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 RESPONSES TO THE PETITIONERS' EXCEPTIONS

COMES NOW, Respondent, the State of Florida Department of Transportation ("FDOT"), by and through its undersigned counsel, and pursuant to Rule 28-106.217, Florida Administrative Code, hereby submits the following Responses to the Petitioners' Exceptions to the January 29, 2024 Amended Recommended Order, and states:

INTRODUCTION

1. On January 29, 2024, the Administrative Law Judge ("ALJ"), E. Gary Early, filed his Amended Recommended Order in the above-styled action with the Clerk of the Division of Administrative Hearings. [1]

2. On February 13, 2024, the Petitioners filed exceptions to the ALJ's Amended Recommended Order.

[1] The ALJ's Recommended Order filed on January 29, 2024, included directions to the South Florida Water Management District. This Amended Recommended Order corrected that scrivener's error.

3. Pursuant to Rule 28-106.217(3), Florida Administrative Code, any party may file a response to any other party's exceptions to the Recommended Order with the agency rendering the Final Order within ten (10) days from the date the exceptions were filed.

4. The Petitioners submitted twenty (20) exceptions to the ALJ's Amended Recommended Order. These twenty exceptions fall into three categories. First, the Petitioners take exception to matters outside the substantive jurisdiction of the St. Johns River Water Management District ("District"); second, Petitioners take exception to findings of fact merely because there is allegedly countervailing evidence in the record; and third, the Petitioners take exception to a conclusion of law. The Petitioners exceptions are grouped accordingly and addressed in turn.

I. Petitioners' Exceptions Numbered 1, 4, 8, and 10.

5. Section 120.57(1)(l), Florida Statutes, provides that an agency "may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction."

6. An agency, however, may not modify conclusions of law over matters outside its substantive jurisdiction. *See G.E.L. Corp. v. Dept. of Environmental Protection*, 875 So. 2d 1257 (Fla. 5th DCA 2004) (DEP jurisdiction extends over environmental issues, not attorneys' fees provisions); *Barfield v. Dept. of Health*, 805 So. 2d 1008 (Fla. 1st DCA 2002) (agency lacks substantive jurisdiction over evidentiary determinations).

7. Petitioners' Exceptions numbered 1, 4, 8, and 10 ask the District to modify conclusions of law that are outside its substantive jurisdiction, therefore each should be rejected.

8. Petitioners' Exception No. 1 argues that "Exhibits 42, 296, 1095, 1114, 1138-1150, 1201-1203, and all agency official Project files from their website(s) should be included in the record." Evidentiary determinations made by an administrative law judge are not within the

District's substantive jurisdiction, so this exception should be rejected. *Barfield*, 805 So. 2d at 1012.

9. Petitioners' Exception No. 4 argues that the ALJ erred in granting three pre-trial motions in limine. Evidentiary determinations are not within the District's substantive jurisdiction. *Id.* This exception should be rejected.

10. Petitioners' Exception No. 8 argues, essentially, that Drs. Anderson, Cho and Barile were wrongly prohibited from providing certain expert testimony regarding nutrient reduction calculations. The ALJ's decisions to preclude Drs. Anderson, Cho and Barile from providing expert testimony on subjects that were not disclosed were evidentiary determinations that are not within the District's substantive jurisdiction. *Id.* This exception should be rejected.

11. Petitioners' Exception No. 10 takes exception to the ALJ's determination that the "Harper Method" model is a reliable method to calculate phosphorus loading, and subsequent factual determinations that the stormwater management system will provide greater removal of phosphorous than those functions currently provided on the site. Regarding the former argument, there was competent, substantial evidence in the record to support the ALJ's finding that the "Harper Method" is a reliable method to calculate phosphorus loading. (JE 8; Tr. pp. 1171, 1172, 1683). Regarding the latter argument, FDOT's analysis of pre- and post-development loading of Total Phosphorus ("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; Tr. pp. 1171-1179, 1618, 1671-1685). As such, there was competent substantial evidence in the record to support the ALJ's finding of fact in paragraph 69. The District should reject this exception.

II. Petitioners' Exceptions Numbered 2, 3, 5 through 7, 9, 11 through 13, and 15 through 20.

12. Petitioners are under the mistaken belief that the District can modify findings of fact merely because there is allegedly contrary evidence in the record. 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. *E.g.*, *Health Care and Ret. Corp. 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 [hearing officer's] findings of fact and to substitute its findings of fact for those of the [hearing officer] unless it first determines that the findings of fact in the recommended order are not supported by competent, substantial evidence."). This principle is codified in section 120.57(1)(l), F.S., which reads in pertinent part:

> 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.

