages & Tobacco, 724 So. 2d 192, 193 (Fla. 1st DCA 1999). If a paragraph in a recommended order substantially addresses matters of fact, then this Court treats it as a finding of fact, not a conclusion of law. *Kanter Real Est., LLC v. Dep't of Env't Prot.*, 267 So. 3d 483, 488–89 (Fla. 1st DCA 2019) (holding that a paragraph in a recommended order was a finding of fact because every sentence in the paragraph was a factual finding).").

[6] COL 134 is a finding of fact. *See Sierra Club v. Dep't of Envtl. Prot.*, 357 So. 3d at 741; *Kanter Real Est., LLC v. Dep't of Env't Prot.*, 267 So. 3d 483, 488–89 (Fla. 1st DCA 2019) (holding that a paragraph in a recommended order was a finding of fact because every sentence in the paragraph was a factual finding).

> 92.D. "The applicant is proposing to increase the roadway crown of Pioneer Trail to provide improved roadway resiliency and reduce the risk of flooding." The evidence failed to demonstrate that impacts resulting from the Project would alleviate flooding or other environmental effects on the property of others. As indicated previously, the reduction in flooding from raising the crown of Pioneer Trail is limited to the surface of the roadway. It does not reduce or affect flooding on the Project site or to off-site properties. This factor is neutral, as was confirmed by the testimony of Mr. Drauer, which is accepted.
>
> 172. As set forth in the Findings of Fact, the only remaining element of the Project having any benefit to the environment is the reduction of the impairment parameters for which Spruce Creek is designated as impaired. All other factors are neutral, or are not environmental factors.

R.O. at 52. FOFs 51 and 52 and FOF/COL 134 contradict the conclusions in FOF/COL 92.B., 92.D., and COL 172.

The second underlined sentence from FOF/COL 92.B. and the last sentence from FOF/COL 92.D. are mislabeled conclusions of law.[7] The balancing of the flooding-related public interest factors is a policy-infused conclusion of law and is statutorily delegated to the agency. *Fla. Power Corp.*, 552 So. 2d at 955. As set forth further below, the R.O. mischaracterizes the testimony of Mr. Drauer during the final hearing. His testimony reflected that, as to the first public interest test factor, meeting the water quantity criteria "would be neutral, *at minimum*." T. 1390:14-17 (emphasis added). FOF 52 and FOF/COL 134 demonstrate that the water quantity analysis pushes this factor from neutral to positive.

Notably, section 10.2.3.1, A.H., Vol. I, recognizes that as to flooding or alleviating the potential for flooding, meeting the water quantity criteria is "*at least* a neutral factor" under the first factor of the public interest test:

[7] *See Sierra Club v. Dep't of Envtl. Prot.*, 357 So. 3d at 741; *Battaglia Prop., Ltd. v. Fla. Land & Adjudicatory Comm'n*, 629 So. 2d at 168.

10.2.3.1 Public Health, Safety, or Welfare or the Property of Others

In reviewing and balancing the criterion regarding public health, safety, welfare and the property of others in section 10.2.3(a), above, the Agency will evaluate whether the regulated activity located in, on, or over wetlands or other surface waters will cause:

***

(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; …

§10.2.3.1, A.H., Vol. I. (emphasis added). *See also* R.O. at 49 (quoting *Martin Co. v. All Aboard Fla.*, Case No. 16-5718, 17-2566 (Fla. DOAH Sept. 29, 2017, Fla. SFWMD Nov. 16, 2017)) (stating that "[t]he overall objectives of a district relate to water resources, their management and protection for *flood control*, water supply, and maintaining environmental quality. *See* s. 373.016(3), Fla. Stat. (2017)" (emphasis added)).

In re-weighing the statutory public interest factors, COL 174 and Footnote 7 (as mentioned in FOF 92.B.) rely on the testimony of Mr. Drauer, a witness for the Applicant who is not a District staff member (T. 1433:02), to find that the Applicant met the "bare minimum" rule requirements, which renders the first public interest factor "neutral." Section 373.414(1)(a), F.S., specifically delegates balancing of the public interest factors to the agency. *1800 Atlantic*, 552 So. 2d at 955. No District employee testified that the Applicant only met the "bare minimum" under the District's rules.

FOF 52 finds that the Applicant provided offsite flooding protection "in excess of that required" under District rules, in support of the first public interest factor being positively weighed, and contrary to the inaccurate summary of Mr. Drauer's testimony cited in FOF/COL 92.B. (which is not supported by competent substantial evidence, as discussed below). Because flood control

and protection are within the District's jurisdiction as policy determinations, the District is authorized to consider evidence in support of additional flood controls proposed by the Applicant that would rise above the "bare minimum" of meeting the District rules and criteria and tip the balancing scale in favor of the Project being clearly in the public interest. *Fla. Power*, 638 So. 2d at 559-61.

