STATE OF FLORIDA
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,

vs.

DOAH CASE NO.: 22-0518
SJRWMD F.O.R. NO.: 2023-06

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

RESPONDENT, FLORIDA DEPARTMENT OF TRANSPORTATION'S EXCEPTIONS TO RECOMMENDED ORDER

COMES NOW, Respondent, the State of Florida Department of Transportation ("FDOT"), by and through its undersigned counsel, and hereby submits its exceptions, to the Honorable Administrative Law Judge E. Gary Early's ("ALJ") January 29, 2024, Recommended Order, pursuant to Rule 28-106.217(1), of the Florida Administrative Code ("F.A.C."), and section 120.57(1)(k), Florida Statutes, and states:

I. STANDARD OF REVIEW

Section 120.57(1)(l), Florida Statutes, authorizes an agency to reject or modify an ALJ's conclusions of law and interpretation of administrative rules "over which it has substantive jurisdiction."

An agency reviewing a recommended order may reject or modify the findings of fact of an administrative law judge where the agency "states with particularity in its final order that the findings were not based upon competent substantial evidence or that the proceeding on which the

findings are based did not comply with the essential requirements of law." *Gross v. Department of Health*, 819 So. 2d 997, 1001 (Fla. 5th DCA 2002). Competent substantial evidence is evidence that "will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. 'Substantial evidence' must be 'competent', and it is [competent], if it is relevant and material to the issue or issues presented for determination." *Gainesville Bonded Warehouse, Inc. v. Carter*, 123 So. 2d 336, 338 (Fla. 1960) (*citing De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957).

The ALJ's finding of fact must also be based upon a preponderance of the evidence and "exclusively on the evidence of record and on matters officially recognized." § 120.57(1)(j), Fla. Stat. If an ALJ improperly labels a conclusion of law as a finding of fact, the label should be disregarded, and the item treated as if it were correctly labeled a conclusion of law. *See Battaglia Properties v. Fla. Land and Water Adjudicatory Comm'n*, 629 So. 2d 161, 168 (Fla. 5th DCA 1993) (*citing Kinney v. Department of State*, 501 So. 2d 129 (Fla. 5th DCA 1987).

In the instant matter, the ALJ came to conclusions of law regarding significant rule criteria and Florida Statutes which must be rejected or modified. As a result, the ALJ's ultimate conclusion was incorrect and Permit No. 103479-2 should be granted.

EXCEPTIONS TO RECOMMENDED ORDER[1]

FDOT's Exception No. 1: The ALJ applied an incorrect burden with regard to the burden shifting provision of section 120.569(2)(p), Florida Statutes

1. The burden of proof in administrative proceedings under chapter 373 is controlled by section 120.569(2)(p), Florida Statutes. This statute provides that in a permit proceeding challenged by a "third party," the applicant may establish "a prima facie case demonstrating entitlement" by entering into evidence the application, relevant evidence submitted to the agency, the staff report, and the notice of intent to issue. At that point, the statute imposes on the challenger the "burden of ultimate persuasion" and the "burden of going forward to prove the case in opposition to the […] permit […]. through the presentation of competent and substantial evidence […]." In effect, where the reviewing agency determines that the application is worthy of approval, the statute automatically determines that the applicant has proven a prima facie case of entitlement to the permit and places the burden of proof on the challenger to prove a case in opposition.

2. In paragraphs 71 and 124 of the Recommended Order, the Administrative Law Judge correctly determined that FDOT had established a prime facie case of entitlement to the permit. As a result, the ALJ then correctly noted that the burden of proof and the burden of persuasion falls on the Petitioners.

3. For example, with regard to nutrient reduction, it became the Petitioners' burden to prove that the project *would not* reduce the pre-development loading of impairments coming from the site after the FDOT established its prima facie entitlement.

