SJR 2024-011

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

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

Petitioners,

v.

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

Respondents.
_____/

DOAH Case No. 23-1512

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

FINAL ORDER

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

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

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

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

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

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

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

I. STATEMENT OF THE ISSUE

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

II. STANDARD OF REVIEW

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

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

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

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

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

B. Competent Substantial Evidence

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

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

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

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

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

C. Essential Requirements of Law

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

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

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

D. Subject Matter Jurisdiction

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

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

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

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

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

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

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

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

III. EXCEPTIONS AND RESPONSES

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

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

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

IV. RULING ON EXCEPTIONS

A. Ruling on Petitioners' Exceptions

Petitioners' Exception No. 1 (Proffer)

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

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

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

Petitioners' Exception No. 2 (FOF 22)

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

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

Petitioners' Exception No. 3 (FOF 27)

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

Petitioners' Exception No. 4 (Motion in Limine)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Petitioners' Exception No. 8 (FOF 62)

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

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

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

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

Petitioners Exception No. 9 (FOF No. 63)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Petitioners Exception No. 11 (FOF No. 74)

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

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

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

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

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

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

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

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

Petitioners Exception No. 13 (FOF No. 87)

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

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

Petitioners Exception No. 14 (FOF No. 88)

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

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

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

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

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

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

Petitioners Exception No. 15 (FOF No. 95)

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

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

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

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

Petitioners Exception No. 16 (FOF No. 96)

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

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

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

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

Petitioners Exception No. 17 (FOF No. 99)

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

Petitioners Exception No. 18 (FOF No. 102)

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

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

Petitioners Exception No. 19 (FOF No. 100)

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

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

Petitioners Exception No. 20 (FOF No. 101)

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

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

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

Petitioners' Requested Relief in Conclusion

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

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

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

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

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

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

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

Applicant's Exception No. 4 (FOF 105)

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

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

Applicant's Exception No. 5 (COL 107)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10. Increased Condemnation Costs: *Id.*

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

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

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

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

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

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

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

Discussion of Applicant's Handbook, Vol. I

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

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

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

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

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

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

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

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

Interpretation of the phrase "hurricane preparedness"

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 3732-33.

Conclusion as to Hurricane Evacuation

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

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

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

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

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

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

District Exception No. III.B.1. (pgs. 18-19)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> 107. The public interest balancing test is just that, a balance. There is no strict formula for determining when a project is clearly

in the public interest, and when it is not. ~~Respondents assert that, mathematically, there are more positive outcomes (one factor barely) than negative outcomes (no factors), with six of the seven criteria being neutral.~~ A further discussion of the balancing test is contained in the Conclusions of Law.

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

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

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

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

91-2148 (Fla. DER Feb. 19, 1992) (DER final order reflecting the same). In *1800 Atlantic Developers*, a Department of Environmental Regulation (DER) final order denied an application for a dredge and fill project to renourish a private beach. *Id.* at 947. On appeal, the 1st DCA held that the applicant "was not obligated to show a need or necessity for the dredging and filling in the sense of benefitting the public or the environment" to demonstrate that its project was clearly in the public interest. *Id.* at 957. In other words, the applicant in *1800 Atlantic Developers* was not required to provide DER with reasonable assurances that there was a need for the project or that a net public benefit would result from the project to obtain a permit. *Id.* Rather, the applicant was only required to show that the project would be carried out in a manner that would not materially degrade water quality and in a manner that was clearly in the public interest. *Id.* Therefore, the 1st DCA determined that DER had erroneously required the applicant to prove the creation of a net environmental benefit to demonstrate that its project was clearly in the public interest. *Id.* The 1st DCA further held that suggestions in DER's final order that this showing is necessary simply because a project is in an OFW go beyond the statutory provisions and have no basis in the law. *Id.*

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

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

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

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

easement within an aquatic preserve (AP). *See id* at ¶ 87. Notably, a net or "extra" environmental benefit in the context of SSL in an AP is explicitly contemplated by the public interest assessment criteria codified in rule 18-20.004(2), F.A.C.,[14] whereas it has been specifically disfavored in the context of ERP under *1800 Atlantic Developers*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

    (b) Impacts to areas classified by the Department of Agriculture and Consumer Services as approved, conditionally approved, restricted or conditionally restricted for shellfish harvesting. Activities that

would cause closure or a more restrictive classification or management plan for a shellfish harvesting area would result in a negative factor in the public interest balance with respect to this criterion;

(c) Flooding or alleviate existing flooding on the property of others. There is at least a neutral factor in the public interest balance with respect to the potential for causing or alleviating flooding problems if the applicant meets the water quantity criteria in Part III of Volume II; and

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

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

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

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

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

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

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

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

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

957. Rather, all seven factors must be collectively considered to determine whether, on balance, a proposed project satisfies the public interest test. *Id.*

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

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

Ultimate Conclusion

As indicated above, the District agrees that it may reweigh the seven factors of the public interest test and reach an alternate conclusion of law that the Project is "clearly in" the public interest. In this case, the R.O. and many exceptions focused on the assignment of a positive, negative, or neutral "weight" to each factor. The assignment of such a weight to each factor is not a uniform practice among the agencies. Notably, many of the orders from ALJs, DEP, and the water management districts reviewed in the preparation of this final order do not include such assignments of weight. *See e.g., Martin Cnty. v. All Aboard Fla. – Operations, LLC*, Nos. 16-5718, 17-2566 at ¶¶ 98-116 (Fla. DOAH Sept. 29, 2017) (Recommended Order); *Bowers v. St. Johns*

River Water Management District, No. 21-0432 at ¶¶ 47-54, 109 (Fla. DOAH Jul. 19, 2021) (Recommended Order). Rather, the focus of the public interest test is on the ultimate findings of fact relevant to each factor. *See e.g.*, *Fla. Power Corp.*, 638 So. 2d at 556-557. In this case, the focus on the assignment of a "weight" for each factor appears to have obscured the importance of the ultimate findings of fact.

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

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

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

- Factor 6 - There was no evidence of significant historical or archaeological resources on or near the project. R.O. ¶ 101.
- Factor 7 - Though onsite wetlands will be affected, the mitigation provided more than offsets the impacts. R.O. ¶¶ 102-105.

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

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

impacts under the seven factors of the public interest test. *See* R.O. ¶¶ 40, 41, 43, 58, 59, 60, 61, 72, 74, 75, 88, 90-107. Thus, the District concludes that this Project is clearly in the public interest.

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

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

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

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

4. The Recommended Order contains no findings of adverse impact as a result of the Project. In aggregate, the District determines that the Applicant clearly demonstrated

compliance with all of the regulatory criteria, including the public interest factors addressed herein, and these factors are enough to render this Project "clearly in" the public interest. The District therefore grants the Applicant's Exception No. 6 and the District's Exception no. III.C. (*Dist. Except.* at pgs. 23-29 and 31-34). This interpretation is as or more reasonable than that contained in COL 175.

ACCORDINGLY, IT IS HEREBY ORDERED:

The Recommended Order dated January 29, 2024, attached hereto as Exhibit "A" is adopted except as modified by the agency in the rulings on FOFs 22, 62, 92.B, 92.D, 107, COL 171, 171 footnote 6, and 175 in Petitioners' Exception Nos. 2 and 8, Applicant's Exception Nos. 3, 5 and 6, and District's Exception Nos. III.A.2., III.B.1, III.B.2, III.B.3, III.C, III.C.3. The Applicant's ERP number 103479-2 is hereby issued under the terms and conditions contained in Technical Staff Report dated October 6, 2023, attached hereto as Exhibit "B".

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT

By: Mary Ellen Winkler
Mary Ellen Winkler
Assistant Executive Director

RENDERED this 12th day of March 2024.

By: Kaylee Peters
for District Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing has been filed with the Clerk of the St. Johns River Water Management District, and that a true and correct copy of the foregoing was furnished to the following via email delivery on this 12th day of March, 2024:

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bearwarriorsunited@gmail.com

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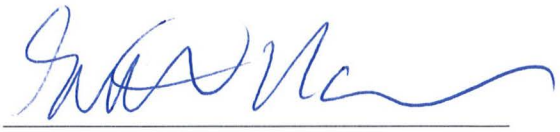

Steven James Kahn

Notice of Rights

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

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

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

Exhibit A

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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

Petitioners,

vs.

Case No. 23-1512

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

Amended as to permitting agency in Recommendation

Respondents.
_____/

AMENDED RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on October 23 through 27, 2023, by Zoom Conference, before E. Gary Early, a designated Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioners: Derek LaMontagne, Qualified Representative
993 Geiger Drive
Port Orange, Florida 32127

For Respondent Department of Transportation:

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Carson Zimmer, Esquire
Office of the General Counsel
Florida Department of Transportation
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For Respondent St. Johns River Water Management District:

Jessica Pierce Quiggle, Esquire
Joel Thomas Benn, Esquire
Thomas I. Mayton, Jr., Esquire
St. Johns River Water Management District
4049 Reid Street
Palatka, Florida 32177-2529

STATEMENT OF THE ISSUE

The issue to be determined is whether Environmental Resource Permit No. 103479-2 ("Permit") for a new interchange at Pioneer Trail and Interstate Highway 95 ("I-95") should be issued to the Florida Department of Transportation ("DOT") by the St. Johns River Water Management District ("District").

PRELIMINARY STATEMENT

On February 28, 2023, the District issued proposed agency action for the Permit to DOT. The Permit authorizes the construction and operation, including a stormwater management system, of a 74.13-acre project known as Pioneer Trail / I-95 Interchange ("Interchange" or "Project").