If FOF/COL 92.B. is modified to accurately reflect Mr. Drauer's testimony during the hearing (which mirrors the language of section 10.2.3.1, A.H., Vol. I), and the District's policy determinations regarding flood control and protection as explained by ALJ Canter in *All Aboard Florida* are applied to the facts in FOF 52, then the proper policy determination would result in the water quantity considerations in the health, safety, and welfare factor of the public interest test being positive, not neutral. *See* R.O. at 26 (FOF/COL 92.B., 92.D., 107, COL 172).

For these reasons, it is more reasonable to conclude that the first factor of the public interest test concretely weighs positively toward "clearly in the public interest" during the District's balancing of the seven public interest factors.

B. Portions of the factual findings in FOF 62, 92.B., and 107 are Not Supported by Competent Substantial Evidence.

The ultimate conclusion of law contained in COL 175 is based in part on unsupported factual findings regarding Respondents' position in balancing the public interest test. These unsupported factual findings are set forth below.

1. Exception to FOF 62

The District takes exception to the underlined portion of FOF 62 below, which is not supported by competent substantial evidence in the record.

> 62. Spruce Creek has been designated as impaired for phosphorus, dissolved oxygen ("DO"), iron, copper, and Enterococci. There is an adopted Total Maximum Daily Load ("TMDL") for waterbody identification (WBID) number

> 2674A, the location in Spruce Creek that ultimately receives discharges from the Project via the Unnamed Canal, that requires a reduction of total phosphorus, and a reduction of biochemical oxygen demand ("BOD") to address the DO impairment. The Project will not contribute to iron, copper, or Enterococci.

There is nothing in the record supporting the finding that the I-95 Interchange Project will not contribute to the loading of Iron and Copper to Spruce Creek.

The testimony during the final hearing supports a finding that the roadway Project will contribute to Iron and Copper runoff. The District's stormwater engineering expert, David Miracle, P.E., testified:

> Q. Do roads contribute to impair—nutrient loading of iron or copper into waterways?
>
> A. Yes. That's why I did the analysis.

T. 1669:04-06. Additionally, Dr. Wendy Anderson, PhD, testified that:

> [W]e do know that copper, zinc—let me see—copper; zinc; lead from tires; and, of course you're going to have a lot of, you know, tire dust coming off as people are stopping and turning across the interchange; and then, also barium and sodium and iron coming off of the brake pads. I mean, any of those are typically associated with major roadways and the runoff going into the creek.

T. 429:09-16.

The District recommends that the last sentence of FOF 62 be modified to be consistent with the testimony provided by Mr. Miracle and Dr. Anderson during the final hearing, that the Project is expected to contribute to Iron and Copper, as there is no competent substantial evidence in the record supporting a finding that the Project will not be a source of Iron and Copper. *See* § 120.57(1)(l), F.S.

2. Exception to FOF 92.B.

The District provides additional reasons for the exception to the two underlined sentences of FOF 92.B. below.

> "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." 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."

As to the first underlined sentence (the characterization of Mr. Drauer's testimony), there is not competent substantial evidence in the record to support that quotation, which omits relevant testimony contained in the final hearing transcript.

FOF 92.B. mischaracterizes Mr. Drauer's testimony as agreeing that the Applicant's compliance with the water quantity criteria only provides a neutral weight for the first public interest factor. Mr. Drauer actually stated that it was neutral *at a minimum*, thereby suggesting it could be positive:

> 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 minimum*.

T. 1390:13–17 (emphasis added).

The District recommends that FOF 92.B. be modified to be consistent with the testimony provided by Mr. Drauer, which is consistent with section 10.2.3.1(c), A.H., Vol. I, that if the applicant meets the water quantity criteria in Part III of A.H., Vol. II, then this is "*at least* [or at minimum] a neutral factor" in the public interest balancing test.

3. Exception to FOF 107

The District takes exception to the underlined portion of FOF 107, which states:

> 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[8]) 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.

To the extent the R.O. is attributing the "mathematical" testimony of "Respondents" in whole or in part to District employee Nicole Martin, who is the only District employee whose testimony is referenced in the findings of fact related to the public interest test (in FOF 92.C.), the underlined portion of FOF 107 does not accurately reflect the District employee's testimony. District expert Nicole Martin testified as follows:

> Q. [I]t is correct to say you are weighing criteria for the public interest. That's a fair assessment of how you determine the public interest?
>
> A. Yes, it's a balancing criteria.
>
> Q. And you're saying so, if during your balancing, even if it's just .0001, you know, units of public interest in favor, that that is sufficient to award a project as clearly in the public interest?
>
> A. I didn't apply any numerical value to it. That's not part of the rule. We found that one of the seven criteria was in favor, and that is sufficient to be clearly in the public interest.

T. 1802:10-22.

In light of Ms. Martin's clear testimony on this issue, later repetitive questioning by Petitioners as to whether the District applies a "mathematical" formula or a "percentage" do not support the finding that the District applies a mathematical formula when balancing the public interest factors. *See* T. at 1826 (repeatedly inquiring as to whether "mathematically neutral" means zero factors, or weighing a positive and negative factor); 1803-04 (questioning concerning balancing neutral against positive factors found to be speculative, when witness testified, "I don't

[8] The District takes exception to the language, "one factor – barely," in combination with the District's exception to FOF/COL 107, below.

know what those are," and ALJ commented, "I think this is a little speculative unless there's something you can tie it to. It's a balancing test ... and it's all case by case.").