[1] References herein to Joint Exhibits will be designated by the letters "JE" followed by the exhibit number and in some instances the page number of the exhibit, *e.g.*, JE 4, Pg. 10. References to party exhibits will be designated by the party offering the exhibit, followed by the exhibit number and in some instances the page number of the exhibit, *e.g.* FDOT Ex. 1. References to the transcript of the testimony taken at the final hearing will be designated by the letter "Tr" followed by the page number of the transcript, *e.g.*, Tr, p. 171. References to the Recommended Order will be designated by the letters "RO" followed paragraph number, *e.g.*, RO ¶ 175.

4. The ALJ's conclusion on this point is clear. In paragraph 138 the ALJ writes:

> A preponderance of the competent, substantial evidence demonstrates that the Project *will* reduce the post-development loading to the receiving waters of parameters *for which Spruce Creek is impaired*, including phosphorus and BOD, as well as iron and copper, to levels less than those in the pre-development condition. Thus, DOT provided reasonable assurances to satisfy applicable water quality criteria and compliance with rule 62-330.301. *Petitioners did not offer a quantum of evidence sufficient to counter that demonstration, and therefore did not meet their burden of proof as to that issue*. (emphasis supplied).

5. The ALJ next writes in paragraph 139, "[t]he steps taken by DOT *will result in a net improvement of water quality in the receiving waters* for those impairment parameters. Thus, DOT has established that it meets the standards of rule 62-330.301(2)." (emphasis supplied).

6. Moreover, in paragraph 140 he writes, "[p]etitioners failed to prove, by a preponderance of persuasive competent and substantial evidence, that the stormwater management system for the Project would be ineffective to reduce post-development loading of impairment parameters to levels less than those in the predevelopment condition." Unfortunately, the ALJ then contradicted his findings in paragraph 138 and 139, and then incorrectly switched that burden back to FDOT. This error is apparent in the following text of paragraph 173:

> 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.* (emphasis supplied).

7. Again, focusing on the nutrient reduction example, once FDOT presented its prima facie case, and established its corresponding entitlement, the burden shifted to Petitioners to prove that Spruce Creek *would not* experience any measurable reduction in concentrations of the impairment parameters because of the Project – which they failed to do. The qualifying language in footnote 9 of the Recommended Order is insufficient to overcome the ALJ's explicit findings in paragraphs 138 through 140, and it is unclear why the ALJ recharacterized "positive" elements of the Technical Staff Report "TSR" to "neutral" ones when the Plaintiffs failed to meet their burden. Accordingly, the reduction of nutrients should have been categorized as a positive factor, consistent with the evidence from the FDOT's prima facie showing.

8. Placing the burden of proof on the wrong party, as the ALJ did here, is reversible error. *Berg v. Bridle Path Homeowners Ass'n. Inc*., 809 So. 2d 32 (Fla. 4th DCA 2002); *K.M.T. v. Department of Health and Rehabilitative Services*, 608 So. 2d 865 (Fla. 1st DCA 1992).

9. Based upon the foregoing, FDOT takes exception with paragraphs 173 and 175 of the recommended order, and requests that the Final Order amend them as follows:

> 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. Respondents proved by a preponderance of the competent, substantial evidence that the Project will significantly reduce the post-development loading to the receiving waters of parameters for which Spruce Creek is impaired. The Petitioners failed to prove by a preponderance of persuasive competent, substantial evidence that the stormwater management system for the Project would be ineffective to reduce post-development loading of impairment parameters to levels less than those in the pre-development condition and provided no credible evidence contradicting the extent of the reductions. Therefore, this factor is positive for purposes of determining whether the Project is "clearly in the public interest." ~~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.~~

175. ~~But for the public interest test,~~ DOT has established that the Project meets and, in some cases, exceeds the ~~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 granted ~~denied~~.

10. Amended paragraphs 173 and 175 are as or more reasonable than the original paragraphs in the Recommended Order.

FDOT's Exception No. 2: The Project's 29% reduction of pre-development Total Phosphorus inputs is a significant public benefit.