On March 21, 2023, Petitioners timely filed a Request for an Extension of Time for Filing Initial Pleading in which they requested an additional 30 days, until April 20, 2023, within which to file their petition. On March 29, 2023, the District entered an Order Denying Request, and Petitioners were given until April 3, 2023, to file a petition requesting a formal hearing.

On April 3, 2023, Petitioners timely filed a Petition for Administrative Hearing. DOT filed a Motion to Dismiss Petition for Administrative Hearing on the basis that the Petition was insufficient, and that two of the individual Petitioners did not timely file a petition. On April 18, 2023, the Petition was referred to the Division of Administrative Hearings, along with DOT's Motion to Dismiss.

Petitioners obtained the services of counsel, who filed an Unopposed Request for Leave to Amend Petition, which was granted. An Amended Petition was filed, which was followed by Respondents' Joint Motion to Strike the Amended Petition in Part. Petitioners thereafter filed a Stipulated Motion to File Second Amended Petition and Agreed-Upon Order, in which Petitioners represented that Respondents did not intend to file a motion to strike the Second Amended Petition in full or part. The Stipulated Motion was granted, and the Second Amended Petition for Hearing was accepted as filed.

The final hearing was scheduled for August 28 through September 1, 2023. On August 1, 2023, counsel for Petitioners moved to withdraw from representation based on fundamental differences with their clients. The motion was granted, and the final hearing was continued and rescheduled for October 23 through 27, 2023.

On September 15, 2023, Petitioners filed a request that they be allowed to be represented by Derek LaMontagne as their Qualified Representative. Respondents did not object, and an Order accepting Mr. LaMontagne as Petitioners' Qualified Representative was entered on September 20, 2023.

On October 19, 2023, the parties filed their Joint Pre-hearing Stipulation ("JPS"). The JPS contained 12 stipulations of fact, each of which is adopted and incorporated herein. The JPS also identified disputed issues of fact and law remaining for disposition.

The Permit under review was subject to the modified burden of proof established in section 120.569(2)(p), Florida Statutes. The burden of proof provisions are discussed in the Conclusions of Law herein.

The hearing convened on October 23, 2023, as scheduled. At the commencement of the hearing, the undersigned took up a number of motions. Each was discussed on the record, and the bases for the following rulings are contained in the Transcript. The motions, responses where applicable, and the rulings on the motions, were as follows:

1. Respondent, St. Johns River Water Management District's, Motion in Limine to Exclude Irrelevant, Immaterial, and Potentially Confusing Evidence, filed October 12, 2023; and Petitioners' Response in Opposition to Respondent, St. Johns River Water Management District's, Motion in Limine to Exclude Irrelevant, Immaterial, and Potentially Confusing Evidence, filed October 19, 2023 — Granted.

2. Respondent, Florida Department of Transportation's Motion in Limine, filed October 17, 2023 — Granted.

3. Petitioners' Motion for Public Hearing, filed October 17, 2023; and Respondent, St. Johns River Water Management District's, Response in

Opposition to Petitioners' Motion for Public Hearing, filed October 20, 2023 — Denied.

4. Respondent, Florida Department of Transportation's Motion in Limine, filed October 18, 2023 — Granted.

5. Petitioners' Motion for Extension of Time to File Exhibits, filed October 18, 2023 — Granted.

Joint Exhibits 1 through 38, consisting of the entire application for the Permit, along with the District's Technical Staff Report ("TSR"), as amended, were received in evidence by stipulation of the parties. As such, DOT, as the permit applicant, established its prima facie case demonstrating entitlement to the Permit pursuant to section 120.569(2)(p).

In addition to presenting the application and TSR, DOT called Casey Lyon, its Environmental Manager, to provide a brief overview of the Project. Ms. Lyon was accepted as an expert in Biology and Environmental Science; State and Federal Environmental Permitting; and Transportation Project Development (Environmental).

Petitioners called the following witnesses: John Baker; Jeff Brower, Chair of the Volusia County Council; Shawn Collins, who was tendered and accepted as an expert in transportation planning management, traffic studies, and comprehensive plan analysis; Dr. Wendy Anderson, who was tendered and accepted as an expert in biology, habitat ecology, water connectivity, conservation, and nutrient flow; Dr. Hung Jung Cho, who was tendered and accepted as an expert in wetland science, aquatic habitat, habitat restoration, ecology, seagrass and aquatic plants, biology, coastal resilience, stormwater impacts, impacts of flooding, flooding reduction, nutrient pollution, and water resources; Katrina Shadix, Executive Director for Bear Warriors United, Inc., who testified to standing and as to factual matters; Mr. LaMontagne, individually and as the Director of Sweetwater

Coalition of Volusia County, Inc., who testified to standing and as to factual matters; Bryon White, who testified to standing and as to factual matters; and Dr. Peter J. Barile, who was tendered and accepted as an expert in water quality, Volusia County and Atlantic coastal ecosystems, wetlands, linkages of land use and environmental impact to water resources, sources of water pollution, and habitat impacts. Petitioners' Exhibits 1, 2, 18, 20, 22, 44, 50 through 58, 62 through 67, 73, 74, 83, 88, 100, 102, 103, 111, 112, 142, 146, 178, 211 through 213, 217, 218, 223, 245, 273, 274, 278, 286, 296, 298, 307, 370, 474, 491, 494, 536, 1011, 1029 through 1035, 1038, 1041, 1043, 1044, 1046, 1051, 1063, 1068, 1070, 1077, 1102, 1115, 1119 through 1122, 1124 through 1126, 1133 through 1135, and 1137 were received in evidence.[1] In addition, the following exhibits were proffered and, though they accompany the record of this proceeding, have not been reviewed or considered in the preparation of this Recommended Order: Petitioners' Exhibits 29, 30, 33, 42, 43, 77, 78, 91, 92, 99, 105 through 107, 113, 115, 116, 121, 177, 272, 291 through 293, 315, 350, 443, 444, 493, 538, 543, 545, 1008, 1009, 1021, 1023, 1024, 1037, 1039, 1042, 1048 through 1050, 1054, 1058, 1066, 1080, 1082 through 1086, 1093 through 1099, 1103, 1113, 1114, and 1117, and DOT Exhibits 21 through 23.[2]

The District called Marjorie Cook, P.E., its Supervising Professional Engineer; David Miracle, Program Manager for the Environmental Resource Permit ("ERP") Program; Justin Dahl, who was tendered and accepted as an expert in wildlife ecology and wetland delineation; and Nicole Martin, who was tendered and accepted as an expert in wildlife ecology and wetland

[1] Though they were discussed at the hearing, and appear in Petitioners' list of exhibits filed with the Joint Pre-hearing Stipulation, Petitioners' Exhibits 20, 53, and 296 could not be located in the exhibits filed by Petitioners in the DOAH exhibit portal.

[2] Though they were proffered by number at the hearing, and appear in Petitioners' list of exhibits filed with the Joint Pre-hearing Stipulation, Petitioners' Proffered Exhibits 42, 1095, and 1114 could not be located in the exhibits filed by Petitioners in the DOAH exhibit portal.

delineation. District Exhibits 1 through 4, 9, 12, 13, 15, and 18 were received in evidence.

DOT recalled Ms. Lyon and, in addition, called Tim Vavre, P.E., who was tendered and accepted as an expert in water resource engineering, drainage, stormwater management systems, and permitting of stormwater management systems; Luis Diaz, who was tendered and accepted as an expert in transportation planning engineering, traffic engineering, and civil engineering; and Michael Drauer, a senior environmental scientist for Stantec, who was tendered and accepted as an expert in environmental science, Federal and state environmental permitting, listed species surveys, soil identification, plant identification, wetland delineation, wildlife habitat surveys and studies, habitat restoration, and wetland and listed species mitigation. DOT Exhibits 1, 3 through 7, 9 through 12, 14, 15, and 18 were received in evidence.

A five-volume Transcript of the final hearing was filed on November 29, 2023. The parties were given 20 days within which to file their proposed recommended orders, making December 19, 2023, the filing date. Petitioners filed a request for additional pages beyond the 40 pages allowed by Florida Administrative Code Rule 28-106.215, which was granted. The parties timely filed Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

The law in effect at the time the District takes final agency action on the application being operative, references to statutes are to Florida Statutes (2023), unless otherwise noted. *Lavernia v. Dep't of Pro. Regul*, 616 So. 2d 53 (Fla. 1st DCA 1993).

FINDINGS OF FACT

The Parties

1. The District is a special taxing district created by section 373.069, Florida Statutes. It has the responsibility to conserve, protect, manage, and control water resources within its geographic boundaries. *See* § 373.016, Fla. Stat. The District is authorized by sections 373.413, 373.414, and 373.416 to administer and enforce ERP program requirements for the management and storage of surface waters, and to apply and implement statewide ERP rules, including Florida Administrative Code Chapter 62-330. § 373.4131(2)(a), Fla. Stat. In implementing responsibilities with regard to ERPs, the District has adopted the ERP Applicant's Handbook ("A.H."), Volumes I and II, to provide standards and guidance to applicants. § 373.4131(1)(a)9., Fla. Stat.

2. DOT is an agency of the State of Florida responsible for coordinating and planning the state's transportation system, including financing and construction of highway facilities and connection points thereto for both the state and federal highway systems. § 334.044, Fla. Stat.