To be sure, Ms. Martin also testified:

> Q. Okay. So, Ms. Martin, if only one of the factors is clearly in favor of the public interest and the rest were neutral, how is the project clearly in the public interest?
>
> A. Because you have that one factor in the public interest. It's a balancing test. It's a balancing rule. And when you look through all of the criteria and there is no requirement that it has to be, you know, a percentage, it is just a balancing test. And so it was determined, based on those seven factors, that the project is clearly in the public interest.

T. 1786:16-1787:01.

The District also takes exception to the portion of FOF 107 attributing the "mathematical" testimony to "Respondents," as FDOT also never put forth any testimony or recommendations that the public interest test was conducted in this fashion. In fact, this is Petitioners' position. *See* T. at 1802-04. There is no competent substantial evidence in the record supporting the finding that "Respondents" made the assertion that the public interest test was conducted in a "mathematical" fashion.

The District recommends that FOF 107 be modified to be consistent with the testimony provided by Ms. Martin, the District's employee and expert at the final hearing, 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 formula.

C. The Public Interest Factors Are More Reasonably Weighed and Balanced in Favor of the Project Meeting the Public Interest Test: Exceptions to Paragraphs 92.B., 92.D., 93, 106, 107, 171, 172-175

The excepted findings of fact in Paragraphs 92.B., 92.D., 93, 106, and 107 are mislabeled, and are actually conclusions of law.[9] Determining whether the proposed Project meets or exceeds the degree of water quality improvement and water quantity criteria required by rule, whether evidence was submitted on a particular issue, and the balancing of the public interest factors are conclusions of law, not factual findings. *1800 Atlantic Dev.*, 552 So. 2d at 955.

1. The District is the proper statutorily delegated entity to assess the weight of each of the public interest factors.

As an initial matter, the District is delegated the statutory authority to decide whether a project is clearly in the public interest. § 373.414, F.S. Section 373.414 requires the "governing board" or "department" to balance the seven statutory factors of the public interest test:

> In determining whether an activity, which is in, on, or over surface waters or wetlands, as delineated in s. 373.421(1), and is regulated under this part, is not contrary to the public interest or is clearly in the public interest, the governing board or the department shall consider and balance the following criteria ….

§ 373.414(1)(a), F.S. This statutory task cannot be delegated to the hearing officer or administrative law judge. *1800 Atlantic Dev.*, 552 So. 2d at 955 ("The hearing officer was not vested with the power to review DER's discretion in setting acceptable mitigative conditions in the sense of passing on their sufficiency to meet the statutory criteria" under § 403.918(2)(b), which provided, "If the applicant is unable to otherwise meet the criteria set forth in this subsection, the *department*, in deciding to grant or deny a permit, shall consider measures proposed by or acceptable to the applicant to mitigate adverse effects which may be caused by the project."

[9] *See Sierra Club v. Dep't of Envtl. Prot.*, 357 So. 3d at 741; *Battaglia Prop., Ltd. v. Fla. Land & Adjudicatory Comm'n*, 629 So. 2d at 168.

(emphasis added)). Accepting the conclusions of law found in FOF/COL 93, 107, and COL 174 and 175, without closer review as to the underlying facts and policy, would "amount to an unlawful abdication of the agency's statutory responsibility and power." *1800 Atlantic*, 552 So. 2d at 955; *see also Fla. Power Corp.*, 638 So. 2d at 563, *Zehmer, C.J., dissenting* ("It is the function of the hearing officer to make determinations of predicate facts underlying the statutory criteria, as these are matters of existing or projected facts susceptible to ordinary methods of proof. Based on the facts so found by the hearing officer, assuming they are supported by competent, substantial evidence, it is the function of the Department or Secretary to weigh the statutory criteria established by the facts and conclude whether the project as a whole is against the public interest. Only the weighing of the criteria involves matters of policy left to the agency's expertise and discretion.").

In *1800 Atlantic*, the First District Court of Appeal reversed and remanded a final order adopting a recommended order denying a dredge and fill permit application in an area designated as an OFW "based on failure to provide reasonable assurances that the project is clearly in the public interest" under (former) section 403.918(2), F.S. 552 So. 2d at 948-49. This section provided,

> 403.918. Criteria for granting or denying permits
>
> (2) A permit may not be issued under ss. 403.91–403.929 unless the applicant provides the department with reasonable assurance that the project is not contrary to the public interest. However, for a project which significantly degrades or is within an Outstanding Florida Water, as provided by department rule, the applicant must provide reasonable assurance that the project will be clearly in the public interest.
>
> (b) If the applicant is unable to otherwise meet the criteria set forth in this subsection, the *department*, in deciding to grant or deny a permit, shall consider measures proposed by or acceptable to the applicant to mitigate adverse effects which may be caused by the project. …

§ 403.918(2), F.S. (1992) (West) (emphasis added).

