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

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT'S RESPONSE TO PETITIONERS' AND FLORIDA DEPARTMENT OF TRANSPORTATION'S EXCEPTIONS TO RECOMMENDED ORDER

Respondent, St. Johns River Water Management District ("District"), pursuant to Rule 28-106.217(3), Florida Administrative Code ("F.A.C."), and by and through its undersigned attorneys, hereby files this Response to both the Petitioners' Exceptions to (Amended) Recommended Order entered by the Administrative Law Judge ("ALJ") on January 29, 2024, and to the Florida Department of Transportation's (hereafter "FDOT") Exceptions to Recommended Order, and states as follows[1]:

On February 13, 2024, Petitioners filed exceptions to the Recommended Order in this case. On the same day, FDOT also filed exceptions to the Recommended Order in this case.

[1] Citations to the Recommended Order are indicated by the abbreviation "RO," followed by the abbreviation "FOF" or "COL" and paragraph number, *e.g.*, "RO, 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."

The majority of Petitioners' exceptions are to the ALJ's findings of fact and many of these seek to have the District reweigh the evidence presented to the ALJ at the final hearing. It is a basic principle of administrative law that if an ALJ's finding of fact is supported by competent substantial evidence from which the finding could reasonably be inferred, then it cannot be disturbed. *See Health Care and Ret. Corp. of Am. v. Dep't of Health & Rehab. Servs.*, 516 So. 2d 292, 296 (Fla. 1st DCA 1987) ("An agency does not have the discretion to ignore the HO's [hearing officer's] findings of fact and to substitute its findings of fact for those of the HO unless it first determines that the findings of fact in the recommended order are not supported by competent, substantial evidence."); *Fla. Ch. of Sierra Club v. Orlando Utility Comm'n*, 436 So. 2d 383, 389 (Fla. 5th DCA 1983).

The issue is not whether the record contains evidence contrary to the ALJ's finding, but whether the finding is supported by competent substantial evidence. *Fla. Sugar Cane League v. State Siting Board*, 580 So. 2d 846 (Fla. 1st DCA 1991) ("Although the record may contain evidence contrary to the hearing officer's findings, neither the agency head nor a reviewing court may overturn a finding of fact that is supported by competent substantial evidence." (citing *Heifetz v. Dep't of Bus. Reg., Div. of Alcoholic Bev. & Tobacco,* 475 So. 2d 1277, 1283 (Fla. 1st DCA 1985))). The term "competent substantial evidence" relates not to the quality, character, convincing power, probative value or weight of the evidence, but refers to the existence of some quantity of evidence as to each essential element and as to the legality and admissibility of that evidence. *DeGroot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957); *Scholastic Book Fairs v. Unemployment Appeals Comm'n*, 671 So. 2d 287, 289 n.3 (Fla. 5th DCA 1996) (citing *Dunn v. State*, 454 So. 2d 641, 649 n. 11 (Fla. 5th DCA 1984) (Cowart, J., concurring)).

The Florida Legislature has codified this principle in paragraph 120.57(1)(l), Florida Statutes ("F.S."), which provides in pertinent part as follows:

> The agency may not reject or modify the findings of fact 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 upon competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law.

Through their exceptions, Petitioners are essentially rearguing their case in an attempt to have the District reweigh evidence, judge the credibility of witnesses, and interpret evidence, which the agency cannot do. *See Goss v. Dist. Sch. Bd. of St. Johns Cty.*, 601 So. 2d 1232, 1234-35 (Fla. 5th DCA 1992). Petitioners do not argue that the proceedings on which the findings were based did not comply with the essential requirements of law. Therefore, the District is limited to determining whether any competent substantial evidence exists upon which the finding may reasonably be inferred. *Brogan v. Carter*, 671 So. 2d 822, 823 (Fla. 1st DCA 1996) ("[W]here the hearing officer in this case properly admitted the evidence and applied the correct burden of proof, the commission was limited to a review of the hearing officer's findings of fact under the well-established rule that an agency may reject a finding only if there was *no* competent substantial evidence to support it…" (citations omitted)); *Rogers v. Dep't of Health*, 920 So. 2d 27, 30 (Fla. 1st DCA 2005); *Heifetz*, 475 So. 2d 1277; *Brown v. Criminal Justice Stds. & Training Comm'n*, 667 So. 2d 977, 979 (Fla. 4th DCA 1996).

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. v. IMC*

Phosphates Co., 18 So. 3d 1089 (Fla. 2d DCA 2009); *G.E.L. Corp. v. Dep't of Envt'l Prot.*, 875 So. 2d 1257, 1264 (Fla. 5th DCA 2004); *Fla. Power Corp. v. DER*, 638 So. 2d 545, 546 (Fla. 1st DCA 1994).

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).

It should also be noted that many of Petitioners' exceptions do not conform to the requirements of section 120.57(1)(k), F.S. Under section 120.57(1)(k), F.S., an agency need not rule on an exception to a recommended order if the exception does not:

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

b) identify the legal basis for the exception, or

c) include appropriate and specific citations to the record.

§ 120.57(1)(k), F.S. (2023).

In many of Petitioners' exceptions, Petitioners either fail to identify the disputed portion of the recommended order by page number or paragraph, fail to identify the legal basis for the exception, or fail to include appropriate and specific citations to the record. Thus, the District need not rule on these exceptions. *Id.*; *Boundy v. School Bd. of Miami-Dade Cnty.*, 994 So. 2d 433 (Fla. 3d DCA 2008); *Indian River Farms Water Control Dist. v. All Aboard Florida Operations, LLC*, Case No. 16-6165, 2017 WL 2918050, at *6 (Fla. SJRWMD June 27, 2017)

(holding that "[w]ithout an asserted legal basis for challenging the finding of fact and without any citations to the record that refute the finding of fact, this Agency need not rule on this exception"); *Dep't of Envt'l Prot. v. S. Palafox Prop., Inc.*, Case No. 14-3674, 2015 WL 4410468, at *11 (Fla. DEP May 29, 2015) (finding that the remainder of petitioner's exception contained more argument and no record citations; therefore, the remainder of the exception was rejected for failing to meet the requirements of § 120.57(1)(k), F.S.). To the extent a party fails to file written exceptions to a recommended order regarding specific issues, the party has waived such specific objections. *Envt'l Coal. of Fla., Inc. v. Broward Cty.*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991).

I. RESPONSES TO PETITIONERS' EXCEPTIONS

Response to Exception No. 1

Petitioners first assert that their exhibits 296, 42, 1095, 1114, and 1138-1150 were unable to be uploaded to the DOAH electronic portal in accordance with the ALJ's Order of Pre-Hearing Instructions due to "size limitations," but that these exhibits should nonetheless be included in the record. *Pets' Ex.* at 1. Petitioners also request that additional consideration be given to their *Motion for Extension of Time to File Exhibits* that was heard and decided by the ALJ on the first day of the final hearing, and request electronic links to documents be accepted in lieu of the documents themselves as to Petitioners' exhibits 1201, 1202, and 1203. *Id.* at 2.

This exception appears to re-argue the Petitioners' *Motion for Extension of Time to File Exhibits*, an evidentiary matter that the ALJ heard and decided on the first day of the final hearing. T. 35-38. The District does not have substantive jurisdiction to overturn the ALJ's evidentiary rulings contained in the Recommended Order. § 120.57(1)(l), F.S.; *Barfield*, 805 So. 2d at 1009 (holding that the agency lacked substantive jurisdiction to displace the ALJ's

evidentiary rulings as to whether documents were inadmissible hearsay). For these reasons, Petitioners' first exception should be rejected.