13. The First District Court of Appeal explained this principle in *Heifetz v. Department of Business Regulation, Division of Alcoholic Beverages & Tobacco*, 475 So. 2d 1277, 1282 (Fla. 1st DCA 1985):

> It is the hearing officer's function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence. If, as is often the case, the evidence presented supports two inconsistent findings, it is the hearing officer's role to decide the issue one way or the other. *The agency may not reject the hearing officer's finding unless there is no competent, substantial evidence from which the finding could reasonably be inferred. The agency is not authorized to weigh the evidence presented, judge credibility of witnesses, or*

> *otherwise interpret the evidence to fit its desired ultimate conclusion.* (Emphasis supplied.)

14. Petitioners' Exceptions Nos. 2, 3, 5 through 7, 9, 11 through 13, and 15 through 20 ask the District to reject findings of fact merely because the Petitioners presented allegedly contrary – but ultimately unpersuasive – evidence at the hearing.

15. Petitioners' Exception No. 2 takes exception to a finding of fact that "[i]n 2005, the Interchange was added to the Transportation Organization list of projects." Relying on Petitioners' Exhibit 146, they argue that the Interchange was not officially added to the Transportation Organization's list of projects until 2013. To support this assertion, Petitioners rely on and quote testimony of Mr. Brower. This quoted testimony was subject to an objection by FDOT's counsel that was sustained by the ALJ. (Tr. pp. 186-188). Whereas the ALJ's finding that the Interchange was added to the Transportation's list of projects in 2005 was supported by competent substantial evidence. (Tr. p. 71). This exception should be rejected both because the District lacks substantive jurisdiction to overturn an ALJ's evidentiary ruling, and because the ALJ's finding of fact was supported by competent substantial evidence.

16. Petitioners' Exception No. 3 is twofold. First, they take exception to the ALJ's finding of fact that the Partial Cloverleaf design had "the highest public support/preference." Second, they take exception to the finding of fact that "impacts were minimized to the extent practicable to realize a safe, functional interchange on a six-lane interstate highway." These separate arguments are addressed immediately below.

17. First, Petitioners argue that the "No Build" scenario had the highest public support and cite to Petitioners' Exhibits 42 and 1115 to support this assertion. Petitioner's Exhibit 42 was not received into evidence. (Tr. p. 942). Petitioners' Exhibit 1115 are the minutes of a public meeting held on the Project. To the extent Petitioners' Exhibit 1115 reflects statements made by

members of the public, those sentiments are not representative of the views of Volusia County's approximately one-half million residents. Petitioners' witness, Mr. Brower acknowledged that a scientific poll of Volusia County's residents to gauge public support for the project was never conducted. (Tr. p. 238). Petitioners' Exhibit 1115 is also hearsay which cannot form the basis of a finding of fact. § 120.57(1)(c), Fla. Stat. In contrast, the ALJ's conclusion was supported by competent substantial evidence in the record. (JE 2E, Pg. 8; JE 25).

18. Second, and relying on the testimony of Dr. Anderson, Dr. Barile and Mr. Collins, Petitioners argue that the construction of two access roads – which their experts deem unnecessary – is evidence that the impacts were not minimalized. As was explained in FDOT's Proposed Recommended Order, maintaining access for existing adjacent landowners is a requirement of section 337.27(1), Florida Statutes, and mitigation was provided for the impacts caused by the construction of these access roads. (JE 2E, p. 9; Tr. pp. 1369, 1774, 1810). As such, there was competent substantial evidence to support the ALJ's finding of fact in paragraph 27.

19. Petitioners' Exception No. 5 argues that the finding of fact in paragraph 38 that "the stormwater ponds create mathematically more storage capacity than currently exists on the project site" is incorrect, and therefore, the conclusion in paragraph 133 is also incorrect. To support these arguments, Petitioners rely on generalized testimony from Dr. Cho regarding the importance of wetlands, the ability of wetlands to hold water, and the ability for water to permeate soil in the area. The ALJ, however, did not accept Dr. Cho as an expert in any of her proffered subjects to the extent that it required testimony regarding engineering. (Tr. pp. 505-506). The storage capacity of the stormwater ponds falls squarely outside her proffered expertise. In contrast, there was competent, substantial evidence in the record to support the ALJ's finding in paragraph 38. (Tr. pp. 1166, 1232).