In *1800 Atlantic*, DER accepted as findings of fact the hearing officer's conclusions that the proposed mitigation offered to meet the statutory mitigation requirement of section 403.918(2)(b) was vague and ill defined, which the court found to be error. 552 So. 2d at 955. The court explained that DER had the statutory duty to determine the adequacy of the mitigation, the weight of the various public interest factors, and then balance the public interest factors to determine whether the project met the public interest test:

> Section 403.918(2)(b) requires that DER, *not the hearing officer*, consider and determine what measures to mitigate adverse effects that may be caused by the project will be legally sufficient under the statute. This task cannot be delegated to the hearing officer. It is the responsibility of DER, not the hearing officer, to establish mitigative measures acceptable to it under the statute. *DER, not the hearing officer, has the statutory responsibility* to define mitigative measures that would be sufficient to offset the perceived adverse effects of the dredging and filling contemplated by the project *in accord with the statutory criteria for determining the public interest*. As the hearing officer's function was only that of a fact finder, it was the hearing officer's function to make findings of fact regarding disputed factual issues underlying the conditions set by DER and the implementation of and compliance with the mitigative conditions set by DER. *The hearing officer was not vested with the power to review DER's discretion in setting acceptable mitigative conditions in the sense of passing on their sufficiency to meet the statutory criteria.* The [DER] Secretary's treatment of the hearing officer's findings regarding the sufficiency of DER's conditions as binding on DER would amount to an unlawful abdication of the agency's statutory responsibility and power. The prescription in section 120.57(1)(b)9 that a hearing officer's findings of fact are binding on the agency when supported by competent substantial evidence does not encompass findings on the sufficiency of the mitigative conditions agreed to by DER and 1800 Atlantic, as such findings are properly characterized as conclusions of law.

Id. at 955 (emphasis added).

Here, the District is statutorily required to weigh and balance the seven public interest factors and determine whether the Project is clearly in the public interest. § 373.414(1)(a), F.S. As explained by Ms. Martin during the final hearing, the District conducted the balancing test and

found that the Project was clearly in the public interest. T. 1786:16-1787:01. As detailed herein, there are additional findings of fact in the R.O. to support that conclusion that the Project is clearly in the public interest. *See* FOF 52, 67.

COL 175, which ultimately finds that the Applicant failed to provide reasonable assurance that the Project is clearly in the public interest, is squarely within the District's substantive jurisdiction. § 120.57(1)(l), F.S. Similarly, the conclusions of law in FOF/COLs 92.B., 92.D., 93, 106, and 107, which gave little weight to the first factor of the public interest test, are squarely within the District's substantive jurisdiction. § 373.414(1)(a), F.S. By stating in COL 93 that the "evidence that the Project is clearly in the public interest is essentially at equipoise[10]" the ALJ, in practical terms, gave no weight to the first public interest factor. Otherwise, the seven public interest factors would not have been at equilibrium. As detailed further herein, the R.O. relies on inaccurate testimony and facts to re-weigh the District's balancing of the seven public interest factors, "in the sense of passing on their sufficiency to meet the statutory criteria." *1800 Atlantic*, 552 So. 2d at 955. That weighing and balancing responsibility is statutorily delegated to the District. *Id.*; § 120.57(1)(l), F.S.

2. The public interest balancing test is a policy matter for District determination.

In *Florida Power Corp. v. State of Florida, Department of Environmental Regulation*, the First District Court of Appeal examined a DER final order denying a permit application, affirming on the basis that "the public interest in the extent of the impact on the environment from this destruction of the forest was a policy matter for [agency] determination and not a question of fact to be resolved by the hearing officer." *Florida Power Corp.*, 638 So. 2d at 546.

[10] "Equipoise" as a noun means "an equal distribution of weight; even balance; equilibrium." https://www.dictionary.com/browse/equipoise

The dispute in *Florida Power Corp.* centered on the clearing of approximately six acres of forested wetlands, which as a result were converted to herbaceous wetlands, and whether that would result in an adverse impact that would affect the public interest factors under (former) section 403.918(2), F.S. *Fla. Power Corp.*, 638 So. 2d at 546. The hearing officer found in the recommended order that the clearing and conversion of wetlands was "de minimis" and not adverse, and did not require mitigation. In the final order, the DER Secretary rejected these factual findings, and explained, "[a]lthough the degree and kinds of impacts from the conversion of forested wetlands to herbaceous wetlands may be findings of fact, whether such impacts are adverse environmental impacts *and the weight accorded to them in the balancing of the public interest criteria are questions of law and policy over which I have final authority and responsibility*." The court agreed. *Id.* at 559, 561 (emphasis added). In light of the substituted factual findings of the DER Secretary that the destruction of six acres of forested wetland was adverse, the "*Secretary reconsidered the balancing of the public interest criteria* in section 403.918(2)," and found the project to be contrary to the public interest. *Id.* at 559-60 (emphasis added). The court found that the DER Secretary's rulings were within her discretion in implementing the statutes and affirmed the final order. *Id.* at 561-62.