Response to Exception No. 2

Petitioners' second exception argues that the I-95 / Pioneer Trail Interchange project was not added to the Transportation Planning Organization ("TPO") List (or "Long Range Transportation Plan") of Projects until 2013, and not 2005, as found in FOF 22. *Pets' Ex.* at 3.

From a review of the transcript and exhibits, it appears that there is no competent substantial evidence in the record to support a finding that the Project was added to the TPO List in 2005. *See* T. 71, 96 (testimony reflects the Project was added to the TPO List sometime after 2005). *Health Care and Ret. Corp.*, 516 So. 2d at 296; *Fla. Ch. of Sierra Club*, 436 So. 2d at 389. Rather, the evidence in the record supports that the Project was added to the TPO List in 2013. *See* T. 186.

As a result, the District agrees that Petitioners' Exception No. 2 is appropriately accepted to reflect that the Project was added to the TPO List in 2013.

Response to Exception No. 3

Petitioners' third exception takes issue with FOF 27, and asks the District to reweigh the evidence in order to find that the publicly preferred alternative project design was the "No Build" alternative (as opposed to the Partial Cloverleaf 2 Alternative), and that the Project's impacts were not minimized to the extent practicable. Petitioners cite the testimony of their experts, Dr. Anderson, Dr. Barile, and Mr. Collins, during the final hearing in support of this exception. *Pets' Ex.* at 3.

The agency cannot disturb the ALJ's factual findings that are supported by competent substantial evidence. *Brogan*, 671 So. 2d at 823; *Heifetz*, 475 So. 2d at 1281. There exists

evidence in the record supporting the ALJ's finding in FOF 27 that the Partial Cloverleaf 2 Alternative had the highest public support, and that impacts were minimized to the extent practicable. *See* Jt. Ex. 25; T. 1361-62. The District also cannot reweigh expert testimony in order to reach a different conclusion. *See Gross v. Dep't of Health*, 819 So. 2d 997, 1004 (Fla. 5th DCA 2002) ("These specific findings clearly show that the ALJ weighed the testimony of each expert witness and found that the expert who testified on behalf of Gross was more credible. The Board is not permitted to reject or modify the findings made by the ALJ because it disagrees with the ALJ's findings, and it may not weigh the credibility of the witnesses and draw a different conclusion."); *Fla. Ch. of Sierra Club*, 436 So. 2d at 388-89 ("Simply because some evidence is disregarded, that does not mean that the findings themselves are not based on other substantial, competent evidence, which the finder in his judgment relied upon."). As a result, this exception is appropriately rejected.

Response to Exception No. 4

For their fourth exception, Petitioners argue that the ALJ's rulings on several *Motions in Limine* on the first day of the final hearing were erroneous. *Pets' Ex.* at 5-6. Petitioners again argue that their witnesses should have been allowed to testify as to opinions that were not disclosed to Respondents prior to the hearing in accordance with the ALJ's Order of Prehearing Instructions, that these witnesses wished to discuss future changes to the stormwater rules, and that the "need" for the Project should have been considered. *Id.* All of these evidentiary arguments were appropriately addressed and denied by the ALJ during the hearing. *See* T. 20-21 (ALJ ruling on *Motion in Limine* regarding proposed new rules); 305-07 (ALJ explaining his Order of Prehearing Instructions); 402-410 (ALJ disallowing testimony that was not provided by

Petitioners' experts at their depositions); 1866-67 (ALJ again denying Petitioners' request to allow late undisclosed testimony).

As an initial matter, this exception fails to "clearly identify the disputed portion of the recommended order by page number or paragraph" as required by section 120.57(1)(k), F.S. This exception could be rejected on this basis alone. *See Boundy*, 994 So. 2d 433; *All Aboard Florida*, Case No. 16-6165, 2017 WL 2918050, at *6; *S. Palafox Prop.*, Case No. 14-3674, 2015 WL 4410468, at *11.

Nonetheless, the District is without authority to disturb the ALJ's evidentiary rulings, such as those decided during the final hearing on the *Motions in Limine* raised in Petitioners' fourth exception. *Pets' Ex.* at 5-6. § 120.57(1)(l), F.S.; *Barfield*, 805 So. 2d at 1009 (holding that the agency lacked substantive jurisdiction to displace the ALJ's evidentiary rulings as to whether documents were inadmissible hearsay). As a result, this exception should be rejected.

Response to Exception No. 5

Petitioners next take exception to FOF 38, that the "stormwater ponds create mathematically more storage capacity than currently exists on the Project site," and COL 133, which finds that a preponderance of the evidence demonstrates that the Project will meet the 25-year, 24-hour design storm. *Pets' Ex.* at 6-7. In support of this exception, Petitioners cite the testimony of one of their expert witnesses, Dr. Cho, in support of their view that the Project would increase flooding, in an attempt to have the District reweigh the evidence. *See id.*

There exists competent substantial evidence in the record to support FOF 38, and that the Project is designed to meet the 25-year, 24-hour storm event in support of COL 133. *See* T. 1161-62; 1236-37; 1529-30; Jt. Ex. 5, 7, 11. *See also* FOFs 51, 52. As a result, the District is without the authority to disturb these factual findings. *Brogan*, 671 So. 2d at 823; *Heifetz*, 475

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

Importantly, Petitioners did not take exception to FOFs 51 and 52, which find that the Project meets the 25-year, 24-hour design storm event, the 100-year, 24-hour design storm event, and that the "increase in storage volume provided stormwater management capacity in excess of that required." R.O. at 17, ¶¶ 51-52. These factual findings form the basis for COL 133, which concludes that a preponderance of the competent substantial evidence shows that the Project will meet the 25-year, 24-hour design storm event. R.O. at 38, ¶ 133. Having failed to take exception to these factual findings, Petitioners have waived any objection to these findings. *Envt'l Coal. of Fla.*, 586 So. 2d at 1213. This exception also fails to propose a conclusion of law that is "as or more reasonable" than COL 133. § 120.57(1)(l), F.S. As a result, Petitioners' fifth exception is appropriately rejected.

Response to Exception No. 6

Petitioners' sixth exception takes issue with FOF 39, which finds that FDOT's six floodplain compensating storage ponds will provide adequate floodplain storage to offset impacts to the 100-year floodplain, on the basis that the language in the R.O. uses the affirmative "*will* … provide compensating treatment" when, as Petitioners argue, "it is simply proposed to happen." *Pets' Ex.* at 8. Petitioners also take exception to COL 140, which finds that Petitioners failed to meet their burden of proof to show that the Project would fail to reduce post-development loading of nutrients to less than pre-development loading conditions, on the basis that testimony was "wrongfully disallowed by the ALJ." *See id.* Finally, Petitioners argue that a portion of Dr. Cho's testimony as to wetland functions was overlooked. *Id.*

First, Petitioners exception to FOF 39 is based on semantics and fails to provide an adequate legal basis for the exception. § 120.57(1)(k), F.S.; *Indian River Farms*, Case No. 16-6165, 2017 WL 2918050, at *6 ("Without an asserted legal basis for challenging the finding of fact and without any citations to the record that refute the finding of fact, this Agency need not rule on this exception."). Notwithstanding, the finding of fact is supported by competent substantial evidence. *See* T. 1529-30 (District engineer, Ms. Cook, testified that the Applicant met the District's special basin criteria by demonstrating no net reduction in flood storage for the 100-year floodplain, by creating six floodplain compensating ponds). Because there is competent substantial evidence in the record to support FOF 39, the District cannot disturb this finding. *Brogan*, 671 So. 2d at 823; *Heifetz*, 475 So. 2d at 1281.