3. Petitioner Bear Warriors United, Inc. ("Bear Warriors") is a Florida not-for-profit corporation established in 2016. Its stated mission is to preserve and protect bears, as well as all of Florida's natural resources and wildlife. In carrying out that mission, Bear Warriors engages in an advocacy and educational efforts. As part of its mission, Bear Warriors provides bear-proof garbage can straps to residents in and around the Project area, to advance both human and animal protection. It has members who recreate in the Spruce Creek ecosystem, and advocates for environmental protection in and around the Spruce Creek watershed. Bear Warriors has sponsored at least one outing in the nearby Doris Leeper Spruce Creek Preserve ("Doris Leeper Preserve") after the Petition was filed, which was attended by roughly 42 members of Bear Warriors. Bear Warriors alleges that the activity authorized by the Permit will adversely affect its members' enjoyment and pursuit of those activities and the success of its mission.

4. Petitioner, The Sweetwater Coalition of Volusia County, Inc. ("Sweetwater"), is a Florida not-for-profit corporation established in 2018. It has a membership of more than 30 neighbors, residents, and organizations whose mission is to preserve and protect the quality of life in the Volusia County area by informing residents of construction projects which significantly impact the natural environment. Members of Sweetwater enjoy hiking, biking, fishing, recreation, canoeing, kayaking, and nature photography in and around Spruce Creek and nearby areas. Sweetwater alleges that the activity authorized by the Permit will adversely affect its members' enjoyment and pursuit of those activities and the success of its mission. Sweetwater opposes the creation of the Interchange at Pioneer Trail and I-95, as well as land modifications and developments that negatively impact Spruce Creek and its tributaries, canals, and ditches, and Volusia County forests and wetlands. Mr. LaMontagne is a member and officer of Sweetwater, and in that capacity speaks at local government meetings to present Sweetwater's environmental concerns regarding development proposals in the Spruce Creek area.

5. Petitioner Derek LaMontagne is a Volusia County resident, though he is currently a student and employee at the University of Florida. He is an avid nature photographer of the Spruce Creek area. Mr. LaMontagne hikes, kayaks, and recreates in areas proximate to the Project and Spruce Creek, its tributaries, and their adjacent natural areas. Mr. LaMontagne alleges that the activity authorized by the Permit will adversely affect his enjoyment and pursuit of those activities.

6. Petitioner Bryon White is a Volusia County resident. Mr. White owns property near the Project on which he grows yaupon holly which he uses for tea sold by his businesses. The local property is not his only source for yaupon holly. Mr. White was the resident caretaker for the Doris Leeper Preserve for three and a half years, and he enjoys recreation, hiking, biking, photography, and field study proximate to Spruce Creek, its tributaries, and

their adjacent natural areas. Mr. White alleges that the activity authorized by the Permit will adversely affect his enjoyment and pursuit of those activities.

Proposed Agency Action

7. In February 2022, DOT applied to the District for an ERP for the construction and operation of the Project in Volusia County, Florida.

8. On February 28, 2023, the District gave notice via email to DOT, as well as multiple objectors and interested persons, that it had issued the Permit to authorize the Project. On March 7, 2023, DOT published the required notice of proposed agency action in the Daytona Beach Journal, a daily newspaper published in Volusia County.

9. Petitioners timely filed their Petition for Administrative Hearing.

Background

10. I-95 was constructed in the mid-1960s as a four-lane, limited access highway. The construction of I-95 was completed before the establishment of state water resource criteria. The Pioneer Trail overpass was constructed as part of the 1960s work.

11. Permit No. 103479-1 was issued February 2010 for the realignment of Pioneer Trail, east of I-95.

12. Pioneer Trail is located approximately 3 miles north of the State Road ("SR") 44/I-95 interchange, and 4.25 miles south of the SR 421/I-95 interchange. There are no existing interchanges between SR 44 and SR 421.

13. The present Project involves an I-95 segment that was expanded to six lanes, and was subject to District Permit No. 118421-2 (issued May 2011). That work was completed in 2016.

14. The Project is approximately three miles south of the main channel of Spruce Creek. An ephemeral watercourse known as the Unnamed Canal runs from a tributary of Spruce Creek through the Project area and further south.

15. The Project is located within the Spruce Creek Hydrologic Basin. The Project meets the applicable special basin criteria for the Spruce Creek Hydrologic Basin contained in A.H. Vol. II, section 13.5.

16. The Spruce Creek Hydrologic Basin is within the Halifax River Watershed.

The Project

17. DOT proposes to construct a new highway interchange to connect with Pioneer Trail at the present Pioneer Trail overpass at I-95 near the cities of Port Orange and New Smyrna Beach in Volusia County, Florida. The Project includes the construction and operation of a Stormwater Management System to serve the 74.13-acre Project.

18. The Project area consists largely of undeveloped parcels surrounding I-95 and Pioneer Trail. A number of existing and permitted residential developments are in the vicinity of the Project, including the Farmton Development of Regional Impact to its south.

19. A diversity of habitat types exist onsite including hydric pine flatwoods, mixed wetland forest, freshwater marshes, and wet prairies. The Project area is bisected by I-95 running north/south; Pioneer Trail running east/west; and South Williamson Boulevard just west of the Project site. On-site wetlands have been severed from other wetlands and watercourses by those roads, by Martin Dairy Road to the east, and are otherwise impacted and fragmented as a result of the nearby residential development and by roadside ditches and existing ponds. Nonetheless, the majority of the on-site wetlands are of moderate quality.

20. The community structure of the onsite wetlands is negatively affected by suppression of fire, which allows for the encroachment of invasive species.

21. Wildlife habitat and movement within the area is fragmented by the existing roadways, which provide significant barriers.

22. In 2005, the Interchange was added to the Transportation Organization list of projects.

23. In 2018, a Project Development and Environment (PD&E) study was commenced to evaluate alternative design configurations and project impacts. The PD&E study was coordinated with the District, the U.S. Fish and Wildlife Service, the Florida Fish and Wildlife Conservation Commission, and Florida's State Historical Preservation Officer. The PD&E study was completed on January 27, 2021.

24. When the design element of the Project was 60 percent complete, stormwater plans were developed. On February 2, 2022, the Permit application was submitted to the District.

25. In March 2022, the District submitted a Request for Additional Information, to which DOT submitted partial responses in April 2022. In January 2023, complete responses were provided. On February 28, 2023, the Permit and notice of proposed agency action was issued.

Project Configuration

26. DOT performed an alternative design analysis that included three build designs for the Pioneer Trail interchange. All three designs had similar wetland and surface water impacts. A "diamond interchange," would result in 45.96 acres of wetland impacts. A full "cloverleaf" interchange would result in 47.29 acres of wetland impacts.

27. The design that is the subject of the ERP, referred to as the Partial Cloverleaf 2 Alternative, is proposed to result in 46.96 acres of wetland impacts. Though having slightly more wetland impact than the diamond interchange, the Partial Cloverleaf has minimal involvement with contaminated areas, incorporated best traffic operations, and has the highest public support/preference. This alternative provided very similar impacts to wetlands and no impacts to listed wildlife. The impacts were minimized to the extent practicable to realize a safe, functional interchange on a six-lane interstate highway.

28. The "partial cloverleaf" design consists of four quadrants.

29. The Northwest Quadrant (Basin A) includes an exit ramp from I-95 South to Pioneer Trail, stormwater ponds, some of which are to be maintained by Volusia County, and an access road into a privately held parcel of property bounded to the west by Williamson Boulevard, for which access to Pioneer Trail is to be severed by the proposed stormwater ponds.

30. The Southwest Quadrant (Basin B) includes an entrance ramp onto I-95 South from Pioneer Trail, and stormwater ponds.

31. The Southeast Quadrant (Basin C) includes stormwater ponds, as well as widening and improvements to Pioneer Trail and Turnbull Bay Road, including construction of a roundabout at the intersection of those roads. Basin C also includes an access road into a privately-held parcel of property adjacent to the Project site, and a floodplain compensation storage area.

32. The Northeast Quadrant (Basin D) includes the entrance ramp onto I-95 North from Pioneer Trail, and a semi-circular exit ramp from I-95 North onto Pioneer Trail.

33. The Project includes widening Pioneer Trail from two lanes to four lanes and raising its elevation between Williamson Boulevard to a roundabout to be constructed at the current intersection of Pioneer Trail and Turnbull Road. The widening is required to accommodate traffic flowing to and from I-95. The increase in elevation will prevent flooding of the road surface during flood events. It is not designed to prevent or reduce flooding of on-site property other than the Project's road surface, or to prevent or reduce flooding of off-site property.

34. An "Unnamed Canal" extends through the Project area. The Unnamed Canal has been designated as an Outstanding Florida Water ("OFW") from a point "upstream [from Spruce Creek] to the Southern section line of Section 4, Township 17 South, Range 33 East." Fla. Admin. Code R. 62-302.700(9)(i)33.a. That section line extends through the Project site. The Unnamed Canal does not retain its OFW designation south of that section line. The Unnamed Canal at the Project site to its intersection with Spruce

Creek is an ephemeral stream, which is dry during much of the year. From southwest to northeast, the Unnamed Canal will pass through culverts under the proposed entrance ramp in the southwest quadrant of the Project, then though existing culverted crossings under I-95 into the southeast quadrant of the Project and under Pioneer Trail east of I-95. The Unnamed Canal then extends northward for approximately three miles before ultimately intersecting with a tributary of Spruce Creek.