Here, the re-balancing of the public interest factors in the above conclusions of law are questions infused with policy determinations that are solely within the discretion of the District. Even the dissenting opinion in *Florida Power* recognized that, "it is the function of the Department or the Secretary to weigh the statutory criteria *established by the facts* and conclude whether the project as a whole is against the public interest. Only the *weighing of the criteria involves matters of policy left to the agency's expertise and discretion*." *Id.* at 562, *Zehmer, C.J., dissenting*.

In this case, the District is not taking exception to any of the ALJ's factual findings that are based on competent substantial evidence. As set forth in further detail *infra*, there are factual findings contained in the R.O. supporting the District's balancing of the seven factors to find that the Applicant provided reasonable assurance that the Project is clearly in the public interest. Significantly, the Applicant has demonstrated an estimated 29% reduction in total phosphorus loading to the receiving waters (Unnamed Canal, which intermittently flows into the ultimate receiving waters -- Spruce Creek), which clearly exceeds the "net improvement" requirement of section 373.414(1)(b)3., F.S., and sections 8.2.3 and 10.3.1.4, A.H., Vol. I. FOF 67; 64, 69, 71, 72.

Additionally, the Applicant demonstrated that the proposed Project would hold water onsite for up to a 100-year 24-hour storm event, which exceeds the general requirement of designing a project to hold stormwater for a 25-year 24-hour storm event. *See* R.O. at 17 (FOF 52). The Applicant did this to provide "added assurance" that the stormwater ponds "would not overtop during storm events." R.O. at 38 (COL 134). Holding more than the minimum required volume of stormwater to avoid overtopping during a storm event could be considered a form of "hurricane preparedness." Notably, "hurricane preparedness" is one of the "potential environmental public health or safety issues resulting from their project" mentioned in the first public interest factor. § 10.2.3.1(a), A.H., Vol. I. Thus, holding extra stormwater for "hurricane preparedness" could be considered a positive benefit under the first public interest factor, and it would be as or more reasonable to have included this consideration in COLs 172 and 174.

The balancing of the public interest factors is a policy determination that is solely delegated to the District. It is well within the District's authority to consider all the factual findings made in the R.O. in balancing the public interest factors when issuing a final order. *See Fla. Power*, 638

So. 2d at 559 ("The Secretary reconsidered the balancing of the public interest criteria in section 403.918(2) in light of the rejected finding of no adverse impact."). As set forth below in additional detail, this appropriately leads to the as reasonable or more reasonable conclusion that the Applicant provided reasonable assurance that the Project is clearly within the public interest.

3. Requiring "extra" environmental benefits is not authorized.

The Applicant is not required to demonstrate "that Spruce Creek, at the point of its impairment designation, would see any measurable effect from the reduction in impairment parameters at the point of the discharge of stormwater to the Unnamed Canal," to obtain an ERP under Chapter 373 or Chapter 62-330 (including the public interest test), as suggested by COL 173. Insofar as a showing of this type could be required under the District's water quality rules, the Applicant demonstrated that the current loading of total phosphorus to the receiving waters would be reduced by 29% as a result of the stormwater system proposed for the Project, which will improve the water quality of Spruce Creek. *See* FOF 67, 69, and 72. Nothing further is required.

The intent to require an "extra" environmental benefit not already required by rule in order to be "clearly in the public interest" is specifically set forth in the last sentence of Paragraph 171, Footnote 6 of the R.O., which states, "There are no similar 'extra' environmental enhancement measures not already required by rule provided by DOT in this case." R.O. at 52.

In *1800 Atlantic*, the court reversed and remanded a final order following a recommended order denying a dredge and fill permit application in an area designated as an OFW "based on failure to provide reasonable assurances that the project is clearly in the public interest." 552 So. 2d at 948-49. The hearing officer in *1800 Atlantic* took a position similar to the ALJ's in this case, and explained in the recommended order: "One searches in vain for any significant public benefit from this project…." *Id.* at 951.

In disapproving the hearing officer's position, the court held:

> The applicant 1800 Atlantic *need not show any particular need or net public benefit as a condition of obtaining the permit*. Nor does the statute require that 1800 Atlantic prove the absence of negative impacts from the project and *demonstrate the creation of a net environmental or societal benefit to meet the public interest test*. Suggestions in the final order that this showing is necessary simply because the project is in Outstanding Florida Water go beyond the statutory provisions and have no basis in the law.

Id. at 956 (emphasis supplied).

The last sentence of Footnote 6 seeks additional "measures not already required by rule," R.O. at 52, which clearly goes "beyond the statutory provisions and ha[s] no basis in the law," *1800 Atlantic*, 552 So. 2d at 956. This error also appears in COL 173.