Next, Petitioners' exception to COL 140 incorporates the arguments in Petitioners' exceptions 4 and 5, which are appropriately rejected, and again seeks to have the District overturn an evidentiary ruling by the ALJ. The District lacks substantive jurisdiction over the ALJ's evidentiary rulings, such as judging the credibility of witnesses, resolving conflicts, and deciding the admissibility of evidence. *See Peace River/Manasota Regional Water Supply Auth. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1088 (Fla. 2d DCA 2009); *Barfield*, 805 So. 2d at 1009; *Goss*, 601 So. 2d at 1234-35.

COL 140 is based on FOFs 68, 75, and 76, to which Petitioners did not take exception, and FOF 74, which is supported by competent substantial evidence. T. 379:12-13; 381:25-382:06 (Petitioners' expert, Dr. Anderson, testifying that she does not perform surface water modeling, and has "never" done any calculations for any "real projects on the ground."); T. 505:02-08 (Petitioners' expert, Dr. Cho, testifying that she is not familiar with the state water quality criteria applicable to the Project and had also never modeled any nutrient loading

calculations); T. 1054:23-1055:11 (Petitioners' expert, Dr. Barile, testifying that he had not performed any modeling calculations). The District is without authority to disturb the ALJ's factual findings that are supported by competent substantial evidence in the record. *Health Care and Ret. Corp. of Am. v. Dep't of Health & Rehab. Servs.*, 516 So. 2d 292, 296 (Fla. 1st DCA 1987). As to Dr. Cho's testimony regarding wetland functions, "[s]imply because some evidence is disregarded, that does not mean that the findings themselves are not based on other substantial, competent evidence, which the finder in his judgment relied upon." *Fla. Ch. of Sierra Club*, 436 So. 2d at 388-89. This exception also fails to propose a conclusion of law that is "as or more reasonable" than COL 140. § 120.57(1)(l), F.S.

Therefore, Petitioners' sixth exception should be rejected.

Response to Exception No. 7

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

"[A]n agency may reject a finding only if there was *no* competent substantial evidence to support it." *Brogan*, 671 So. 2d at 823 (emphasis in original); *Health Care and Ret. Corp.*, 516 So. 2d at 296. First, as to FOF 49, there is competent substantial evidence in the record to

support the finding that the ICPR model is accepted and reliable. *See* T. 1159-60 (Applicant's engineer, Mr. Vavra, testified that ICPR is commonly used by stormwater drainage engineers for modeling and commonly accepted by water management districts); 1526; 1573 (District expert engineer, Ms. Cook, explaining that the ICPR model methodology uses commonly accepted engineering practices). Second, as to FOF 59, there is also evidence in the record to support that the Project was designed by a State of Florida registered professional engineer and that it is capable of performing and functioning as designed. *See* T. 1154 (Mr. Vavra testifying that he is the drainage engineer of record, and that he was responsible for the design of the drainage and conveyance and stormwater management systems); 1532-33 (Ms. Cook explaining that the plans and calculations were signed and sealed by a Florida registered professional and the Project will be capable based on generally accepted engineering and scientific principles of performing and functioning as proposed).

It would be impermissible for the District to reweigh the testimony of the experts, including Dr. Barile's testimony regarding rainfall. It is the function of the ALJ to weigh all the evidence, judge credibility of witnesses, draw permissible inferences, and make factual findings supported by competent substantial evidence. *Goss v. Dist. Sch. Bd. of St. Johns Cty.*, 601 So. 2d 1232, 1234-35 (Fla. 5th DCA 1992). "Simply because some evidence is disregarded, that does not mean that the findings themselves are not based on other substantial, competent evidence, which the finder in his judgment relied upon." *Fla. Ch. of Sierra Club*, 436 So. 2d at 388-89.

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

> Mr. Vavra credibly testified that if rainfall increases for a period, that increase will result in phosphorus figures at the same ratio for the pre- and post-development calculations. Thus, even though higher levels of rainfall may increase pre-development levels of

> total phosphorus in the runoff, the system as designed will be capable of providing the same degree of treatment and storage, thereby resulting in a comparable post-development reduction in the pre-development levels of phosphorus.

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

Finally, the District is without the substantive jurisdiction to overturn the ALJ's evidentiary rulings on the *Motions in Limine*. § 120.57(1)(k), F.S.; *Barfield*, 805 So. 2d at 1009 (holding that the agency lacked substantive jurisdiction to displace the ALJ's evidentiary rulings as to whether documents were inadmissible hearsay).

For the foregoing reasons, Petitioners' seventh exception should be rejected.

Response to Exception No. 8

Petitioners' eighth exception takes issue with the last sentence of FOF 62, which finds that "[t]he Project will not contribute to iron, copper, or Enterococci." R.O. at 19, ¶ 62. The remainder of the exception is an evidentiary argument regarding the proper scope of Petitioners' experts' testimony during the final hearing and attempt to re-argue evidentiary matters decided by the ALJ previously. *Pets' Ex.* at 9-10. This exception fails to "include appropriate and specific citations to the record" in support of a modification to FOF 62, contrary to section 120.57(1)(k), F.S., so the District is not required to rule on this exception.

Nonetheless, there exists no competent substantial evidence in the record to support the ALJ's finding that the Project will not contribute to iron and copper. In fact, both Petitioners' and the District's experts testified that roadway projects *do* contribute to iron and copper. *See* T.

1669:04-06 (testimony by District stormwater expert engineer Mr. Miracle); 429:09-16 (testimony by Petitioners' expert Dr. Anderson). As a result, the District agrees that FOF 62 should be modified to be consistent with the testimony provided during the final hearing, that the Project is expected to contribute to iron and copper runoff. *See also Dist. Exceptions*, at 18-19.

The District, however, is without the authority to revisit the ALJ's evidentiary rulings as argued in the remainder of this exception. § 120.57(1)(k), F.S.; *Barfield*, 805 So. 2d at 1009 (holding that the agency lacked substantive jurisdiction to displace the ALJ's evidentiary rulings as to whether documents were inadmissible hearsay). The ALJ already entertained Petitioners' arguments regarding their expert witnesses providing late, undisclosed opinions during the final hearing. T. 406 (ALJ explaining that his Order of Prehearing Instructions requires disclosure of late formulated opinions by deposition); 410 (ALJ explaining that being a Qualified Representative means understanding the rules of evidence and procedure); 576-77 (ALJ correcting Petitioners' misunderstanding that no further depositions were allowed and explaining that witnesses could be deposed twice, but would be limited to one hour [for newly formulated opinions]); 1056 (Petitioners' expert admitting he was informed during his deposition that if he formulated new opinions, those would need to be disclosed to Respondents prior to trial).

Moreover, the ALJ allowed Petitioners to proffer expert testimony during the final hearing in areas where their testimony was limited. *See* T. 274-287, 309-353 (proffer from Petitioners' expert, Mr. Collins, as to "need" for the Project); 490-492 (proffer from Petitioners' expert, Dr. Anderson, on phosphorus); 605-607 (sustaining objection to Dr. Cho's testimony but not striking it, in lieu of proffered testimony on phosphorus); 1035 (acknowledging that Dr. Barile's deposition transcript is in evidence in lieu of proffered testimony regarding the future proposed stormwater rules).