35. Access from Pioneer Road to privately-owned properties, one adjacent to the northwest quadrant and another adjacent to the northeast quadrant of the Project, will be severed by the Project. DOT proposes to restore access to Pioneer Trail, as required by section 337.27(1), Florida Statutes, by constructing access roads into the properties. The access road at the northwest quadrant will cross stormwater ponds proposed to run parallel to Pioneer Trail. The access road at the northeast quadrant will extend from the proposed roundabout at the Pioneer Road/Turnbull Bay Road intersection, and over a culverted crossing of the Unnamed Canal. The access roads were part of the Project from the 30 percent design stage, and part of the 60 percent design stage plans on which the first stormwater plans were based.

36. The privately-owned parcel of property at the northeast quadrant, about 250 acres in size, is located north of Pioneer Trail, between I-95 and Martin Dairy Road. DOT is taking 24 acres at the southern end of that parcel for the Interchange (Basin D). The 250-acre parcel has been identified as a desirable wildlife corridor extension for the Doris Leeper Preserve, which is located roughly a mile to the northeast from the Project.

37. In order to construct the Interchange, DOT proposes to fill 48.80 wetland acres, with an additional 10.12 acres of wetlands to be subject to secondary impacts. 58.82 acres of these direct and secondary impacts are considered adverse and will require mitigation. An additional 3.11 acres of surface waters will be impacted which include roadside ditches and an

existing artificial pond dug in uplands. The ditch and pond impacts are not considered adverse; therefore, no elimination/reduction analysis, cumulative-impacts analysis, or mitigation is required.

38. Stormwater is to be managed by a wet detention system designed to attenuate and treat stormwater from the Project site, with stormwater ponds and/or floodplain compensation storage areas in each of the four quadrants of the Interchange. The stormwater ponds create mathematically more storage capacity than currently exists on the Project site.

39. There are several areas within the Project for which stormwater treatment in the wet detention system is impractical. To offset the impacts from those areas within the 100-year floodplain of the Spruce Creek Hydrologic Basin, DOT has proposed to include six floodplain compensation ("FPC") ponds to receive stormwater from areas of I-95, largely consisting of existing travel lanes, for which treatment has heretofore not been provided. The FPC ponds will, as the name implies, provide compensating treatment to offset the impacts from those areas for which treatment of stormwater is impractical so that there is no net reduction in flood storage.

Financial, Legal, and Administrative Capability

40. The parties stipulated that DOT has the legal capability of completing the Project in accordance with the conditions of the Permit. DOT further provided reasonable assurance that it has the financial and administrative capability of ensuring that the Project will be undertaken in accordance with the conditions of the Permit.

41. DOT is a state agency. Thus, it is, by rule, an acceptable operation and maintenance entity for ensuring that the Project will be operated and maintained in compliance with the requirements of section 373.416(2) and chapter 62-330.

Sufficient Real Property Interest

42. DOT has the right, conferred by section 337.27 to exercise the power of eminent domain and condemnation. A.H. Vol. I, section 4.2.3(d). Such

authority is sufficient evidence of a sufficient real property interest over the land upon which the Project is to be constructed, provided the Permit contains a provision that work cannot begin until proof of ownership is provided to the District.

43. Condition 27 of the Permit requires DOT to provide proof of sufficient real property interest to the District before construction of the Project can begin. Thus, DOT has, by rule, demonstrated that it has a sufficient property interest in the area encompassed by the Project.

Water Quantity Impacts

44. Water quantity related conditions for issuance of an ERP are established in rules 62-330.301(1)(a) (the project "[w]ill not cause adverse water quantity impacts to receiving waters and adjacent lands), 62-330.301 (1)(b) (the project "[w]ill not cause adverse flooding to on-site or off-site property), and 62-330.301(1)(c) (the project "[w]ill not cause adverse impacts to existing surface water storage and conveyance capabilities"). Those criteria are further explained in A.H. Vol. II, sections 3.1, 3.2.1, and 3.3.1.

45. The Project meets the discharge rate, design storm, floodplain encroachment, and flood protection criteria set forth in the ERP rules.

46. The Project will not reduce the 10-year floodplain storage, does not propose any dams, will not alter the flow of any stream or water course, and will not lower the groundwater table. Thus, the requirements in A.H. Vol. II, sections 3.3.2, 3.4.1, 3.5.1, and 3.5.2 do not apply. The pre- versus post- mean annual storm criterion in section 3.2.1(a) does not apply because this project modifies an existing system.

47. Soils in the Project area are predominantly Type D soils. Such soils have very low infiltration with a permanent high-water table. The underlying soils create an almost impervious layer which allows wetlands to be perched atop that layer.

48. Stormwater treatment via wet detention systems is proposed for the runoff from the project site. Due to the nature of the underlying soils, water

does not percolate or infiltrate through the bottom of the detention ponds, but is rather held to allow for evaporation or for off-site flow after a period. The ponds are designed for a static pool condition below the control elevation.

49. In calculating pre- and post-development runoff volumes and peak discharge rates for the Project site, DOT utilized the Interconnected Channel and Pond Routing ("ICPR") model. The ICPR model is an accepted and reliable method for determining stormwater flows and volumes. Site-specific data, including soil types on the Project site, were considered and utilized in designing the system.

50. Since a portion of the Unnamed Canal in Basin D is an OFW, DOT provided 50 percent greater treatment and pond volume in accordance with District criteria for systems discharging to an OFW.

51. A preponderance of the evidence demonstrates that the post-development peak rate of discharge from the Project site will not exceed the pre-development peak rate of discharge for the 25-year, 24-hour storm, which meets the standards of A.H. Vol. II, section 3.2.1.

52. In addition, DOT sized the ponds to be capable of accommodating runoff generated by a 100-year, 24-hour storm event, with one foot of freeboard from the bottom of the maintenance berm surrounding the ponds to the design high water in the ponds. This increase in storage volume provided stormwater management capacity in excess of that required.

53. The Project will not alter any existing conveyance systems, meeting the standards of A.H. Vol. II, section 3.3.1.

54. The Project will not reduce the 10-year floodplain storage within the Project site, meeting the standards of A.H. Vol. II, section 3.3.2.

55. The Project does not include any dams that will be greater than six feet in height, meeting the standards of A.H. Vol. II, section 3.4.1.

56. The Project will not alter the flow of any stream or water course. Where culverts are proposed in the Unnamed Canal, such culverts have been

sized to ensure that no post-construction alteration of flow will occur, meeting the standards of A.H. Vol. II, section 3.5.1.

57. The Project will not lower the groundwater table, meeting the standards of A.H. Vol. II, section 3.5.2.

58. The Project will not cause an adverse impact to any work of the District. There are no works of the District on or near the Project site.

59. The Project has been designed by Florida registered professional engineers and is reasonably expected to be capable of performing and functioning as designed.

60. DOT, an agency of the State of Florida, is a recognized maintenance entity authorized by rule to operate and maintain the surface water management system approved through the Permit. A.H. Vol. I, section 12.3.1(c). The Permit includes conditions (Nos. 16 and 22) which require periodic and documented inspections of the stormwater management system, and routine maintenance, including the removal and disposal of sediment and debris. DOT has a "robust" highway maintenance program that looks at everything, including erosion and vegetation. DOT has the capability to ensure that the maintenance obligations imposed by the terms and conditions of the Permit will be met.

61. From the standpoint of water quantity permitting criteria, the Project meets the discharge rate, design storm, floodplain encroachment, and flood protection criteria set forth in the ERP rules.

Water Quality Impacts

62. Spruce Creek has been designated as impaired for phosphorus, dissolved oxygen ("DO"), iron, copper, and Enterococci. There is an adopted Total Maximum Daily Load ("TMDL") for waterbody identification (WBID) number 2674A, the location in Spruce Creek that ultimately receives discharges from the Project via the Unnamed Canal, that requires a reduction of total phosphorus, and a reduction of biochemical oxygen demand

("BOD") to address the DO impairment. The Project will not contribute to iron, copper, or Enterococci.

63. Phosphorous is described as being "sticky," meaning it tends to adsorb to soil and sediment particles. If a system has rooted plants, they can take phosphorus up as a nutrient, locking it into the system. Whether a natural wetland or a stormwater pond, plants growing therein pull phosphorus off of the sediment particles, and lock it up into the plant tissue. In a constructed system, maintenance with an occasional harvest will pull the phosphorus out of the system. Otherwise, those plants will go through their natural senescence and recycling, allowing phosphorous to accrue over time. Thus, to control phosphorus, one must design a system with maintenance in mind. The evidence indicates that maintenance is a feature of the Permit, and is within the capabilities of DOT to perform.

64. Since Spruce Creek is impaired for the listed parameters, DOT is required, pursuant to rule 62-330.301(2), to implement measures that will result in a net improvement of the water quality in the receiving waters for those parameters.

65. DOT 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.[3]

66. Using the Harper Method, DOT applied a projection for the Project area of 51 inches of annual rainfall. That projection was a reasonable assumption for purposes of the calculations.

67. Calculating the pre-development loading for phosphorus for each basin in the Project area based on its existing land use and calculations of directly connected impervious areas, and comparing that to the calculated post-development loading with the Project in place, it was determined that the wet

[3] DOT did not calculate nitrogen loading or removal since Spruce Creek is not impaired for nitrogen.

detention ponds will treat total phosphorus to reduce loading to the receiving waters by 29 percent upon completion. Specifically, post-development loading of total phosphorus (4.411 kg/yr) will be less than the pre-development loading of total phosphorus (6.193 kg/yr) to the receiving waters.[4] The application of the Harper Method was well-explained at the hearing, and the results were supported by competent, substantial, and persuasive evidence, which is accepted. Evidence to the contrary was generally predicated on the perceived inadequacy of the existing rules to protect water quality, or was otherwise contradicted by more persuasive evidence.[5]

68. Petitioners questioned the accuracy of the 51 inches of rainfall per year assumption, arguing that more recent or more localized measurements would have resulted in higher annual rainfall figures. However, Mr. Vavra credibly testified that if rainfall increases for a period, that increase will result in phosphorous 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.