11. A net 29% annual reduction in Total Phosphorus ("TP") Loading from the Project site far exceeds the "net improvement" requirements of rule 62-330.301(2), F.A.C.

12. FDOT's analysis of pre- and post-development loading of TP from the Project site demonstrated that following development of the Project, the loading of TP from the Project site will be reduced from 6.193 kg/yr. (pre-development) to 4.411 kg/yr. (post-development) resulting in a significant 29% annual reduction in TP loading from the Project site. (JE 8; T, Pgs. 1171-1179, 1618, 1671-1685).

13. A 29% annual reduction in TP Loading from the Project site is a significant benefit to the unnamed canal and to the Spruce Creek Hydrologic Basin. Inexplicably, the ALJ disagrees

in the Recommended Order. *See* RO ¶ 174 ("In complying with rule 62-330.301(2), DOT has done the bare minimum to qualify for the Permit.").

14. The phrase "net improvement" is neither defined in chapter 373, Florida Statutes, nor in rule chapter 62-330, F.A.C. If a term is not defined in rule or statute, its common ordinary meaning applies. *See Cole Vision Corp. v. Dep't of Bus. & Prof'l Reg.*, 688 So. 2d 404, 410 (Fla. 1st DCA 1997). It is appropriate to refer to dictionary definitions when construing statutes to ascertain the plain and ordinary meaning of the words used therein. *Barco v. School Bd. Of Pinellas County*, 975 So. 2d 1116, 1122 (Fla. 2008).

15. Merriam Webster's online dictionary defines "net" as the "remaining after the deduction of all charges, outlay, or loss." *See* Definition of "net" at https://www.merriam-webster.com/dictionary/net (last visited February 11, 2024). The same dictionary defines "improvement" as "the state of being improved." *See* Definition of "improvement" at https://www.merriam-webster.com/dictionary/improvement (last visited February 11, 2024). Finally, this dictionary defines "improved" as "to enhance in value or quality: make better[.]" *See* Definition of "improve" at https://www.merriam-webster.com/dictionary/improved (last visited February 11, 2024).

16. In the context of rule 62-330.301, the phrase "net improvement" simply means that the water quality will be enhanced more than it will be harmed.[2] In the instant matter, "simple

[2] This interpretation is consistent with the revision to rule chapter 62-330, F.A.C., filed for adoption on April 28, 2023, which, if ratified by the legislature, will read, "[i]n instances where an applicant is unable to meet state water quality standards because existing ambient water quality does not meet standards and the system will contribute to this existing condition, the applicant must implement mitigation measures that are proposed by, or acceptable to, the applicant that will cause net improvement of the water quality in the receiving waters for those parameters that do not meet standards. The applicant shall demonstrate such net improvement whereby the pollutant loads discharged from the post-development condition for the proposed project shall be demonstrated to be less than those discharged based on the project's pre-development condition." 49 Fla. Admin. Reg. 38 (February 24, 2023).

regulatory compliance" would be a 1% annual reduction in TP loading from the Project site. The FDOT proposes to reduce nutrient loading by a significantly greater margin than 1%.

17. A hearing officer's findings related to the sufficiency of mitigation are essentially conclusions of law and are not binding on the District. *See Save Anna Maria, Inc. v. Department of Transportation*, 700 So. 2d 113, 116 (Fla. 2d DCA 1997). Likewise, the District is not bound by the ALJ's conclusion that a 29% annual reduction in TP loading from the Project site is "simple regulatory compliance." As such, the District should determine that the annual reduction in Total Phosphorus from the site is a significant public benefit.