As a result of the above, Petitioners' eighth exception is appropriately rejected; except for modifying FOF 62 to reflect that the Project is expected to be a source of iron and copper runoff.

Response to Exception No. 9

Petitioners next take exception to the last sentence of FOF 63, which provides that "[t]he evidence indicates that maintenance is a feature of the Permit, and is within the capabilities of DOT to perform," arguing that it "lacks basis in the evidence," and that Petitioners' experts provided contrary testimony. *Pets' Ex.* at 10-11. Petitioners then cite Petitioners' Exhibit 278, and the testimonies of Jeff Brower, Dr. Anderson, and Dr. Cho, provided during the final hearing, in support of their position that the Applicant will not maintain the Project. *Id.*

The agency cannot disturb the ALJ's factual findings that are supported by competent substantial evidence. *Brogan*, 671 So. 2d at 823; *Heifetz*, 475 So. 2d at 1281. There is competent substantial evidence in the record to support the challenged portion of FOF 63, that the Applicant has the capability to perform maintenance, and that maintenance is a feature of the Permit. *See* Jt. Ex. 1 (Permit), at 6, ¶ 16 (requiring the permittee to provide routine maintenance of all components of the stormwater management system to remove trapped sediments and debris); 7, ¶ 22 (requiring inspections of the stormwater management system once within two years of completion and every two years thereafter, recordkeeping for each inspection, and notification to the District if the system is not functioning as designed and permitted). *See also* T. 63 (Applicant's environmental manager, Ms. Lyon, testifying that her group performs the inspections required by the permit every two years); 1087-89 (Ms. Lyon explaining the Applicant's "robust" maintenance program, which consists of visual and mechanical evaluations, a "Stormwater Asset Maintenance System" computer inventory to track and maintain over 10,000 ponds statewide, and a specific maintenance guide to ensure conformance); 1531 (District

engineer, Ms. Cook, testifying that the Applicant meets the requirements of section 12.3.1, A.H., Vol. I, because it is a state agency). *See also* FOF 60.

Petitioners did not take exception to FOF 60. R.O. at 18, ¶ 60 (finding that the Applicant "has a 'robust' highway maintenance program that looks at everything, including erosion and vegetation," and that "DOT has the capability to ensure that the maintenance obligations imposed by the terms and conditions of the Permit will be met."). The ALJ considered the testimony presented and made a specific finding that the Applicant has the capability to perform the maintenance required under the Permit, yet Petitioners take no exception to this finding of fact. To the extent a party fails to write written exceptions to a recommended order regarding specific issues, the party has waived such objections. *Envt'l Coal. of Fla.*, 586 So. 2d at 1213.

Further, Petitioners ask the District to consider testimony of Mr. Brower, Dr. Anderson, and Dr. Cho. The District cannot reweigh expert testimony in order to reach a different conclusion. *Gross*, 819 So. 2d at 1004 ("The Board is not permitted to reject or modify the findings made by the ALJ because it disagrees with the ALJ's findings, and it may not weigh the credibility of the witnesses and draw a different conclusion."); *Fla. Ch. of Sierra Club*, 436 So. 2d at 388-89 ("Simply because some evidence is disregarded, that does not mean that the findings themselves are not based on other substantial, competent evidence, which the finder in his judgment relied upon.").

Notably, the ALJ admitted Petitioners' Exhibit 278, but stated that "unless I get something that it's either in a joint exhibit or in an exhibit that has some greater detail in terms of authenticity, *I'm not going to give it any weight*." T. 182 (emphasis added). The District lacks substantive jurisdiction over the ALJ's evidentiary rulings, such as judging the credibility of

witnesses, resolving conflicts, and the weight given to certain evidence. *See Peace River/Manasota*, 18 So. 3d at 1088; *Barfield*, 805 So. 2d at 1009; *Goss*, 601 So. 2d at 1234-35.

As a result, Petitioners' ninth exception should be rejected.

Response to Exception No. 10

Petitioners next take exception to FOF 65, which finds that the Applicant "calculated phosphorus loading to Spruce Creek using the Harper Method, which was first developed around 2007, and has since been recognized in the field as a reliable method for making such calculations," arguing that this finding "is based on no credible evidence" and contrary to the testimony of Petitioners' experts. *Pets' Ex.* at 11. Petitioners also take exception to FOF 69, which finds that the Project "will provide greater removal of phosphorus than currently exists, which will result in a net improvement of water quality in the receiving waters," arguing that the modeling "does not take into account existing wetlands [*sic*] benefits." *Pets' Ex.* at 12. Petitioners then take exception to the portions of FOFs 70 and 73 that "justif[y] the BMP Trains model as valid simply for being 'commonly used and accepted' by others when testimony and current water problems in Florida undermine that validity." *Id.* Petitioners then argue that Mr. Vavra's modeling calculations did not include "the effects of disturbing and indeed destroying wetlands or forests as part of land clearing, or account for the benefits and ability of wetlands to treat [p]hosphorus," and that increased rainfall "must make a difference in the result calculated." *Id.* at 13. Petitioners also argue that the ALJ's finding in FOF 73 that compensating treatment will offset the impacts from the constrained areas "does not and should not mean 'equally offset.'" *Id.* Finally, Petitioners again raise the evidentiary argument that their experts "were wrongfully barred" from testifying as to the calculations and models. *Id.* at 14.

As to Petitioners' exceptions to FOFs 65, 70, and 73[2], Petitioners fail to cite any appropriate and specific citations to the record regarding the Harper Method or the BMP Trains model in support of this exception. § 120.57(1)(k), F.S. Nonetheless, there exists competent substantial evidence in the record to support these findings. Mr. Vavra testified that the Harper Method is reasonably relied upon by experts in the field of stormwater engineering. T. 1172. Mr. Miracle, a District engineer, testified that the BMP Trains model is commonly accepted in the field of engineering for calculating nutrient removal, and he had no reason to doubt it. T. 1634-35. Since there exists competent substantial evidence in the record to support the findings in FOF 65 and 70, they cannot be disturbed by the District. *Brogan*, 671 So. 2d at 823; *Heifetz*, 475 So. 2d at 1281.

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

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

[2] FOF 73 does not mention the BMP Trains model. Petitioners' next exception to FOF 73 is addressed below.

> purpose, you'd just go in and you'd lay concrete and you'd walk away. But that's not how it works.

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

The record demonstrates that the ALJ considered Petitioners' argument during the final hearing as to the loss of wetland functions and did not agree that the modeling calculations must include "the effects of disturbing and indeed destroying wetlands … or account for the benefits and ability of wetlands to treat [p]hosphorus." *See id.* The ALJ also considered Petitioners' arguments regarding increased rainfall in Volusia County, and made specific findings (FOFs 68 and 75, to which Petitioners also did not take exception) that even with higher levels of rainfall, the stormwater management system would provide "the same degree of treatment and storage, thereby resulting in a comparable post-development reduction in the pre-development levels of phosphorus." R.O. at 20, ¶ 68. The ALJ also specifically found in FOF 67 that the calculations showed a 29% reduction in phosphorus from pre-development to post-development. R.O. at 19-20, ¶ 67. Petitioners failed to take exception to FOFs 67, 68, 75 and 76; therefore, any objections to these specific findings are waived. *Envt'l Coal. of Fla., Inc. v. Broward Cty.*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991). Additionally, the District is not authorized to reweigh the evidence. *Gross*, 819 So. 2d at 1004; *Fla. Ch. of Sierra Club*, 436 So. 2d at 388-89. As a result, Petitioners' exception to FOF 69 is properly rejected.