20. Petitioners' Exception No. 6 is a jumbled, amalgamation of several of their other exceptions. Petitioners first argue that the ALJ was wrong to conclude that "[t]he FPC ponds *will,* as the name implies, provide compensating treatment to offset the impacts." They take particular umbrage to the ALJ's use of the word "will" because that term presupposes that "it will happen." It is unclear what Petitioners hope to prove with this argument. The capability of any future project necessarily involves a certain amount of presupposition; however, reasonable assurance was provided that these systems will operate as intended. As such, there was competent, substantial evidence to support the ALJ's finding in paragraph 39. Next, Petitioners reincorporate their flawed arguments regarding the nutrient reduction capabilities of the Project and objections to the ALJ restricting testimony raised in Exceptions Nos. 4 and 5. The District should reject these exceptions for the same reasons discussed in the responses above.

21. In Exception No. 7, Petitioners object to the ALJ's finding of fact that the Interconnected Channel and Pond Routing model is an accepted and reliable method for determining stormwater flows and volumes. Contrary to Petitioners argument, the ALJ's conclusion here was not the result of some circular logic, but in fact based on competent substantial evidence in the record. (JE 4; JE 5; Tr. pp. 1159, 1160, 1526, 1573). Regarding Petitioners' exception to the ALJ's granting of a motion in limine, this was an evidentiary determination outside the District's substantive jurisdiction. *Barfield,* 805 So. 2d at 1012. The District should reject this exception.

22. Petitioners' Exception No. 9 takes exception to the finding of fact in paragraph 63 that the stormwater ponds will be adequately maintained. FDOT has a robust postconstruction maintenance program for the stormwater system designed for the Project. (JE 2E, Pg. 3, 5; JE 3; Tr. pp. 1087-1089). Furthermore, FDOT, as a state agency, has the financial and administrative

capability to ensure that the Project will be undertaken in accordance with the terms and conditions of the Permit. (JE 2E, pp. 5-6; JE 3). As such, this finding was supported by competent substantial evidence. This exception should be rejected.

23. Petitioners' Exception No. 11 takes exception to a finding of fact in paragraph 74 that "Petitioners did not run any models or perform any calculations to demonstrate non-compliance." They argue that Dr. Anderson *did* perform these calculations but was wrongly prevented from testifying on this subject due to the ALJ's determination that Dr. Anderson lacks the necessary qualifications to present such testimony. Whether Dr. Anderson was qualified to testify on this subject is an evidentiary determination outside the District's substantive jurisdiction. *Id.* This exception should be rejected.

24. Petitioners' Exception No. 12 takes exception to the Uniform Mitigation Assessment Method ("UMAM") calculated by M. Dinardo. Petitioners argue that the scoring was incorrect and, in essence, that an adverse inference be drawn because FDOT did not call Dinardo as a witness, without the benefit of any legal citation to support this latter point. Indeed, Petitioners are under the mistaken belief that Respondents were required to call Dinardo as a witness; however, section 120.569(2)(p), Florida Statutes, places no such burden on FDOT. If there were "inconsistencies in [Dinardo's] work," as Petitioners allege, then they should have called him as a witness. They did not, so this exception should be rejected.

25. Petitioners' Exception No. 13 argues the ALJ's finding of fact that the mitigation credits available in the Farmton Mitigation Bank are of "high quality" and will be "protected in perpetuity." To support the District modifying these findings of fact, Petitioners argue that one can't assume every acre of property in the mitigation bank is "high quality," lands in the mitigation bank will not be "protected in perpetuity" because the District has previously released conservation

easements in the Farmton Mitigation Bank in the past. Petitioners rely on witness Shadix's testimony, but cite to no other evidence in the record to support these assertions. Whereas, there was ample evidence in the record to support the ALJ's finding of fact. Specifically, these mitigation credits were generated as a result of wetland enhancement or restoration activities implemented for the Bank; recordation of a perpetual site protection instrument for the Bank; implementation of active habitat and wildlife management plans for the Bank; and provision of financial assurances to ensure that the Bank is perpetually managed and maintained. (JE 32, JE 33; Tr. pp. 1365, 1366,1368, 1457, 1458). The District should reject this exception.