18. Based upon the foregoing, FDOT takes exception with paragraphs 107 and 174 of the recommended order, and requests that the Final Order amend them as follows:

> 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.
>
> 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 <u>exceeded</u> ~~were~~ those required by the District's water quality standards.[7] ~~In complying with rule 62-330.301(2),~~ DOT has done <u>more than</u> the bare minimum to qualify for the Permit. <u>This is</u> ~~That element of simple regulatory compliance is not~~ sufficient to establish that the Project is "clearly in the public interest."[8]

19. Amended paragraphs 107 and 174 are as or more reasonable than the original paragraphs in the Recommended Order.

FDOT's Exception No. 3: The ALJ's finding that A.H. Vol I, section 10.2.3.1 (a) was a neutral factor is an incorrect conclusion of law.

20. Whether a factor is negative, neutral, or positive is a question of law for the ALJ. However, given the technical nature of the case, witness testimony regarding this ultimate question was allowed and was apparently persuasive to the ALJ. *See* RO ¶ 92.B. ("*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*." (emphasis supplied)); *See* RO ¶ 92.C. ("This factor is neutral, *as was confirmed through the credible testimony of Mr. Drauer and Ms. Martin*, *which is accepted*." (emphasis supplied)); *See* RO ¶ 92.C. ("This factor is neutral, *as was confirmed by the testimony of Mr. Drauer, which is accepted.*" (emphasis supplied)).

21. Regarding Mr. Drauer's testimony quoted in paragraph 92.B, the Recommended Order quotation omits a dependent clause, a qualifier that changes the nature of his statement. Specifically, Mr. Drauer testified, "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.*" (emphasis supplied). Tr. pp. 1390-91.

22. By ending his statement with "at minimum," Mr. Drauer implies that meeting a Handbook criterion would be a neutral factor, but that it could be a positive factor in the "public interest" determination.

23. This distinction is important given that the Project not only meets the water quantity criteria in the Applicant's Handbook but far exceeds it. The ALJ notes this fact in paragraphs 52 and 134 of the Recommended Order, which follow:

> 52. DOT sized 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.* (emphasis supplied).
>
> 134. DOT designed the ponds to accommodate stormwater volumes from a 100-year/24-hour storm. By so doing, *DOT provided added assurance* that the ponds would not overtop during storm events. (emphasis supplied).

24. Despite this finding, the ALJ (incorrectly) concluded "[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.'" *See* RO ¶ 92.B.

25. The ALJ misconstrued Mr. Drauer's testimony and so discounted the significant public benefit that the Project's stormwater capacity provides to the public health, safety, or welfare or the property of others. The ALJ's conclusion that this factor is neutral should be modified by the District to be a positive factor for the purposes of determining whether the Project is clearly in the public interest.

26. Based upon the foregoing, FDOT takes exception with paragraphs 92.B., 92.D., and 107 of the recommended order, and requests that the Final order amend them as follows:

> 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. The Project as designed exceeds the water quantity criteria in the Applicant's Handbook. Therefore, a~~A~~ preponderance of the evidence establishes that the factors in this subparagraph are positive ~~neutral~~ for purposes of determining whether the Project is "clearly in the public interest."
>
> 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 showed ~~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 positive ~~neutral, as was confirmed by the testimony of Mr. Drauer, which is accepted~~.
>
> 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.

27. Amended paragraphs 92.B., 92.D., and 107 are as or more reasonable than the original paragraphs in the Recommended Order.

FDOT's Exception No. 4: The conclusion that the factor described in Applicant's Handbook Volume I, section 10.2.3.7 is neutral is incorrect.

28. The seventh public interest test factor is the "current condition and relative value of functions being performed by areas affected by the proposed activities." *See* Fla. Admin Code. R. 62-330.302(1)(a)7.

29. In paragraphs 102 through 105, the ALJ analyzes this factor, ultimately concluding that "[t]he [District's] survey and assessment of the wetlands, and the assignment of UMAM scores as reflected in J.Ex.28, is supported by a preponderance of the competent, substantial, and persuasive evidence in the record." RO ¶ 104.