69. The stormwater management system proposed for the Project will provide greater removal of phosphorus than currently exists, which will

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[4] Mr. Miracle testified that the basin-by-basin analyses for phosphorus showed that Basin D is expected to have a slight increase in phosphorus. However, the Project as a whole will result in a reduction of phosphorous as set forth in this paragraph. An ERP is evaluated on the overall impacts of a permitted project on the environment, and not on its individual but integrated components.

[5] Petitioners questioned why DOT did not include phosphorus loading calculations [as well as the BOD, iron and copper calculations discussed herein] with the original application, but rather provided those calculations after the permit was issued. However, as will be discussed in the Conclusions of Law, this is a de novo proceeding, designed to formulate agency action, rather than review proposed action taken previously. The loading calculations for each of the parameters discussed herein were supported by competent, substantial, and persuasive evidence, and are accepted as an accurate representation of pre- and post-development conditions.

result in a net improvement of water quality in the receiving waters. Thus, DOT has established that it meets the standards of rule 62-330.301(2).

70. The District used data provided by DOT to calculate levels of BOD, iron, and copper in stormwater from the Project using the BMP Trains model, which is similar to, and relies on, the same inputs and calculations as the Harper Method discussed above. The BMP Trains model is commonly used and accepted in the field of engineering to perform nutrient analysis in stormwater systems. However, the program allows one to manually input values to achieve reliable results for other water quality parameters, including BOD, iron, and copper.

71. The calculations performed by Mr. Miracle showed that the post-development loading of BOD, iron, and copper will be less than the pre-development loading of those impairment parameters, resulting in a net improvement of the water quality in the receiving waters, and providing reasonable assurance that the Project meets the requirements of rule 62-330.301(1)(e), A.H. Vol. II, sections 4.0 and 4.1, and A.H. Vol. I, sections 10.2.4.5 and 10.3.1.4.

72. Based on the foregoing, DOT's plans and calculations establish that the Project will result in a "net improvement" to total phosphorus, BOD, iron, and copper, as recommended by the TMDLs and Final Order of Verified Impaired Waters, meeting the standards of A.H. Vol. II, sections 4.0 and 4.1, and A.H. Vol. I, sections 10.2.4.5 and 10.3.1.4.

73. Due to site constraints, a portion of the stormwater from the Project will not be conveyed to a stormwater management system. Compensating treatment is being provided to direct currently untreated stormwater from existing I-95 travel lanes to new stormwater ponds for treatment. That compensating treatment will offset the impacts from the constrained areas.

74. DOT provided reasonable assurance that the Project provides adequate compensating treatment capacity. Petitioners did not run any models or perform any calculations to demonstrate non-compliance with any

District 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.

75. Petitioners asserted that significant rainfall experienced in Volusia County in 2022 when Hurricane Ian crossed the area, and the growing frequency of significant rainfall events due to climate change may result in adverse flooding impacts from the Interchange to off-site properties. Petitioners did not, however, provide competent, substantial, and persuasive evidence that greater future rainfall events would affect the ability of the stormwater system to attenuate storm events meeting the flood protection standards in A.H. Vol. I, section 3.1. In that regard, Dr. Barile acknowledged that the system was designed to meet existing District stormwater system standards established in the ERP rule and A.H. Volume II. Thus, DOT provided reasonable assurance that the Project will not result in adverse impacts to water quality in the receiving waters.

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.

Direct Impacts

77. The Project will result in direct impacts to 48.8 acres of wetlands, which constitutes removal of all wetlands within the Project footprint. Of that, 0.1 acres is an isolated wetland of less than one-half acre in size, for which compliance with the A.H. regulatory standards is not required.

78. The Project will also affect 3.11 acres of surface waters which consist of existing roadside ditches and an artificial pond dug in uplands, for which compliance with the A.H. regulatory standards is not required.

Secondary Impacts

79. Secondary impacts are not direct impacts of the Project, but are those adverse effects to the functions of the surrounding wetlands and habitats that would not occur but for the construction of the Project. DOT established that the Project is expected to result in 10.12 acres of secondary impacts.

Wetland Mitigation

80. DOT proposes to offset direct and secondary impacts to wetlands resulting from the Project by mitigation.

81. A functional Uniform Mitigation Assessment Method ("UMAM") analysis was performed to determine the mitigation sufficient to offset the loss of wetland/surface water functions from the Project. UMAM is authorized by statute and adopted by rule. The undersigned accepts UMAM as an accurate and representative measure of the impacts of the Project.

82. UMAM scoring is designed to evaluate the functional value of wetlands based on factors that include their landscape and location, water environment, and vegetative community structure. The analysis of those factors results in the assignment of a qualitative score for each of the wetlands to be impacted.

83. In general, the wetlands in the Project area, due to, among other things, fragmentation and isolation of the wetlands, presence of invasive species, and lack of identifiable wildlife species use, were assigned scores consistent with wetlands of moderate quality. Direct impacts are calculated assuming a post-development value of zero. Secondary impacts, which do not involve the complete elimination of wetland values, are scored for the pre- and post-development values. The difference in the pre-development score and the post-development score assigned to each existing wetland - the "delta" - is multiplied by the number of affected wetland acres to establish the functional loss value for direct and secondary impacts.

84. Based on the UMAM scoring of the affected wetlands, DOT calculated the wetland mitigation credits needed to offset the direct and secondary

impacts for wetlands in the Project area. Based on that analysis, DOT will obtain a total of 35.57 UMAM credits as follows: 31.03 forested freshwater UMAM mitigation credits and 1.35 herbaceous freshwater UMAM mitigation credits to be debited from the Farmton North Mitigation Bank, and 3.19 forested freshwater UMAM mitigation credits to be debited from the Lake Swamp Mitigation Bank. The Project and the approved service areas for the two mitigation banks are within Drainage Basin 17 (Halifax River), consistent with to A.H. Vol. I, section 10.2.1.2(b), and A.H. Vol. II, Appendix A.

85. Mr. Brower, testifying for Petitioners, expressed his opinion that mitigation for wetland impacts is a "Ponzi scheme." Dr. Anderson, Dr. Cho, and Dr. Barile noted that neither of the proposed mitigation areas, though within the regional Halifax River watershed established by rule, were directly in the Spruce Creek sub-basin. Thus, in their collective opinions, the mitigation is not directed to the waterbody most directly affected by the Project. Their concerns are not without merit. However, this case is not a rule challenge, and the validly promulgated mitigation rule must be applied as written. No witness disputed the UMAM scores that formed the basis for the mitigation, or that the mitigation bank service areas included the regional Halifax River watershed of which Spruce Creek is a part.

Design Modifications

86. A.H. Vol. I, section 10.2.1.2(b) provides that:

> The Agency will not require the applicant to implement practicable design modifications to reduce or eliminate impacts when:
>
> * * *
>
> b. The applicant proposes mitigation that implements all or part of a plan that provides regional ecological value and that provides greater long term ecological value than the area of wetland or other surface water to be adversely affected.

87. Although the Partial Cloverleaf alternative (46.96 acres of wetland impacts) had marginally greater wetland impacts than the Diamond Interchange Alternative (45.96 acres of wetland impacts), Mr. Drauer offered his opinion that the mitigation banks used in this case provide regional ecological value that is of greater value to the environment than the fragmented and somewhat degraded wetlands on the Project site. His opinion was based on the size of the mitigation areas — with the Farmton Mitigation Bank, at roughly 20,000 acres, being the largest in the country — providing functions for a much greater and contiguous geographic region than the individual mitigation parcels, the high quality of the mitigation bank wetlands, and the fact that they are protected in perpetuity. His opinion is accepted. Based thereon, DOT was not required to implement practicable design modifications to reduce or eliminate impacts of the Project.

Cumulative Impacts

88. The Project is considered not to have unacceptable cumulative impacts if mitigation offsets adverse impacts within the same hydrologic basin in which the impacts occur. As set forth herein, the proposed mitigation is adequate to offset adverse wetland impacts within the Halifax River basin, in which the Project is located.

Public Interest Balancing Test

89. Portions of the Project are within or discharge to the ephemeral Unnamed Canal, an OFW that is a tributary of Spruce Creek. Therefore, DOT must provide reasonable assurances that the Project is clearly in the public interest, as described by the balancing test set forth in section 373.414(1)(a), rule 62-330.302(1)(a), and A.H. Vol. I, sections 10.2.3 through 10.2.3.7.

Balancing - Public Health, Safety, or Welfare or the Property of Others

90. A.H. Vol. I, section 10.2.3.1 establishes four criteria to be balanced in order to determine if regulated activities will adversely affect the public health, safety, or welfare or the property of others.

91. A.H. Vol. I, section 10.2.3.1(a) requires an evaluation of hazards or improvements to public health or safety.

92. The final revised TSR, along with testimony at the hearing, identified several factors upon which the District based its determination that the Interchange will not adversely affect the public health, safety, or welfare or the property of others. As set forth in the TSR, those factors are:

A. The Project creates "alternative routes to evacuate coastal populations facing imminent hurricane impacts." The testimony at hearing indicated that the Interchange is also designed to enhance traffic incident management by improving emergency response times and allowing for a detour point in the event of an accident or blockage. Those traffic safety factors will be discussed herein.