Indeed, section 373.414, F.S., rule 62-330.302(1), F.A.C., and the Applicant's Handbook, Vol. I, sections 10.2.3 through 10.2.3.7, do not contain a requirement for an applicant to show a "net public benefit," a "net environmental benefit," or any "extra environmental enhancement measures" not already provided by rule. *See* § 373.414, F.S.; 62-330.302(1), F.A.C.; §§ 10.2.3-10.2.3.7, A.H., Vol. I. *1800 Atlantic*, 552 So. 2d at 956.

This, however, does not render the public interest test superfluous, as suggested by Paragraph 174, Footnote 8 of the R.O. As correctly pointed out elsewhere in the R.O., the public interest test is a balancing test. The balancing test is not a mathematical formula. Yet this balancing test is strictly within the purview of the agency pursuant to statute and policy reasons. *See* § 373.414(1)(a) ("In determining whether an activity, which is in, on, or over surface waters or wetlands … is clearly in the public interest, the governing board or the department shall consider and balance the following criteria ….").

In limiting the authority of the ALJ and the courts to balance the public interest factors, Florida courts have thus practically limited the overreaching of agencies and administrative judges

attempting to require "extra" project features not required under the applicable rules, similar to what could be considered an exaction prohibited under "the unconstitutional conditions doctrine." *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606 (2013) ("Under *Nollan* and *Dolan* the government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts"). The courts have essentially set guardrails prohibiting administrative agencies and tribunals from attempting to require from an applicant "extra environmental enhancement measures not required by rule," (R.O. at 53, fn. 8), which goes "beyond the statutory provisions and ha[s] no basis in the law." *1800 Atlantic*, 552 So. 2d at 956.

4. It is more reasonable to conclude that the first public interest factor has real weight and the balance of the factors weigh in favor of "clearly in the public interest."

The statutory directive and policy justification support that the District conduct the balancing portion of the public interest test. *1800 Atlantic*; *Fla. Power Corp*. Florida law provides that the District is within its authority to conduct the balancing test upon consideration of all of the evidence adduced at the final hearing. *Fla. Power*. The District posits that an "as reasonable or more reasonable" conclusion of law would be the following:

> Applicant's plans and calculations showing a 29% reduction in total phosphorus discharge to the receiving waters, along with stormwater ponds designed to meet (and hold water for) a 100-year, 24-hour design storm event, which both exceed what the District's rules require for water quality and water quantity, clearly make the first factor positive. The first factor has more positive weight than described in FOF/COL 93 ("slightest of a tip to the positive") and FOF/COL 107 ("barely"). With one clearly positive public interest factor of greater than minimal weight, and the remaining six factors all neutral, the only reasonable, logical conclusion is that the overall balance of the seven public interest test factors weighs in favor of "clearly in the public interest." Thus, the Applicant provided reasonable assurance that the Project is clearly in the public interest and the Permit should be issued.

As a result, the District recommends that FOF/COLs 92.B., 92.D., 93, 106, and 107, and COLs 171 (Footnote 6), 172, 173, 174 (and Footnotes 7 and 8), and 175, be amended to reflect the as or more reasonable conclusion of law set forth above, and supported by the factual findings contained in FOFs 52, 64, 67, 69, 71, 72, and FOF/COL 134 in the R.O. Specifically, recommended revisions to these findings are shown with strike-through (for deletions) and underlining (for additions) as follows:

> 92.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 minimum." His testimony is accepted. A preponderance of the evidence establishes that the factors in this subparagraph are ~~neutral~~ positive for purposes of determining whether the Project is "clearly in the public interest."
>
> 92.D. "The applicant is proposing to increase the roadway crown of Pioneer Trail to provide improved roadway resiliency and reduce the risk of flooding." The evidence ~~failed to~~ demonstrated that impacts resulting from the Project would alleviate flooding or other environmental effects on the property of others. As indicated previously, the reduction in flooding from raising the crown of Pioneer Trail is limited to the surface of the roadway. It does not reduce or affect flooding on the Project site or to off-site properties. This factor is ~~neutral~~ positive, as was confirmed by the testimony of Mr. Drauer, which is accepted.
>
> 93. As will be discussed in the Conclusions of Law, evidence that the Interchange will establish an alternate route for hurricane and disaster evacuation, and improve emergency response times does not constitute "an improvement to public safety *with respect to environmental conditions*" as set forth in A.H. Vol. I, section 10.2.3.1(a). Post-development discharges from the stormwater system will be improved ~~to the degree required by rule~~. The reduction in the impairment parameters is a positive factor~~, though marginally so, since the evidence was not compelling that Spruce Creek, at the point of its impairment designation, would see any measurable effect from the reduction in impairment parameters at the point of the discharge of stormwater to the Unnamed Canal~~. The evidence that the Project is clearly in the public interest ~~is essentially at equipoise, with the slightest of a~~ tips to the positive ~~solely as a result of DOT's compliance with the District's water quality rules~~.