30. The ALJ then concludes that "[t]hough onsite wetlands will be affected, the mitigation provided *more* than offsets the impacts. Thus, as characterized by the parties, the factor described in A.H. Vol. I, section 10.2.3.7. is neutral." (emphasis supplied) RO ¶ 105.

31. As noted above, mitigation was provided that fully compensates for the permanent loss of ecological functions within the Project site. (JE 2 at 8, 12-13; 28; Tr. pp. 1774:12-1775:05.)

32. But it should not be considered a neutral factor because the Project along with offsite 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. *See* RO ¶ 165.

33. The wetlands within the Project site are fragmented by I-95, Pioneer Trail, Williamson Boulevard, an FP&L easement, and FDOT ponds, as well as being surrounded by existing development, which would increase the possible spread of exotic and nuisance vegetation species on the subject wetlands and limit the possibility of prescribed burns. (JE 2; Tr. pp. 1785 - 1786; 1844 -1845). In contrast to the wetlands within the Project site, the mitigation bank credits from Lake Swamp Mitigation Bank and Farmton North Mitigation Bank would provide regional ecological value and greater long term ecological value because they retain a connection to an Outstanding Florida Water, provide for downstream detrital transport, will be permanently maintained, and enhance wildlife utilization. (RO ¶¶ 19-21, 87; JE 2, Pg. 8, 12-13; Tr. pp 1367:05-1369:02; 1774:12-1775:05.)

34. Based upon the foregoing, FDOT takes exception with paragraph 105, and requests that the Final Order amend it as follows:

> 105. Though onsite wetlands will be affected, the mitigation provided more than offsets the impacts. Thus, ~~as characterized by the parties,~~ the factor described in A.H. Vol. I, section 10.2.3.7. is positive ~~neutral~~.

35. Amended paragraph 105 is as or more reasonable than the original paragraph in the Recommended Order.

FDOT's Exception No. 5: The ALJ improperly ignored hurricane and other emergency safety measures.

36. The Project will provide an improvement to public safety because it will provide an additional access point to I-95 for emergency evacuation, particularly when hurricanes are approaching the area. (JE 2E, Pg. 11; FDOT Ex. 6; Tr. pp. 1283-1288, 1291, 1295).

37. With the existing, currently under construction, and approved but not yet constructed developments occurring at the intersection of I-95 and Pioneer Trail, this additional access point to I-95 for residents in the vicinity will enable evacuation without having to travel south to the SR 44 interchange or north to SR 421 on side roads that are likely to be clogged in an emergency. *Id.* This new interchange will also provide better access for emergency management when accidents or disasters occur in the area between the existing interchanges at SR 44 and SR 421. This factor weighs in favor of the activities proposed in the application being clearly in the public interest. *Id.*

38. Relying on previous DOAH recommended orders, the ALJ concludes the public interest test is limited to interests that are environmental in nature, and ultimately concludes, "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.'" RO ¶ 171.

39. This conclusion is incorrect for two reasons. First, it ignores that new access points do provide an environmental benefit to adjacent property owners. To be sure, the new access points will allow quicker evacuation, but it will also allow quicker entry into the area in the event of an emergency – including environmental emergencies such as hazardous waste spills. As was noted by Mr. Diaz, the Project will enhance emergency response not only for hurricanes but for other emergencies like fires. *See* Tr. p. 1284.

40. Quicker response times – to fight both structural and wildland fires – is a significant environmental benefit. This is an environmental factor that was improperly ignored by the ALJ.

41. Second, it rejects guidance adopted in section 10.2.3.1.(a) of the Volume I of the Applicant's Handbook, wherein it states:

> 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 [*sic*] 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 supplied).

42. The ALJ's error is apparent when one replaces "navigational aids" with "access points" in the language above.

43. Regarding the merits of the statutory analysis cited in paragraph 171, this analysis ignores "the fact that a substantial public need or benefit would be met by approving the project may be taken into consideration in balancing adverse environmental effects." *See 1800 Atlantic Developers v. Department of Envtl. Regulation*, 552 So. 2d 946, 957 (Fla. 1st DCA 1989).