26. In Exception No. 15, Petitioners assert that there are public conservation lands or lands under easements on both sides of I-95 for a wildlife crossing feature and so ask the District to modify the ALJ's finding of fact in paragraph 95. To support this exception, Petitioners rely on portions of Dr. Anderson's testimony and argue that proffered exhibits support their argument. Regarding Dr. Anderson's testimony, Petitioners argue that Dr. Anderson *confirmed* that "there is a preserved area (or several) included in the subdivision south of pioneer trail." Her testimony did no such thing. Specifically, she stated, "[y]ou can see [the unnamed canal] kind of draining from south to north from the conservation area, or the wetland area in that quadrant, which is, as far as I know, *about to* be a preserved conservation area for a subdivision in that area, and then it passes underneath." (Emphasis supplied). A speculative easement or preservation is not the same thing as an actual easement or preservation. Regarding the canal's connection to the Coastal Woods development, Dr. Anderson again provided a qualified statement that the unnamed canal is "*probably,* connected to the conservation areas of the Coastal Woods development." (Emphasis supplied). Whereas, there was competent substantial evidence in the record to support the ALJ's finding. (JE 2E, Pg. 7; FDOT Ex. 7; Tr. pp. 68-70, 95, 1384-1387, 1492, 1814). Regarding the

proffered exhibits, the decisions to exclude these documents were evidentiary determinations not within the District's substantive jurisdiction. *Barfield*, 805 So. 2d at 1012. This exception should be rejected.

27. In Exception No. 16, Petitioners argue, in essence, that the state's identification of a parcel in the Northeast Quadrant of the Project Site as an "Essential Parcel(s) Remaining" in the Florida Forever Five-Year Plan regarding Spruce Creek is evidence the Project will impact Doris Leeper Spruce Creek Preserve. There is an obvious temporal paradox with this argument. Nothing in the record indicates that this "essential" parcel has been or will be acquired by the state, only that the state has identified it as a *desirable* wildlife corridor extension for the Preserve at some point in the future. In fact, the ALJ expressly addressed Petitioners' argument:

> The evidence that the Project would affect the Doris Leeper Preserve was not persuasive. The privately-owned parcel to the east of the Project's northeast quadrant has been identified as a desirable wildlife corridor extension for the Preserve. A portion of that property is within the Project area. However, a speculative acquisition of property that is not currently in the Preserve, that has no identified willing seller, and for which funding has not been identified, is not sufficient to establish that the Project will adversely affect the conservation of fish and wildlife. RO ¶ 96.

Petitioners merely repeat their failed arguments in Exception No. 15. As such, this exception should be rejected.

28. In Exception No. 17, Petitioners' first argument is much like the argument raised in Exception number 16. In sum, they argue that future recreation will be affected, because "more development into [the Doris Leeper Spruce Creek Preserve's] essential future parcels prevents that future recreation." This argument fails for the same reasons discussed in the response to Exception number 16 above. Petitioners next argue that present recreation "might" be affected because previous development near Turnbull Bay had, according to Petitioners, negatively impacted

Spruce Creek. All direct and secondary impacts to wetlands and surface waters are contained within the Project site, and all such impacts are being mitigated. (JE 2E, Pgs. 4, 5, 8, 9; JE 28; JE 32, JE 33; JE 34; JE 35). No credible evidence was presented showing that any off-site recreational uses will be impacted by the Project. As such, the ALJ's finding was supported by competent substantial evidence so this exception should be rejected.

29. Petitioners' Exception No. 18 repeats arguments expressly addressed and rejected by the ALJ. In short and relying on Dr. Cho's testimony, Petitioners argue that the affected wetlands are of "very high quality." On this point, the ALJ concluded:

> 103. *Although several of Petitioners' witnesses testified to the high value of the impacted wetlands, none spent more than a few hours at the Project location, nor had they penetrated into the interior of the wetlands.* Dr. Anderson's observations were limited to a 30-minute view from the Pioneer Trail right-of-way. She indicated that the Unnamed Canal is a significant tributary of Spruce Creek, draining a substantial area, which is not in dispute. *Dr. Cho was at the Project site for 'about an hour, hour and a half,' went a hundred yards into the wetlands in the northeast quadrant, and did not traverse or perform transects of the northeast quadrant, or any other portion of the Project area. [She] acknowledged that one cannot judge the quality of wetlands without going through the site*. (Emphasis supplied).