Petitioners' next exception to FOF 73, which finds that compensating treatment would offset impacts from constrained areas, also lacks citations to the record. § 120.57(1)(k), F.S. But there is competent substantial evidence in the record to support it. In fact, Ms. Cook testified that "they're treating more existing roadway than the areas that they're not treating," and "they're capturing road runoff that currently goes to this unnamed canal untreated," so "the receiving waterbody is seeing –it's seeing a higher level of treatment … there's going to be a net improvement in water quality for those areas that are not treated." T. 1585. There is competent substantial evidence in the record to support FOF 73, that compensating treatment will offset the impacts from the untreated areas. Therefore, the District cannot disturb this finding. *Brogan*, 671 So. 2d at 823; *Heifetz*, 475 So. 2d at 1281.

Finally, as to Petitioners' argument that their experts "were wrongfully barred" from testifying to the calculations, the District is without authority to revisit the ALJ's evidentiary rulings. § 120.57(1)(k), F.S.; *Barfield*, 805 So. 2d at 1009. As set forth in response to Petitioners' eighth exception, the ALJ addressed this evidentiary issue during the final hearing and allowed Petitioners to proffer expert testimony during the final hearing in areas where testimony was limited. T. 406; 410; 576-77; 274-287, 309-353; 490-492; 605-607; 1035. The District is without jurisdiction to disturb these evidentiary rulings. § 120.57(1)(k), F.S.; *Barfield*, 805 So. 2d at 1009.

Petitioners' tenth exception is appropriately rejected in its entirety.

Response to Exception No. 11

Petitioners next take exception to FOF 74, claiming that the finding that Petitioners did not run any models or perform any calculations to demonstrate non-compliance with any District

standard is "patently false." *Pets' Ex.* at 14. Petitioners then cite portions of the final hearing transcript where their experts were allegedly "cut off" or "restricted" in their testimony. *Id.*

There exists competent substantial evidence in the record to support FOF 74. All of Petitioners' experts that were potentially qualified[3] to perform modeling calculations testified that they had not. Petitioners' expert, Dr. Anderson, testified that she does not perform surface water modeling, and has "never" done any calculations for any "real projects on the ground." T. 379:12-13; 381:25-382:06. Petitioners' expert, Dr. Cho, testified that she is not familiar with the state water quality criteria applicable to the Project and had also never modeled any nutrient loading calculations. T. 505:02-08. Petitioners' expert, Dr. Barile, also testified that he had not performed any modeling calculations. T. 1054:23-1055:11. The District is without authority to disturb the ALJ's factual findings that are supported by competent substantial evidence in the record. *Health Care and Ret. Corp.*, 516 So. 2d at 296.

As set forth in response to Petitioners' eighth exception, the ALJ allowed Petitioners ample leeway to proffer expert testimony, along with proffering numerous exhibits. R.O. at 6. None of Petitioners' proffered documents contain any models or calculations performed by Petitioners' experts. Notwithstanding, the District is without jurisdiction to revisit these evidentiary rulings. § 120.57(1)(k), F.S.; *Barfield*, 805 So. 2d at 1009. As a result, this exception should be rejected.

Response to Exception No. 12

For Petitioners' twelfth exception, they argue that FOFs 84 and 85, regarding the adequacy of the Uniform Mitigation Assessment Method ("UMAM"), "is wrong" based on the

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

Applicant not calling Mr. Dinardo as a witness, Mr. Dinardo authoring the initial UMAM values, and portions of Mr. Dahl's testimony cited by Petitioners. *Pets' Ex.* at 14-15.

Petitioners do not argue that there is no competent substantial evidence supporting these findings. *See id.*; *Health Care and Ret. Corp.*, 516 So. 2d at 296 (agency cannot disturb findings of fact unless there is no competent substantial evidence in the record to support them). Petitioners also do not dispute the finding in FOF 85 that "[n]o witness disputed the UMAM scores that formed the basis for the mitigation …." R.O. at 24, ¶ 85.

This exception re-argues Petitioners' position during the final hearing and argument contained in their PRO. *See Pets' PRO* at 20. It should also be noted that Petitioners did not object to the admission of Joint Exhibit 23, which contains the UMAM scores, at the final hearing. T. 52-54. Since Petitioners made no contemporaneous objection to that exhibit, they have waived any objection. *Tri-State Systems, Inc. v. Dep't of Transp.*, 500 So. 2d 212, 215 (Fla. 1st DCA 1986), *rev. denied*, 506 So. 2d 1041 (1987). Even if an objection had been made, the District lacks authority to rule on the admissibility of evidence. *See Barfield*, 805 So. 2d at 1009.

Petitioners seek to have the District reweigh the evidence regarding the UMAM values, which is improper. *Gross*, 819 So. 2d at 1004; *Fla. Ch. of Sierra Club*, 436 So. 2d at 388-89. As a result, this exception should be rejected.

Response to Exception No. 13

Petitioners' thirteenth exception again asks the District to reweigh the evidence, here regarding FOF 87, which finds that Farmton Mitigation Bank has high quality wetlands that are protected in perpetuity. Petitioners claim that this finding "cannot be concluded to be true because the exact location of mitigation is not known" and cite testimony of Ms. Shadix in support. *Pets' Ex.* at 16.

Petitioners do not argue that there is no competent substantial evidence to support FOF 87. *See id.*; *Health Care and Ret. Corp.*, 516 So. 2d at 296 (agency cannot disturb findings of fact unless there is no competent substantial evidence in the record to support them). In fact, there exists competent substantial evidence in the record supporting FOF 87. T. 1457 (Mr. Drauer explaining that degradation of wetlands is much more unlikely in a mitigation bank because of the active mitigation plan, management plan, and non-wasting funds, along with invasive species removal and active monitoring); T. 1476-77 (Mr. Drauer explaining that mitigation banks seek "lift" to raise the wetland scores in order to obtain bank credits, and when those successes are completed, additional credits are released); T. 1782-83 (Ms. Martin explaining that both mitigation banks are managed in perpetuity). Again, Petitioners seek to have the District reweigh the evidence presented at final hearing. The ALJ cites the testimony of Mr. Drauer in support of FOF 87, and specifically states, "[h]is opinion is accepted."

"It is black letter law that an agency may not reweigh evidence submitted to an administrative hearing officer, resolve conflicts in the evidence, judge the credibility of witnesses or otherwise interpret the evidence anew." *Brown*, 667 So. 2d at 979 (citing *Heifetz*, 475 So. 2d at 1281). As a result, this exception should be rejected.

Response to Exception No. 14

Petitioners' fourteenth exception takes issue with FOF 88, which finds that the proposed mitigation is adequate to offset wetland impacts within the Halifax River basin, where the Project is located. Petitioners argue that this finding "ignores the intent of the rule, the hydrology of the area, and the evidence and testimonies provided." *Pets' Ex.* at 16. While Petitioners acknowledge that the ALJ considered Petitioners' experts' testimony that the mitigation banks are not located within the Spruce Creek sub-basin, Petitioners continue to dispute that "this can

only be addressed in a different forum." *Id.* As the ALJ noted in the R.O., Petitioners' argument is essentially a rule challenge to the District's mitigation banking rules. R.O. at 24, ¶ 85 ("However, this case is not a rule challenge, and the validly promulgated mitigation rule must be applied as written."). Nonetheless, Petitioners continue to argue that the mitigation banks are not hydrologically connected to Spruce Creek, citing the testimony of Dr. Anderson and Dr. Cho that they believe the mitigation is inadequate. *Pets' Ex.* at 17-19.