44. The District should follow the guidance adopted in the Applicant's Handbook. An additional access point for hurricane evacuation (preparedness) provided by the Project should have been considered when determining whether the Project is clearly in the public interest.

45. Even if the public interest test were limited to environmental considerations, sufficient environmental factors were introduced to support this Project being "clearly in the public interest." The Project will allow quicker response times to fight fires and enhance emergency disaster prevention and mitigation in the Project site and the greater area.

46. Based upon the foregoing, FDOT takes exception paragraph 171, and requests that the Final Order replace it with the following:

> 171. The finder of fact may consider that a substantial public need or benefit may be provided by a project when balancing adverse environmental impacts. *See 1800 Atlantic Developers v. Department of Envtl. Regulation*, 552 So.2d 946 (Fla. 1st DCA 1989). There was competent, substantial evidence presented at trial that the Project will provide an alternative route for hurricane and disaster evacuation via I-95 and will enhance traffic incident response times. Hurricane evacuation and the traffic incident management are safety factors that are appropriate factors here when determining whether this Project is "clearly in the public interest."

47. Amended paragraph 171 is as or more reasonable than the original paragraph in the Recommended Order.

FDOT's Exception No. 6: A Project with six neutral factors and one positive factor is clearly in the public interest.

48. Six neutral factors and one positive factor shows that the project is clearly in the public interest.[3]

49. The ALJ concluded that the public interest scale is to be balanced. It is not defined nor is it a mathematical formula. *See* RO ¶ 174.

50. Balancing of public interest factors free from quantitative restraints is appropriate. A project might have four positive factors and three negative factors. Mathematically that project should be "clearly in the public interest," but ignores potential nuance in the case-specific facts of each application. The benefits must be weighed against the harms, and the harm done by three negative factors may outweigh the benefit provided by the four positive factors. At the extreme

[3] FDOT raised, in its exceptions herein, that other factors were improperly considered neutral and should be considered positive. Should those exceptions be accepted, this would mean that more than one factor would be positive and the argument that this project is clearly in the public interest becomes even more compelling. Notwithstanding, for the reasons set forth in FDOT's Exception No. 6, the project is, nonetheless, clearly in the public interest were the District to find six neutral public interest factors and one positive public interest factor.

end, one negative factor might be so detrimental that it outweighs the benefits provided by six positive factors.

51. But where six factors are neutral and one factor is positive, the answer is clear. The total impact of the Project is not negative nor is it Neutral – a benefit is provided. It is therefore *clear* that the Project is in the public interest. Concluding otherwise would require an applicant to demonstrate a "significant public benefit" which is not part of the test. *See 1800 Atlantic*, 552 So 2d at 956.

52. FDOT has met all the relevant ERP criteria, and, in some cases, exceeded them. *See* RO ¶¶ 52, 105. Like the hearing officer in *1800 Atlantic*, the ALJ in the instant case has mistakenly read a "significant public benefit" requirement into the public interest test.

53. Based upon the foregoing, FDOT takes exception with paragraph 175 of the recommended order, and requests that the Final Order amend it as follows:

> 175. ~~But for the public interest test,~~ DOT <u>has</u> established that the Project meets <u>and, in some cases, exceeds the</u> 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 <u>granted</u> ~~denied~~.

54. Amended paragraph 175 is as or more reasonable than the original paragraph in the Recommended Order.

II. CONCLUSION

WHEREFORE, FDOT, the applicant for the permit in question, respectfully requests that the St. Johns River Water Management District grant the exceptions described above and enter a final order approving the issuance of Permit No. 103479-2 on the terms and conditions set forth in the amended TSR, dated October 6, 2023, and the complete application for Environmental Resource Permit.

Respectfully submitted this 13th day of February, 2024.

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