RO ¶ 103. Petitioners argue that the Finding of Fact in paragraph 99 should be modified because it "ignores [Dr. Cho's] testimony." However, the opposite is true. The ALJ considered Dr. Cho's testimony and found it to be wanting. The ALJ's finding in paragraph 99 was supported by competent substantial evidence so this exception should be rejected.

30. Petitioners' Exception No. 19 argues, essentially, that the Project's impacts to Spruce Creek during the construction phase are not properly accounted for and mitigated against. The opposite is true, FDOT's permit requires performance-based erosion and sediment best management practices be installed prior, during, and after construction. (JE 1, pp. 4-8; Tr. pp.

1087-1090). The ALJ's Finding of Fact in paragraph 100 was therefore supported by competent substantial evidence. This exception should be rejected.

31. Finally, in Exception No. 20, Petitioners argue that the finding of fact that "there are no historical or archaeological resources on or near the Project" is incorrect. They ask the District to modify this finding of fact based on the testimony of Mr. Baker concerning the location of the Old Kings Road, and because Native American shell middens are identified in Petitioners' Exhibit 142. The ALJ addressed both of these arguments in his Amended Recommended Order stating:

> Though Petitioners asserted that the historic Old Kings Road might possibly traverse the area, their own exhibit, [Petitioner's Exhibit 142], shows what is believed to be the location of the Old Kings Road being to the east of the Project. It also shows the only other archeological site, the Spruce Creek Mound Complex, being well to the north of the Project. Any suggestion of archeological resources in the area is entirely speculative.

RO ¶ 101. Conversely, FDOT's Project Development and Environment study coordinated with Florida's State Historical Preservation Officer which determined that no historical or archaeological resources would be impacted by the project. (JE 23; Tr. pp. 1362, 1443). As such, the ALJ's finding was supported by competent substantial evidence. This exception should be rejected.

III. Petitioners' Exception No. 14

32. While the District has authority to reject or modify a Conclusion of Law, such authority is not without limitation:

> The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction .... When rejecting or modifying such conclusion of law ... the agency must state with particularity its reasons for rejecting or modifying such conclusion of law ... and must make a finding that its substituted conclusion of

> law ... is as or more reasonable than that which was rejected or modified.

§ 120.57(1)(l), Fla. Stat. The label assigned to a statement made by the ALJ in the recommended order is not dispositive as to whether that statement is a conclusion of law or finding of fact. *Pillsbury v. Department of Health and Rehabilitative Services*, 744 So. 2d 1040, 1041-42 (Fla. 2d DCA 1999); *Kinney v. Department of State*, 501 So. 2d 129, 132 (Fla. 5th DCA 1987). It is the true nature and substance of the ALJ's statement that controls an agency's authority to reject a FOF or modify a COL. *J. J. Taylor Companies, Inc. v. Department of Business and Professional Regulation*, 724 So. 2d 192, 192 (Fla. 1st DCA 1999).

33. Petitioners' Exception No. 14 takes exception to the Finding of Fact in Paragraph 88 of the Amended Recommended Order. Petitioners do not argue that the Halifax River Basin is in a different hydrologic basin, but instead disagree that use of mitigation areas within the same hydrological basin but outside the Halifax River basin should be allowed.

34. As was correctly noted by the ALJ, "this case is not a rule challenge, and the validly promulgated mitigation rule must be applied as written." RO ¶ 85. An agency is required to follow its rules as written, not as a permit challenger would like them to be modified. *See, Boca Raton Artificial Kidney Center, Inc. v. Dep't of Health & Rehab. Serv.*, 493 So. 2d 1055, 1057 (Fla. 1st DCA 1986); *Vantage Healthcare Corp. v. Agency for Health Care Admin.*, 687 So. 2d 306, 308 (Fla. 1st DCA 1997); *Collier Cnty. Bd. Of Cnty. Comm'rs v. Fish & Wildlife Conserv. Comm'n*, 993 So. 2d 69, 72-73 (Fla. 2d DCA 2008). Since the District is required to follow its rules as adopted, this exception should be rejected.

CONCLUSION

WHEREFORE, FDOT, the applicant for the permit in question, respectfully requests that the St. Johns River Water Management District reject the Petitioners' exceptions.

Respectfully submitted this 23rd day of February, 2024.

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