This exception fails to identify a legal basis in support. § 120.57(1)(k), F.S. As a result, the District is not required to rule on this exception. *Id.*; *Boundy*, 994 So. 2d 433; *All Aboard Florida*, 2017 WL 2918050, at *6; *S. Palafox Prop., Inc.*, 2015 WL 4410468, at *11. Nonetheless, this finding is supported by competent substantial evidence. T. 1774; 1780 (Ms. Martin testifying that the mitigation was sufficient and fully offset the impacts to wetlands); 1785-86.

Further, Petitioners' citation to subsection 373.4136(6)(a)5., F.S., does not support their position. *See Pets' Ex.* at 19. Subsection 373.4136(6)(a)5., F.S., provides that the water management district shall consider whether a proposed mitigation bank can reasonably offset certain types of wetland impacts within a specified geographic area when determining the boundaries of a mitigation service area. § 373.4136(6), F.S. Both mitigation banks here, Farmton North Mitigation Bank and Lake Swamp Mitigation Bank, underwent permitting through the District and were determined to reasonably offset impacts within the Halifax River basin, in accordance with the District's established Regional Watersheds for Mitigation Banking. A.H., Vol. II, App'x A. T. 1774:15-25. Petitioners did not take exception to the finding in FOF 85 that "[n]o witness disputed … that the mitigation bank service areas included the regional Halifax River watershed of which Spruce Creek is a part." R.O. at 24, ¶ 85. Petitioners,

therefore, have waived any argument that the proposed mitigation does not meet District rules. *Envt'l Coal. of Fla., Inc. v. Broward Cty.*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991).

The District is not authorized to reweigh the evidence to reach a different conclusion. *See Peace River/Manasota Regional Water Supply Auth. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1088 (Fla. 2d DCA 2009); *Barfield v. Dep't of Health*, 805 So. 2d at 1009; *Goss v. Dist. Sch. Bd. of St. Johns Cty.*, 601 So. 2d 1232, 1234-35 (Fla. 5th DCA 1992).

As a result, Petitioners' fourteenth exception is appropriately rejected.

Response to Exception No. 15

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

There exists competent substantial evidence in the record to support FOF 95 that "[t]here are no public conservation lands or lands under perpetual conservation or agricultural easement

on both sides of I-95 or Pioneer Road for a wildlife crossing feature." Jt. Ex. 2, 27; FDOT Ex. 11; T. 1382:23-1383:06; 1385:09-1387:12; 1388:04-11, 1720:22-1721:12; see also FOF 96. As a result, the District is without the authority to disturb these factual findings. *Brogan*, 671 So. 2d at 823; *Heifetz*, 475 So. 2d at 1281. The District also cannot reweigh expert testimony in order to reach a different conclusion. *Gross*, 819 So. 2d at 1004; *Fla. Ch. of Sierra Club*, 436 So. 2d at 388-89.

Petitioners also allude to an objection to FOF 19 as "inaccurate," but fail to explain how anything in that paragraph is inaccurate.[4] Thus, the District need not rule on any objection to FOF 19. §120.57(1)(k), F.S.; *See Boundy v. School Bd. of Miami-Dade Cnty.*, 994 So. 2d 433; *Indian River Farms Water Control Dist. v. All Aboard Florida Operations, LLC*, Case No. 16-6165, 2017 WL 2918050, at *6 (Fla. SJRWMD June 27, 2017) (holding that "[w]ithout an asserted legal basis for challenging the finding of fact and without any citations to the record that refute the finding of fact, this Agency need not rule on this exception"); *Dep't of Envt'l Prot. v. S. Palafox Prop., Inc.*, Case No. 14-3674, 2015 WL 4410468, at *11 (Fla. DEP May 29, 2015) (finding that the remainder of petitioner's exception contained more argument and no record citations; therefore, the remainder of the exception was denied for failing to meet the requirements of § 120.57(1)(k), F.S.). To the extent a party fails to file written exceptions to a recommended order regarding specific issues, the party has waived such specific objections. *Envt'l Coal. of Fla., Inc. v. Broward Cty.*, 586 So. 2d at 1213.

As a result, Petitioners' fifteenth exception should be rejected.

[4] Notwithstanding, there is competent substantial evidence in the record supporting FOF 19. T. 1786 (Ms. Martin explaining that the onsite wetlands have been fragmented by roadways and utility lines, and permitted developments).

Response to Exception No. 16

Petitioners' sixteenth exception takes issue with FOF 96, disputing the finding that the Project would not affect the Doris Leeper Preserve. *Pets' Ex*. at 21. In support of this exception, Petitioners rely on Petitioners' Exhibits 18 and 307 in an attempt to have the District reweigh the evidence. Petitioners' Exhibit 18 was entered into evidence over objection for standing purposes only. (T. 692:06-693:12).

There exists competent substantial evidence in the record to support the finding in FOF 96 that the Project would not affect the Doris Leeper Preserve. The closest point of Doris Leeper Preserve is located more than a mile north of the Project site. T. 1452:7-18. As a result, the District is without the authority to disturb these factual findings. *Brogan*, 671 So. 2d at 823; *Heifetz*, 475 So. 2d at 1281. The District also cannot reweigh expert testimony in order to reach a different conclusion. *Gross*, 819 So. 2d at 1004; *Fla. Ch. of Sierra Club*, 436 So. 2d at 388-89.

As a result, Petitioners' sixteenth exception should be rejected.

Response to Exception No. 17

Petitioners' seventeenth exception takes issue with FOF 99, disputing the finding that the Project would not affect recreational values. *Pets' Ex.* at 23. In support of this exception, Petitioners rely on testimony from several Petitioners, plus testimony from Petitioners' expert John Baker, in an attempt to have the District reweigh the evidence.

There exists competent substantial evidence in the record to support the finding in FOF 99 that the Project would not affect recreational values, because the Project area is not navigational and is not used for boating or commercial fishing. Jt. Ex. 2; T. 1782:07-10. As a result, the District is without the authority to disturb these factual findings. *Brogan*, 671 So. 2d at 823; *Heifetz*, 475 So. 2d at 1281. The District also cannot reweigh expert testimony in order

to reach a different conclusion. *Gross*, 819 So. 2d at 1004; *Fla. Ch. of Sierra Club*, 436 So. 2d at 388-89.

As a result, Petitioners' seventeenth exception should be rejected.

Response to Exception No. 18

Petitioners' eighteenth exception takes issue with FOF 102, disputing the finding that the "current condition and relative value of functions of the affected wetlands is, at best, moderate." Pets' Ex. at 23. In support of this exception, Petitioners rely on testimony from Petitioners' expert Dr. Cho, in an attempt to have the District reweigh the evidence.

There exists competent substantial evidence in the record to support the finding in FOF 102 that the current condition and relative value of functions of the affected wetlands is moderate because 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. Jt. Ex. 2; T. 1785:20-1786:06; 1844:15-1845:02. Moreover, Dr. Cho did not visit all the on site wetlands to form her opinion—she only visited a portion of the wetlands (in Wetland 6). T. 1719:10-12. Dr. Barile opined that the wetlands were simply "functional," not "high quality." T. 1050:19-1051:01. As a result, the District is without the authority to disturb these factual findings. *Brogan*, 671 So. 2d at 823; *Heifetz*, 475 So. 2d at 1281. The District also cannot reweigh expert testimony in order to reach a different conclusion. *Gross*, 819 So. 2d at 1004; *Fla. Ch. of Sierra Club*, 436 So. 2d at 388-89.