106. Taking into account the TSR and the competent, substantial evidence adduced at the hearing, the bases for the conclusion that the Project is clearly in the public interest boil down to ~~two~~ three factors. The first, related to traffic safety, is that it is intended to provide an alternate route for hurricane and disaster evacuation via I-95, and enhances traffic incident response times, with the Interchange being roughly between a 7.5 mile stretch between SR 44 and SR 421. The second is that stormwater that currently drains to the Unnamed Canal will benefit from enhanced water quality treatment and ~~an incremental~~ reduction in levels of phosphorus, BOD, iron, and copper for which Spruce Creek is impaired, a reduction required by rule since the Unnamed Canal is an OFW, though not itself subject to an impairment designation.

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.

171. Footnote 6. The undersigned recognizes the conclusion in *Goldberg v. South Florida Water Management District*, Case No. 16-1018 (Fla. DOAH Nov. 8, 2016; Fla. SFWMD Jan. 10, 2017), that non-environmental safety measures could be considered in the public interest balancing test. Judge Canter's well-reasoned and subsequently issued analysis calls that into question. However, even without the traffic safety measures discussed in *Goldberg*, the applicant for that ERP exceeded the bare minimum standards required by rule in order to meet the public interest test, including providing water quality enhancement projects such as the installation of baffle boxes, reestablishment of oxbows in the North Fork of the St. Lucie River, and dredging of unsuitable sediments in a tributary; providing greater mitigation to provide habitat and improve water quality than was required; and providing enhanced public recreational access to the river. ~~There are no similar "extra" environmental enhancement measures not already required by rule provided by DOT in this case~~.

172. As set forth in the Findings of Fact, the ~~only remaining~~ element<u>s</u> of the Project having ~~any~~ benefit to the environment ~~is~~ <u>are</u> the reduction of the impairment parameters for which Spruce Creek is designated as impaired <u>and the stormwater ponds designed for a 100-year, 24-hour design storm event</u>. All other factors are neutral, or are not environmental factors.

173. Discharges to the Unnamed Canal (which is not designated as impaired) will flow downstream to the point at which Spruce Creek is designated as impaired. The "positive" factor of a post-development reduction of the concentration of the Spruce

Creek impairment parameters to the Unnamed Canal includes a 29% reduction in total phosphorus discharged to receiving waters. ~~is one required by the District's water quality rules. There was no competent, substantial evidence to demonstrate to what extent, or whether, the waters of Spruce Creek would experience any measurable reduction in concentrations of the impairment parameters, only that the post-development concentration of those parameters from the stormwater management system to the receiving waters of the Unnamed Canal would be reduced~~.

174. How the public interest scale is to be balanced is not defined. It is not a mathematical formula. The Applicant has demonstrated a 29% reduction in total phosphorus discharge to receiving waters, along with stormwater ponds designed to meet (and hold water for) a 100-year, 24-hour designed storm event, which both exceed the rule requirements for water quality and water quantity. The environmental element of the first factor weighs positive. ~~To the extent it includes a qualitative element, the sole remaining "environmental" element provided to meet the "public interest" test is not compelling. The reduction in the impairment parameters were those required by rule 62-330.301(2), DOT has done the bare minimum to qualify for the Permit. That element of simple regulatory compliance is not sufficient to establish that the Project is "clearly in the public interest."~~

174. Footnote 7. As suggested by Mr. Drauer, simple compliance with regulatory requirements warrants consideration as a neutral factor, at minimum, in a "public interest" determination.

~~174. Footnote 8. It stands to reason that if simple regulatory compliance is, *ipso facto*, sufficient to establish that a proposed ERP is "clearly in the public interest," the public interest test is superfluous, having no real effect on whether a permit is to be issued or denied. Caselaw suggests that is not the intent of the public interest test over the years of its application by DEP, the water management districts, and the courts.~~

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. Thus, application for Environmental Resource Permit No. 103479-2 should be ~~denied~~ approved.

IV. Petitioners did not Meet Their Burden of Ultimate Persuasion Under Section 120.569(2)(p), F.S.

District staff recognize 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 under section 120.569(2)(p), F.S. *See 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*., 29 F.A.L.R. 4063 (Fla. DEP 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.*, 28 F.A.L.R. 3844, 3846 (Fla. DEP 2005) (evidentiary rulings of the ALJ concerning the admissibility and competency of evidence are not matters within the agency's substantive jurisdiction). Instead, District staff raise this issue in an abundance of caution to preserve it for a potential appeal.

Footnote 9 and the following part of COL 173 of the Recommended Order state:

> Fn. 9: A good portion of the evidence regarding the "neutral" nature of elements deemed positive in the TSR was elicited during Petitioner's examination of witnesses. Thus, the result reached herein is a measure of Petitioners meeting their burden of ultimate persuasion to establish their case in opposition to the Permit through the presentation of competent and substantial evidence.
>
> COL 173: … The "positive" factor of a post-development reduction of the concentration of the Spruce Creek impairment parameters to the Unnamed Canal is one required by the District's water quality rules. There was no competent, substantial evidence to demonstrate to what extent, or whether, the waters of Spruce Creek would experience any measurable reduction in concentrations of the impairment parameters, only that the post-development concentration of those parameters from the stormwater management system to the receiving waters of the Unnamed Canal would be reduced.