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

C. "The project is not located in an area classified by the Department of Agriculture as approved, conditionally approved, restricted or conditionally restricted for shellfish harvesting." Merely proposing a project that is far from shellfish harvesting areas, without more, does not make a project clearly in the public interest. This factor is neutral, as was confirmed through the credible testimony of Mr. Drauer and Ms. Martin, which is accepted.

D. "The applicant is proposing to increase the roadway crown of Pioneer Trail to provide improved roadway resiliency and reduce the risk of flooding." The evidence failed to demonstrate that impacts resulting from the

Project would alleviate flooding or other environmental effects on the property of others. As indicated previously, the reduction in flooding from raising the crown of Pioneer Trail is limited to the surface of the roadway. It does not reduce or affect flooding on the Project site or to off-site properties. This factor is neutral, as was confirmed by the testimony of Mr. Drauer, which is accepted.

E. "Finally, the proposed project will result in a net reduction of total phosphorus to Spruce Creek, which is impaired for phosphorus." That factor will be discussed herein.

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

Balancing - Conservation of Fish and Wildlife

94. The Project will have no effect on any federally-listed species. The area of the Project includes no designated critical habitat, and will affect no threatened or endangered species. As to state-listed species, within 90 days prior to commencement of construction, a gopher tortoise survey will be performed, and any tortoises on the site will be relocated. A scrub jay survey revealed a general lack of scrub jay habitat, and the presence of no scrub jays

on site. The Project area contains no wood stork nesting colonies, and despite the occasional presence of individuals, is not a critical feeding or foraging area for the species.

95. The U.S. Fish & Wildlife Service and Florida Fish & Wildlife Conservation Commission determined that there are no documented road kills of wildlife species with high conservation value within a known area where traversing I-95 or Pioneer Trail creates a potential hazard to motorists and/or wildlife species. There 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.

96. 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.

97. There was insufficient evidence to support a finding that the Project will result in adverse impacts to the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters, or adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats. Thus, as characterized by the parties, the factor described in A.H. Vol. I, section 10.2.3.2. is neutral.

Balancing - Navigation, Flow of Water, or Erosion or Shoaling

98. The Unnamed Canal is ephemeral, its course being dry for most of the year, and flowing north towards Spruce Creek only in response to rainfall. A preponderance of the competent, substantial evidence established that the Project will not adversely affect navigation or the flow of water or cause harmful erosion or shoaling in Spruce Creek or any of its tributaries. Thus, as

characterized by the parties, the factor described in A.H. Vol. I, section 10.2.3.3. is neutral.

Balancing - Fishing or Recreational Values or Marine Productivity

99. Given the nature of the Unnamed Canal, there is no effect from the Project on fishing, recreational values, or marine productivity in the vicinity of the Project. With the mitigation proposed and the stormwater treatment and compensatory treatment being provided, DOT established, by a preponderance of the competent, substantial evidence, that the Project would have no measurable adverse impact on fishing, recreational values, or marine productivity in Spruce Creek or its tributaries. Thus, as characterized by the parties, the factor described in A.H. Vol. I, section 10.2.3.4. is neutral.

Balancing - Temporary or Permanent Nature

100. The Project is of a permanent nature. Although there will be permanent loss of wetlands, such loss will be offset through mitigation. The proposed mitigation is permanent in nature. Temporary impacts will occur during construction, but DOT is required to obtain a permit from the Department of Environmental Protection ("DEP") to account for temporary impacts during construction. Temporary impacts will recover at the conclusion of the construction. Thus, as characterized by the parties, the factor described in A.H. Vol. I, section 10.2.3.5. is neutral.

Balancing - Historical and Archaeological Resources

101. There was no evidence of significant historical or archaeological resources on or near the Project. Though Petitioners asserted that the historic Old Kings Road might possibly traverse the area, their own exhibit, PEx 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. Thus, as characterized by the parties, the factor described in A.H. Vol. I, section 10.2.3.6. is neutral.

Balancing - Current Condition and Relative Value of Functions

102. The current condition and relative value of functions of the affected wetlands is, at best, moderate. Though the vegetation itself is generally healthy, the value of the wetlands as a whole is compromised by being hydrologically severed due to the combined effects of I-95, Pioneer Trail, Williamson Boulevard, and Martin Dairy Road. The wetlands suffer from the combined effects of fire suppression and invasive species. The periphery of the wetlands is also impacted by trash and litter from I-95.

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. He acknowledged that one cannot judge the quality of wetlands without going through the site.

104. The survey and assessment of the wetlands, and the assignment of UMAM scores as reflected in J.Ex.28, is supported by a preponderance of the competent, substantial, and persuasive evidence in the record.

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

Public Interest Balancing Test - Conclusion

106. Taking into account the TSR and the competent, substantial evidence adduced at the hearing, the bases for the conclusion that the Project is clearly in the public interest boil down to two factors. The first, related to traffic safety, is that it is intended to provide an alternate route for hurricane and

disaster evacuation via I-95, and enhances traffic incident response times, with the Interchange being roughly in between a 7.5 mile stretch between SR 44 and SR 421. The second is that stormwater that currently drains to the Unnamed Canal will benefit from enhanced water quality treatment and an incremental reduction in levels of phosphorus, BOD, iron, and copper for which Spruce Creek is impaired, a reduction required by rule since the Unnamed Canal is an OFW, though not itself subject to an impairment designation.

107. The public interest balancing test is just that, a balance. There is no strict formula for determining when a project is clearly in the public interest, and when it is not. Respondents assert that, mathematically, there are more positive outcomes (one factor - barely) than negative outcomes (no factors), with six of the seven criteria being neutral. A further discussion of the balancing test is contained in the Conclusions of Law.

CONCLUSIONS OF LAW

Jurisdiction

108. DOAH has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat.

Standing

109. Section 120.52(13) defines a "party," in pertinent part, as a person "whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party." Section 120.569(1) provides, in pertinent part, that "[t]he provisions of this section apply in all proceedings in which the substantial interests of a party are determined by an agency."

110. Standing under chapter 120 is guided by the two-pronged test established in the seminal case of *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981). In that case, the court held that:

> We believe that before one can be considered to have a substantial interest in the outcome of the proceeding, he must show 1) that he will suffer an injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury.

Id. at 482.

111. *Agrico* was not intended as a barrier to the participation in proceedings under chapter 120 by persons who are affected by the potential and foreseeable results of agency action. Rather, "[t]he intent of *Agrico* was to preclude parties from intervening in a proceeding where those parties' substantial interests are totally unrelated to the issues that are to be resolved in the administrative proceedings." *Mid-Chattahoochee River Users v. Fla. Dep't of Env't Prot.*, 948 So. 2d 794, 797 (Fla. 1st DCA 2006)(citing *Gregory v. Indian River Cnty.*, 610 So. 2d 547, 554 (Fla. 1st DCA 1992)).

112. The standing requirement established by *Agrico* has been refined, and now stands for the proposition that standing to initiate an administrative proceeding is not dependent on proving that the proposed agency action would violate applicable law. Instead, standing requires proof that the petitioner has a substantial interest and that the interest reasonably could be affected by the proposed agency action. Whether the effect would constitute a violation of applicable law is a separate question.

> Standing is "a forward-looking concept" and "cannot 'disappear' based on the ultimate outcome of the proceeding." ... When standing is challenged during an administrative hearing, the petitioner must offer proof of the elements of standing, and it is sufficient that the petitioner demonstrate by such proof that his substantial interests "*could* reasonably be affected by ... [the] proposed activities."

Palm Beach Cnty. Env't. Coal. v. Fla. Dep't of Env't. Prot., 14 So. 3d 1076, 1078 (Fla. 4th DCA 2009) (citing *Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1083 (Fla. 2d DCA 2009); and *Hamilton Cnty. Bd. of Cnty. Comm'rs v. State, Dep't of Env't. Regul.*, 587 So. 2d 1378 (Fla. 1st DCA 1991)); *see also St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist.*, 54 So. 3d 1051, 1055 (Fla. 5th DCA 2011) ("Ultimately, the ALJ's conclusion adopted by the Governing Board that there was no proof of harm or that the harm would be offset went to the merits of the challenge, not to standing.").

113. The individual Petitioners alleged standing based on the detrimental effect of the Project on their use and enjoyment of Spruce Creek, the nearby Doris Leeper Preserve, and areas that they frequent. The Project would effectively eliminate an area identified as an "Essential Parcel" for expansion of the Preserve.

114. The evidence adduced at hearing indicated that the Interchange will have little or no effect on Spruce Creek or the Doris Leeper Preserve. Nonetheless, the allegations that Petitioners use the potentially affected areas at a frequency and for purposes that are different from that of the general public, and that the Project would adversely affect their quality of life as they have come to enjoy it, are sufficient, despite the ultimate failure of proof at the hearing.

115. Petitioners meet the second prong of the *Agrico* test, that is, this proceeding is designed to protect them from potential adverse impacts on water quantity, water quality, and alleged adverse effects to the public interest caused by the Project, impacts that are the subject of chapter 373 and the rules adopted thereunder.

116. The question for determination as to the first prong of the *Agrico* test is whether Petitioners have alleged injuries in fact of sufficient immediacy as a result of the Project to entitle them to a section 120.57 hearing.

117. In *Reily Enterprises, LLC v. Florida Department of Environmental Protection*, 990 So. 2d 1248, 1251 (Fla. 4th DCA 2008), the Court found that a challenger to a permit, alleged to adversely affect a nearby water body, met the *Agrico* test for standing. The facts upon which the court found standing were that the petitioner in that case:

> [C]an see the Indian River from his house across the Reily property. He and his family have "spent time down at the causeway," and they have "enjoyed the river immensely with all of its amenities" over the years. He is concerned that the project will affect his "quality of life" and "have effects on the environment and aquatic preserve [that he and his family] have learned to appreciate."