As a result, Petitioners' eighteenth exception should be rejected.

Response to Exception No. 19

Petitioners' nineteenth exception takes issue with FOF 100, disputing the finding that the proposed mitigation will fully offset the permanent impacts of the Project. *Pets' Ex.* at 24. In support of this exception, Petitioners rely on testimony from Petitioners' experts Dr. Anderson and Dr. Cho to argue that the construction work itself will release an unspecified amount of phosphorus, in an attempt to have the District reweigh the evidence. Notably, the ALJ sustained objections to both Dr. Anderson and Dr. Cho offering an opinion about whether there is a net improvement for total phosphorus, because neither offered an opinion on that subject at their depositions. T. 402:02-410:19 (Dr. Anderson), 574:10-577:06 (Dr. Cho).

There exists competent substantial evidence in the record to support the finding in FOF 100 that proposed mitigation will fully offset the proposed permanent impacts of the Project. Jt. Ex. 2 at 6, 9; T. 99:12-25; 1780:08-16; 1810:09-13. There also exists competent substantial evidence in the record to support the findings regarding phosphorus, in FOF 67, 69, and 72, that the Project will result in a net improvement for total phosphorus discharged. Jt. Ex. 2, 8; T. 1170:11-1172:21, 1620:12-1621:14; 1637:05-10. As a result, the District is without the authority to disturb these factual findings. *Brogan*, 671 So. 2d at 823; *Heifetz*, 475 So. 2d at 1281. The District also cannot reweigh expert testimony in order to reach a different conclusion. *Gross*, 819 So. 2d at 1004; *Fla. Ch. of Sierra Club*, 436 So. 2d at 388-89. Additionally, Petitioners did not take exception to FOFs 67 or 72 regarding the net improvement for total phosphorus. Having failed to take exception to these related factual findings, Petitioners have waived any objection to the findings in FOF 100 as to water quality. *Envt'l Coal. of Fla.*, 586 So. 2d at 1213.

As a result, Petitioners' nineteenth exception should be rejected.

Response to Exception No. 20

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

There exists competent substantial evidence in the record to support the finding in FOF 101 that there was no evidence of significant historical or archaeological resources on or near the Project. FDOT provided documentation from the Director and State Historic Preservation Officer of the Florida Division of Historical Resources at the Florida Department of State that it concurred with FDOT's Cultural Resource Assessment Survey, which concluded that no impacts to significant historical or archaeological resources are expected to occur. Jt. Ex. 23, at 209; T. 1783:07-1784:22. No impacts to historical or archaeological resources are anticipated. Jt. Ex. 2 at 7, 12; Jt. Ex. 23 at 207-209; T. 1784:01-1785:06. Additionally, Mr. Baker's lay testimony and Petitioners' Exhibit 142 were unpersuasive, because the map depicting the alleged location of Old Kings Road showed that the road was outside the Project's footprint. Pet. Ex. 142; T. 160:01-03. The ALJ weighed the evidence presented at final hearing and specifically found in FOF 101 that any "suggestion of archeological resources in the area is entirely speculative." RO at 29. As a result, the District is without the authority to disturb the ALJ's factual findings. *Brogan*, 671 So. 2d at 823; *Heifetz*, 475 So. 2d at 1281. The District also cannot reweigh expert

testimony in order to reach a different conclusion. *Gross*, 819 So. 2d at 1004; *Fla. Ch. of Sierra Club*, 436 So. 2d at 388-89.

As a result, Petitioners' twentieth exception should be rejected.

Response to Requested Relief in Conclusion

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

As a result, Petitioners' requested relief in its Conclusion should be rejected.

II. RESPONSE TO FDOT'S EXCEPTIONS

Response to FDOT's Exception No. 1

In its first exception, FDOT takes issue with the ALJ's application of section 120.569(2)(p), F.S., in COL 173 and 175, by noting that after "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." FDOT notes that FOF 71, and COLs 124, 138 through 140 support its position. As a result, FDOT argues that the ALJ committed "reversible error" by placing "the burden of proof on the wrong party."

The District agrees with FDOT's exception as to the ALJ improperly shifting the burden of proof and persuasion back to FDOT after it established its *prima facie* case. At that point, "the burden of ultimate persuasion and … the burden of going forward to prove the case in

opposition" shifted to the Petitioner. § 120.569(2)(p), F.S. Additional support for this view appears in FOF 74 ("Petitioners did not run any models or perform any calculations to demonstrate non-compliance with any compliance standard, or otherwise present competent substantial evidence that the Project will not provide adequate compensating treatment or will not meet the District's water quality treatment requirements"), FOF 75 ("Dr. Barile acknowledged that the system was designed to meet existing District stormwater system standards… . Thus, DOT provided reasonable assurance that the Project will not result in adverse impacts to water quality in the receiving waters"), and FOF 76 (stating that much of Petitioner's "testimony in opposition to the stormwater system was directed not to whether it would function as designed, but rather to the belief that it is preferable to keep rain in natural areas" which was not relevant to the permitting criteria). The District notes that it lacks substantive jurisdiction over the interpretation of section 120.569 or evidentiary rulings, which are within the exclusive province of the ALJ, as discussed in the District's exceptions.

While the District generally agrees with FDOT's proposed revision to COL 175 (FDOT Resp. at 6 ¶ 9), the District would caution against revising COL 173 in a way that could be interpreted as reweighing evidence (DOT Response at 5, ¶ 9). While there is a finding of fact that the project would cause a 29% reduction in total phosphorus discharged (in FOF 67), which is significant for public interest purposes, there is not a similar finding of fact regarding the percentage reduction in iron and copper discharged. Thus, it might be necessary to have additional facts regarding whether the percentage reduction in iron and copper is significant for public interest purposes.

Response to FDOT's Exception No. 2

In its second exception, FDOT takes issue with the ALJ's conclusions in COLs 107 and 174 that a 29% reduction in total phosphorus discharged would be the "bare minimum to qualify for the Permit" and is not significant for purposes of the public interest test in section 373.414(1)(a), F.S., rule 62-330.302(1), F.A.C., and section 10.2.3.1, A.H., Vol. I. FDOT contends that a 29% reduction of pre-development total phosphorus is more than a minimal net improvement for purposes of the public interest test, and is a significant public benefit. The District agrees with FDOT's position, for the reasons stated on pages 9 through 13 of the District's Exceptions to Recommended Order.

The District generally agrees with FDOT's proposed revisions to COLs 107 and 174 (FDOT Resp. at 8 ¶18), but the District recommends accepting the language in its proposed revisions to COLs 107 and 174 as discussed in the District's Exceptions to Recommended Order at pages 33 and 34.

Response to FDOT's Exception No. 3

In its third exception, FDOT takes issue with the ALJ's conclusions in FOFs/COLs 92.B., 92.C., 92.D., and 107 that the first public interest factor of section 10.2.3.1(a), A.H., Vol. I, was "neutral," rather than positive. FDOT contends that the ALJ incorrectly concluded the first public interest factor was neutral. The District agrees with this exception for the reasons stated in the District's Exceptions to Recommended Order at pages 15 through 22. Notably, section 10.2.3.1, A.H., Vol. I, recognizes that as to flooding or alleviating the potential for flooding, meeting the applicable water quantity criteria is "at least a neutral factor" under the first factor of the public interest test, which suggests it can be a positive factor.