R.O. at 52 - 53. Footnote 9 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), F.S., and rebutted the Applicant's *prima facie* case (as to the positive public interest benefits of the project). The quoted part of COL 173 then suggests that after Petitioners rebutted

the Applicant's *prima facie* case (as to the positive public interest benefits of the project on Spruce Creek), the Applicant failed to present evidence demonstrating "to what extent, or whether, the waters of Spruce Creek would experience any measurable reduction in concentrations of the impairment parameters… ." However, 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) to rebut the Applicant's *prima facie* case. Moreover, there is no competent substantial evidence in the record to support such a conclusion.

The R.O. relies on the testimony of Mr. Drauer to support the conclusion that the flood protection measures taken by the Applicant amount to, at best, a "neutral" factor in the public interest balancing test. R.O. at 26 (FOF 92.B., 92.D.); 52-53 (COL 172, 174, fn. 7). However, as shown above, the R.O. does not accurately quote Mr. Drauer's testimony, which states "neutral *at a minimum*." T. 1390:13–17. Moreover, the ALJ later properly limited Mr. Drauer's testimony regarding flooding, because he is an environmental consultant, not an engineer. T. 1391-1392 ("We've had [Mr. Vavra's] testimony as to flooding and to the water table and to the soils and things; and I'm not sure that—this witness is more, as I—as I see it, more of a wetland and species and plant expert, so if we could kind of limit him to those areas.").

Additionally, it is the agency, not the Applicant or ALJ, that balances the public interest factors. *See 1800 Atlantic*; *Fla. Power Corp.* The only reliance on District testimony regarding the public interest balancing test is in FOF 92.C., citing Ms. Martin's testimony about shellfish harvesting. The R.O. cites to no other District testimony when balancing the public interest factors, including District testimony regarding flooding or phosphorus loading to Spruce Creek. In a review of the record, Petitioners hardly questioned the District engineer responsible for the phosphorus loading analysis contained in the public interest balancing test. *See* T. 1666-1670

(questioning focused on the current level of phosphorus in Spruce Creek, whether roads contribute to nutrient loading, and the reasonable assurance standard).

As to other witnesses examined by Petitioners, no testimony was elicited that appears to support the conclusion of law contained in Footnote 9 and COL 174. *See, e.g.*, T. 153-157 (no testimony from Mr. Baker as to flooding or nutrient impairment with regard to the public interest test); T. 222-228 (lay testimony from Mr. Brower as to the public interest factors); *see also* T. 223-224 (declining to accept Mr. Brower's testimony as expert testimony, but allowing "some deference to the local government officials who are interested enough to come to these types of proceedings and testify"); T. 294-298 (limiting testimony of Mr. Collins as it relates to the public interest test to hurricane evacuation), *see also* T. 347-348 (sustaining Respondents' objection to Mr. Collins's testimony as it relates to the public interest test); T. 466 (sustaining Respondents' objection as to testimony of Dr. Anderson with regard to phosphorus loading because she did not offer this opinion during her deposition, and Dr. Anderson admitting that she is not an expert in flooding); T. 574-577 (sustaining Respondents' objection to testimony of Dr. Cho with regard to phosphorus loading analysis because she did not opine on this during her deposition); T. 1030-1034 (opining by Dr. Barile that the Project will not result in net reduction in phosphorus based on a TMDL report and "DEP and the Water Management District's understanding of what happens when you add excess nutrients to an Impaired Water, and the consequences of that"), *but see* T. 1054-1055 (admitting that he did not do any independent calculations to determine a net reduction in phosphorus and had not reviewed the Applicant's calculations at the time of his deposition) and FOF 74 (at R.O. 21 – 22).

Petitioners' examination of witnesses mainly focused on the "public acceptance" of the Project as the "public interest" test. As explained by the ALJ during the hearing,

> I'm being asked to make a decision as to whether DOT qualifies for an ERP permit for this project. And there could be a million people in favor of it, and it may not meet the standards. And there can be a million people opposed to it and it may meet the standards. I mean, how—the degree of public acceptance or nonacceptance is not something that's going to play in my decision at all. I'm governed by a set of rules that I have to apply based on the evidence I hear, which is primarily scientific-based evidence.

T. 168:18-169:05.

For these reasons, the District disputes that there is sufficient evidence in the record to support the conclusions contained in Footnote 9 and COL 173, that Petitioners met their burden of ultimate persuasion under section 120.569(2)(p), F.S., to rebut the Applicant's *prima facie* case as to the public interest benefits of the Project and their weight. District staff raise the issue now, in an abundance of caution, for preservation purposes. *See Barfield*, 805 So. 2d at 1012; *Lane*, 29 F.A.L.R. 4063; *Lardas,* 28 F.A.L.R. at 3846.

Respectfully submitted on this 13th day of February, 2024.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 13, 2024, the original of the foregoing has been filed by hand delivery with the District Clerk of St. Johns River Water Management District, and that a true and correct copy of the foregoing was furnished electronically to:

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