118. Petitioners' interests are comparable to the type of general "quality of life" issues found sufficient to confer standing in *Reily*.

119. The individual Petitioners alleged and offered proof of an "injury in fact which is of sufficient immediacy to entitle [them] to a section 120.57 hearing."

120. Petitioners Bear Warriors and Sweetwater have alleged standing as associations acting on behalf of the interests of their members. The facts adduced at the hearing are sufficient to demonstrate their associational standing under *Florida Home Builders Association v. Department of Labor and Employment Security*, 412 So. 2d 351 (Fla. 1982) and its progeny, including *St. Johns Riverkeeper, Inc. v. St. Johns River Water Management District*, 54 So. 3d at 1154-1155.

121. As a result of the facts supporting standing as described in the testimony of Mr. LaMontagne and Mr. White, and the representatives of Bear Warriors and Sweetwater, there is sufficient evidence to demonstrate that, if the adverse impacts of the Project on Spruce Creek and its tributaries, and on the Doris Leeper Preserve had been proven, those impacts would have adversely affected Petitioners.

Nature of the Proceeding

122. This is a de novo proceeding, intended to formulate final agency action and not to review action taken earlier and preliminarily. *Young v. Dep't of Cmty. Aff.*, 625 So. 2d 831, 833 (Fla. 1993); *Hamilton Cnty. Bd. of Cnty. Comm'rs v. Dep't of Env't. Regul.*, 587 So. 2d at 1387; *McDonald v. Dep't of Banking & Fin.*, 346 So. 2d 569, 584 (Fla. 1st DCA 1977).

Burden and Standard of Proof

123. Section 120.569(2)(p) provides that:

> For any proceeding arising under chapter 373, chapter 378, or chapter 403, if a nonapplicant petitions as a third party to challenge an agency's issuance of a license, permit, or conceptual approval, the order of presentation in the proceeding is for the permit applicant to present a prima facie case demonstrating entitlement to the license, permit, or conceptual approval, followed by the agency. This demonstration may be made by entering into evidence the application and relevant material submitted to the agency in support of the application, and the agency's staff report or notice of intent to approve the permit, license, or conceptual approval. Subsequent to the presentation of the applicant's prima facie case and any direct evidence submitted by the agency, the petitioner initiating the action challenging the issuance of the permit, license, or conceptual approval has the burden of ultimate persuasion and has the burden of going forward to prove the case in opposition to the license, permit, or conceptual approval through the presentation of competent and substantial evidence.

124. DOT made its prima facie case of entitlement to the Permit by entering into evidence the complete application files and supporting documentation, the Permit, and the TSR. In addition, DOT presented the testimony of Casey Lyon, its Environmental Manager. With DOT having made its prima facie case, the burden of ultimate persuasion is on Petitioners to prove their case in opposition to the Permit by a preponderance of the

competent and substantial evidence, and thereby prove that DOT failed to provide reasonable assurance that the standards for issuance of the ERP were met.

125. The standard of proof is preponderance of the evidence. § 120.57(1)(j), Fla. Stat.

Reasonable Assurance Standard

126. Issuance of the proposed ERP is dependent upon there being reasonable assurance that the activities authorized will meet applicable standards.

127. Reasonable assurance means "a substantial likelihood that the project will be successfully implemented." *Metropolitan Dade Co. v. Coscan Fla., Inc.*, 609 So. 2d 644, 648 (Fla. 3d DCA 1992). Reasonable assurance does not require absolute guarantees that the applicable conditions for issuance of a permit have been satisfied. Furthermore, speculation or subjective beliefs are not sufficient to carry the burden of presenting contrary evidence or proving a lack of reasonable assurance necessary to demonstrate that a permit should not be issued. *FINR II, Inc. v. CF Indus., Inc.*, Case No. 11-6495 (Fla. DOAH Apr. 30, 2012; Fla. DEP June 8, 2012).

ERP Permitting

128. Section 373.413(1) provides, in pertinent part, that:

> [T]he governing board [of the District] and the [DEP] may require such permits and impose such reasonable conditions as are necessary to assure that the construction or alteration of any stormwater management system, dam, impoundment, reservoir, appurtenant work, or works will comply with the provisions of this part and applicable rules promulgated thereto and will not be harmful to the water resources of the district.

129. Section 373.4131, which establishes the creation and implementation of statewide ERP rules, provides, in pertinent part, that:

> (1) The [DEP] shall initiate rulemaking to adopt, in coordination with the water management districts, statewide environmental resource permitting rules governing the construction, alteration, operation, maintenance, repair, abandonment, and removal of any stormwater management system, dam, impoundment, reservoir, appurtenant work, works, or any combination thereof, under this part.
>
> * * *
>
> (2)(a) Upon adoption of the rules, the water management districts shall implement the rules without the need for further rulemaking pursuant to s. 120.54. The rules adopted by [DEP] pursuant to this section shall also be considered the rules of the water management districts. The districts and local governments shall have substantive jurisdiction to implement and interpret rules adopted by [DEP] under this part, consistent with any guidance from [DEP], in any license or final order pursuant to s. 120.60 or s. 120.57(1)(l).

130. Pursuant to its rulemaking authority, DEP adopted rules 62-330.301 and 62-330.302, which establish standards applicable to this proceeding.

131. The A.H. has been jointly adopted for use by DEP and the state's five water management districts. Fla. Admin. Code R. 62-330.010(4). DEP and the water management districts "developed [the] Applicant's Handbook to help persons understand the rules, procedures, standards, and criteria that apply to the environmental resource permit (ERP) program under Part IV of Chapter 373 of the Florida Statutes (F.S.)." A.H. § 1.0.

Water Quantity

132. A.H. Vol II, section 3.2.1, provides, in pertinent part, that "[t]he post-development peak rate of discharge must not exceed the pre-development peak rate of discharge for the 25-year frequency, 24-hour duration storm."

133. A preponderance of the competent, substantial evidence demonstrates that the stormwater management system for the Project will meet that standard.

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

135. Since the Project contains no Class A soils, and thus no impacts to Class A soils, there are no applicable special basin plans requiring the provision of recharge volume equivalence.

136. Based on the Findings of Fact herein, the Project meets the water quantity standards established in rules 62-330.301(1)(a) (the project "[w]ill not cause adverse water quantity impacts to receiving waters and adjacent lands), 62-330.301(1)(b) (the project "[w]ill not cause adverse flooding to on-site or off-site property), and 62-330.301(1)(c) (the project "[w]ill not cause adverse impacts to existing surface water storage and conveyance capabilities"), and the corresponding provisions of A.H. Vol. II, sections 3.1, 3.2.1, and 3.3.1.

137. The Project will not reduce the 10-year floodplain storage, does not propose any dams, will not alter the flow of any stream or water course, and will not lower the groundwater table. Thus, the requirements in A.H. Vol. II, sections 3.3.2, 3.4.1, 3.5.1, ad 3.5.2 do not apply.

Water Quality

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

demonstration, and therefore did not meet their burden of proof as to that issue.

139. The steps taken by DOT will result in a net improvement of water quality in the receiving waters for those impairment parameters. Thus, DOT has established that it meets the standards of rule 62-330.301(2).

140. Petitioners failed to prove, by a preponderance of persuasive competent and substantial evidence, that the stormwater management system for the Project would be ineffective to reduce post-development loading of impairment parameters to levels less than those in the pre-development condition.

Fish, Wildlife, and Listed Species

141. Rule 62-330.301(1)(d) provides, in pertinent part, that:

> (1) To obtain an individual or conceptual approval permit, an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, removal, or abandonment of the projects regulated under this chapter:
>
> * * *
>
> (d) Will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters.

142. A.H. Vol. I, section 10.1.1(a) provides, in pertinent part, that:

> Applicants must provide reasonable assurance that:
>
> (a) A regulated activity will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters [paragraph 62-330.301(1)(d), F.A.C.].

143. A.H. Vol. I, section 10.2.2, entitled Fish, Wildlife, Listed Species and their Habitats, provides, in pertinent part, that:

> Pursuant to section 10.1.1(a), above, an applicant must provide reasonable assurances that a regulated activity will not impact the values of wetland and other surface water functions so as to cause adverse impacts to:
>
> (a) The abundance and diversity of fish, wildlife, listed species, and the bald eagle (Halieaeetus leucocephalus), which is protected under the Bald and Golden Eagle Protection Act, 16 U.S.C. 668-668d (April 30, 2004); a copy of the Act is in Appendix F; and
>
> (b) The habitat of fish, wildlife, and listed species.

144. Based on the Findings of Fact set forth herein, and as supported by a preponderance of the persuasive evidence adduced at the hearing, DOT demonstrated that the Project, evaluated in its entirety with mitigation, will not impact the values of wetland and other surface water functions so as to cause adverse impacts to the abundance, diversity, or habitat of fish, wildlife, and listed species.

Mitigation

145. It is well established that:

> Addressing transportation projects with unavoidable impact to wetland areas, the Florida Legislature expressed its intent that "mitigation to offset the adverse effects of these transportation projects be funded by [FDOT] and be carried out by the use of mitigation banks and any other mitigation options that satisfy state and federal requirements in a manner that promotes efficiency, timeliness in project delivery, and cost-effectiveness."