The District generally agrees with FDOT's proposed revision to FOF/COL 92.B and FOF/COL 107 (FDOT Resp. at 10 – 11, ¶26). However, the District recommends accepting the language in its proposed revision to FOF/COL 92.D., as discussed in the District's exceptions at pages 33 and 34, and because the third and fourth sentences of FOF/COL 92.D. are either supported by evidence regarding raising the crown of the road (Jt. Ex. 2 at 11; T. 1537:21-1528:02, 1540:17-22, 1541:14-19, 1558:17-19, 1559:07-22, 1561:03–1562:04) or by an inference therefrom (regarding the extent of the benefits of raising the crown of the road). *See Health Care and Ret. Corp.*, 516 So. 2d at 296 ("An agency does not have the discretion to ignore the HO's [hearing officer's] findings of fact and to substitute its findings of fact for those of the HO unless it first determines that the findings of fact in the recommended order are not supported by competent, substantial evidence."); *Fla. Ch. of Sierra Club*, 436 So. 2d at 389.

Response to FDOT's Exception No. 4

In its fourth exception, FDOT takes issue with the ALJ's conclusion in FOF/COL 105 that the seventh public interest test factor of section 10.2.3.7, A.H., Vol. I. was "neutral," rather than positive. FDOT contends that the ALJ incorrectly concluded the seventh public interest factor was neutral, based on the findings of fact in FOF 102 through 105 and COL 165 that the Project, along with FDOT's proposed mitigation "will provide greater long term ecological value to the area than the value currently provided by the wetlands that will be impacted by construction of the project." FDOT Resp. at 12, ¶ 32 (citing R.O. at 46, ¶ 165).

Although the record contains testimony that the seventh public interest factor could be positive, none of the Respondents' witnesses testified that the seventh public interest test factor was "positive." T:1392:23-1393:03 (Drauer), 1785:11-1786:15 (Martin). The District's Proposed Recommended Order noted that District staff testified that the seventh public interest

test factor was neutral but could be considered positive due to the regional ecological value and greater long-term ecological value of the mitigation versus the existing wetlands that would be impacted by the Project. (Dist. PRO at 27-28). That "extra" mitigation value was provided to meet section 10.2.1.2(b), A.H., Vol. I, does not preclude such "extra" mitigation also being considered positive under the seventh public interest factor. *Fla. Power Corp. v. DER*, 638 So. 2d at 546.

While the District agrees with this exception in theory, it is not necessary to reach this issue or to amend COL 105 to support the ultimate conclusion that the project is "clearly in the public interest," because the overall balance of the public interest test factors weighs in favor of "clearly in the public interest" even if the seventh factor were considered neutral.

Response to FDOT's Exception No. 5

In its fifth exception FDOT takes issue with the ALJ's conclusion in COL 171 that "hurricane evacuation and traffic incident management are non-environmental factors that are not appropriate factors for determining whether the Project is 'clearly in the public interest.'" FDOT contends the ALJ "improperly ignored hurricane and other emergency safety measures" as public interest test factors, which it contends are environmental in nature. FDOT contends that the ALJ's COL 171 "rejects guidance" in section 10.2.3.1(a), A.H., Vol. I, that the first public interest test factor includes "hurricane preparedness or cleanup." FDOT further contends that "hurricane preparedness" includes creating or improving access points or creating or improving emergency and hurricane evacuation routes that improve travel times (away from the emergency or hurricane). Finally, FDOT contends that its position is supported by the decision in *1800 Atlantic Dev. v. State of Florida, Dep't of Envtl. Reg.*, 552 So. 2d 946, 957 (Fla. 1st DCA 1989), *rev. denied*, 562 So. 2d 345 (Fla. 1990).

Initially, the District acknowledges the need as expressed by FDOT for increased resiliency measures like the road improvements that allow residents and visitors to the State of Florida to better prepare ahead of hurricanes. The District agrees that the R.O. does not mention in the analysis "hurricane preparedness or cleanup," which phrase is expressly mentioned in section 10.2.3.1(a), A.H., Vol. I. However, the District is not aware of any authority that addresses "hurricane preparedness or cleanup" in the context of a public need or benefit from improving travel time or public safety.

To an extent, the District agrees with FDOT that the ALJ reads the public interest test too narrowly, to include only environmental considerations. Even *Martin County v. All Aboard Florida*, the key case cited in COL 171, recognizes that there are non-environmental factors expressly mentioned in the public interest test in section 373.414(1)(a)—navigation and preservation of historical or archaeological resources:

> 100. As to the potential for non-environmental impacts associated with train operations, it is explained in the Conclusions of Law that the public interest test does not include consideration of non-environmental factors other than those expressly articulated in the statute, such as navigation and preservation of historical or archaeological resources.
>
> ***
>
> 163. In *Florida Wildlife Federation v. South Florida Water Management District*, Case No. 04-3064 (Fla. DOAH Dec. 03, 2004; SFWMD Dec. 08, 2004), the Administrative Law Judge rejected an attempt to interject non-environmental factors in the public interest analysis:
>
> > The application of the public interest test does not involve consideration of non- environmental factors other than those expressly set forth in the statute such as navigation or preservation of historical or archaeological resources. Specifically, traffic concerns, congestion, quality of rural life, and school overcrowding are not within the seven factors contained in Section 373.414(1)(a).
>
> R.O. at 49, ¶ 116. The District adopted the Recommended Order in toto, and the Fourth District Court affirmed per curiam, without opinion. *Fla. Wildlife Fed. v. So. Fla. Water Mgmt. Dist.*, 902 So. 2d 812 (Fla. 4th DCA 2005).

Martin County, R.O. at 29, ¶ 100; 47, ¶ 163 (emphasis added).

FDOT suggests that the District substitute the phrase "access points" where the phrase "navigational aids" appears in section 10.2.3.1(a). The District would approach this substitution with caution. While the District agrees that hurricane evacuation is significant, it would caution against reading into a rule or statute terms that do not appear therein. The "plain meaning of the statute is always the starting point in statutory interpretation." *Alachua Cnty. v. Watson*, 333 So. 3d 162, 169 (Fla. 2022).

The District also reads the phrase from *1800 Atlantic* quoted on page 14, ¶ 43, to mean that the phrase "substantial need or benefit" was referring to an environmental benefit. Notably, the court in *1800 Atlantic* proceeded to state that the applicant for a private project "need not show any particular need or net public benefit as a condition of obtaining the permit." *1800 Atlantic*, 552 So. 2d at 957. Notwithstanding, it is not necessary to reach this issue to support the ultimate conclusion that the project is "clearly in the public interest," because the additional water quality and water quantity benefits alone make the Project weigh in favor of "clearly in the public interest." For these reasons, the District recommends accepting the language in its proposed revision to COL 171 and 175, as discussed in the District's exceptions at pages 33 and 34, respectively.

Response to FDOT's Exception No. 6

In its sixth exception, FDOT takes issue with the ALJ's conclusion in COL 175 that the Project is not "clearly in the public interest." While District staff agrees with this exception, the District recommends adopting the District's proposed revisions because they would maintain the phrases showing that the ALJ had no reservations about recommending approval of the Project except for the public interest test. The District would caution against striking Footnote 9, which

discusses Petitioners meeting their burden of ultimate persuasion (which involves an interpretation of section 120.569 and an evidentiary ruling), because the District lacks substantive jurisdiction over the interpretation of section 120.569 or evidentiary rulings.

Respectfully submitted this 23rd day of February, 2024.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 23, 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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