Bluefield Ranch Mitigation Bank Trust v. S. Fla. Water Mgmt. Dist., 263 So. 3d 125, 129 (Fla. 4th DCA 2018).

146. Section 373.4136(6) provides, in pertinent part, that:

> The department or water management district shall establish a mitigation service area for each mitigation bank permit. ... Except as provided herein, mitigation credits may be withdrawn and used only to offset adverse impacts in the mitigation service area. The boundaries of the mitigation service area shall depend upon the geographic area where the mitigation bank could reasonably be expected to offset adverse impacts. ...
>
> * * *
>
> (c) Once a mitigation bank service area has been established by the department or a water management district for a mitigation bank, such service area shall be accepted by all water management districts, local governments, and the department.

147. A.H. Vol. I, section 10.3.1.3 provides, in pertinent part, that:

> Mitigation through participation in a mitigation bank shall be in accordance with Section 373.4136, F.S., and Chapter 62-342, F.A.C. (Mitigation Banks).

148. The Project is within the Halifax River Drainage Basin, which is the service area for the Farmton North Mitigation Bank and the Lake Swamp Mitigation Bank. Petitioners argue that the mitigation areas are disconnected from, and do not directly provide adverse impact offsets to, Spruce Creek, which is also in the Halifax River Drainage Basin. However, such direct offsets to a sub-basin of the regional basin served by a mitigation bank service area are not required. As indicated, this case is not a rule challenge, and compliance with the rules of the District is based upon the District's existing standards. Spruce Creek is within the Farmton North Mitigation Bank and Lake Swamp Mitigation Bank service areas, and they are, therefore, suitable mitigation for the Project.

149. DOT demonstrated by a preponderance of competent and substantial and persuasive evidence that the mitigation proposed for the ERP will offset the adverse impacts of the Project. Based on the Findings of Fact set forth herein, Petitioners failed to prove by a preponderance of competent and substantial evidence that the mitigation proposed for the Project is not adequate.

Secondary Impacts

150. Rule 62-330.301(1)(f) provides, in pertinent part, that:

> (1) To obtain an individual or conceptual approval permit, an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, removal, or abandonment of the projects regulated under this chapter:
>
> * * *
>
> (f) Will not cause adverse secondary impacts to the water resources.

151. "Secondary impacts are impacts caused not by the construction of the project itself, but by 'other relevant activities very closely linked or causally related to the construction of the project.'" *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140, 1143 (Fla. 2d DCA 2001)(citing *Fla. Power Corp. v. Dep't of Env't. Regul.*, 605 So. 2d 149, 152 (Fla. 1st DCA 1992); and *Conservancy, Inc. v. A. Vernon Allen Builder, Inc.*, 580 So. 2d 772, 777 (Fla. 1st DCA 1991)).

152. A.H. Vol. I, section 10.2.7 establishes the criteria for consideration of secondary impacts and provides, in pertinent part, that:

> (a) An applicant shall provide reasonable assurance that the secondary impacts from construction, alteration, and intended or reasonably expected uses of a proposed activity will not cause or contribute to violations of water quality standards or adverse impacts to the functions of wetlands or other surface waters ....

> (b) An applicant shall provide reasonable assurance that the construction, alteration, and intended or reasonably expected uses of a proposed activity will not adversely impact the ecological value of uplands for bald eagles, and aquatic or wetland dependent listed animal species for enabling existing nesting or denning by these species ....

There was no competent, substantial evidence to establish that any species on the Wetland Dependent Species List referenced in A.H. Vol. I, section 10.2.7(b) utilize the Project area.

153. A.H. Vol. I, section 10.2.7 also provides that:

> A proposed activity shall be reviewed under this criterion by evaluating the impacts to: wetland and surface water functions identified in section 10.2.2, above, water quality, upland habitat for bald eagles and aquatic or wetland dependent listed species, and historical and archaeological resources. ... If such secondary impacts cannot be prevented, the applicant may propose mitigation measures as provided for in sections 10.3 through 10.3.8, below.

154. DOT established, by a preponderance of the competent substantial evidence, that 10.12 acres of the Project site will be subject to secondary impacts requiring mitigation. The functional loss resulting from the secondary impacts was calculated by application of the UMAM rule.

155. Mitigation credits of 32.38 functional units were purchased from the Farmton North mitigation bank, and 3.19 functional units from the Lake Swamp mitigation bank. The mitigation banks provide regional ecological value for impacts occurring within the Halifax River Basin. The mitigation provided offsets the combined functional loss from the direct and secondary impacts. Evidence to the contrary was not persuasive.

156. Based on the Findings of Fact set forth herein, Petitioners failed to prove by a preponderance of competent and substantial evidence that the activities authorized by the ERP will cause adverse secondary impacts to the water resources.

Cumulative Impacts

157. Section 373.414(8)(a) provides, in pertinent part, that:

> The governing board ..., in deciding whether to grant or deny a permit for an activity regulated under this part, shall consider the cumulative impacts upon surface water and wetlands.

158. Rule 62-330.302(1)(b) provides that:

> (1) In addition to the conditions in Rule 62-330.301, F.A.C., to obtain an individual or conceptual approval permit under this chapter, an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, repair, removal, and abandonment of a project:
>
> * * *
>
> (b) Will not cause unacceptable cumulative impacts upon wetlands and other surface waters as set forth in sections 10.2.8 through 10.2.8.2 of Volume I.

159. A.H. Vol. I, section 10.2.8 provides, in pertinent part, that:

> [A]n applicant must provide reasonable assurance that a regulated activity will not cause unacceptable cumulative impacts upon wetlands and other surface waters within the same drainage basin as the regulated activity for which a permit is sought.
>
> * * *
>
> When adverse impacts to water quality or adverse impacts to the functions of wetlands and other surface waters, as referenced in the paragraphs above, are not fully offset within the same drainage basin as the impacts, *then* an applicant must provide reasonable assurance that the proposed activity, when considered with the following activities, will not result in unacceptable cumulative impacts to water quality or the

> functions of wetlands and other surface waters, within the same drainage basin. (emphasis added).

160. As set forth herein, impacts from the Project will be fully offset by the use of mitigation credits at the Farmton North Mitigation Bank and the Lake Swamp Mitigation Bank, both of which are within the same drainage basin as Spruce Creek and the Project.

161. Based on the Findings of Fact set forth herein, as supported by a preponderance of the persuasive evidence adduced at the hearing, and applying the standards set forth in A.H. Vol. I, section 10.2.7, DOT demonstrated that the Project, evaluated in its entirety with mitigation, will not result in unacceptable cumulative impacts upon wetlands and other surface waters.

Elimination or Reduction of Impacts

162. A.H. Vol. I, section 10.2.1 provides, in pertinent part, that:

> The following factors are considered in determining whether an application will be approved by the Agency: the degree of impact to wetland and other surface water functions caused by a proposed activity; whether the impact to these functions can be mitigated; and the practicability of design modifications for the site that could eliminate or reduce impacts to these functions, including alignment alternatives for a proposed linear system.

163. A.H. Vol. I, section 10.2.1.1 provides, in pertinent part, that:

> The term "modification" shall not be construed as including the alternative of not implementing the activity in some form, nor shall it be construed as requiring a project that is significantly different in type or function. A proposed modification that ... adversely affects public safety through the endangerment of lives or property is not considered "practicable."

164. The design alternative selected for the Project, i.e., the Partial Cloverleaf 2 Alternative, has one more acre of wetland impact (46.96 acres) than the least impacting alternative, the "diamond interchange" (45.96 acres). A.H. Vol. I, section 10.2.1.2 provides, in pertinent part, that:

> The Agency will not require the applicant to implement practicable design modifications to reduce or eliminate impacts when:
>
> * * *
>
> b. The applicant proposes mitigation that implements all or part of a plan that provides regional ecological value and that provides greater long term ecological value than the area of wetland or other surface water to be adversely affected.

165. DOT has proposed mitigation to offset the impacts of the Project that provides regional ecological value and greater long-term ecological value than the areas to be adversely affected. Therefore, DOT was under no requirement to implement practicable design modifications to reduce or eliminate impacts from the Project.

Public Interest Test

166. Section 373.414(1) provides, in pertinent part, that:

> As part of an applicant's demonstration that an activity regulated under this part will not be harmful to the water resources or will not be inconsistent with the overall objectives of the district, the governing board ... shall require the applicant to provide ... reasonable assurance that such activity ... within an Outstanding Florida Water ... will be clearly in the public interest.
>
> (a) In determining whether an activity ... is clearly in the public interest, the governing board ... shall consider and balance the following criteria:
>
> 1. Whether the activity will adversely affect the public health, safety, or welfare or the property of others;

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

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

4. Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;
5. Whether the activity will be of a temporary or permanent nature;

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

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

167. Rule 62-330.302(1) provides, in pertinent part, that:

> In addition to the conditions in Rule 62-330.301, F.A.C., to obtain an individual or conceptual approval permit under this chapter, an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, repair, removal, and abandonment of a project:
>
> (a) ... within an Outstanding Florida Water, are clearly in the public interest, as determined by balancing the following criteria as set forth in sections 10.2.3 through 10.2.3.7 of Volume I. . . .

168. The seven public interest criteria listed in section 373.414(1)(a) are repeated almost verbatim in rule 62-330.302(1) and A.H. Vol. I, sections 10.2.3.1 through 10.2.3.7.

169. The public interest test was largely determined by the District to have been met by the benefit to public health, safety, or welfare from the

traffic safety factors of increased hurricane evacuation and incident response capabilities along the stretch of I-95 between SR 44 and SR 421 pursuant to A.H. Vol. I, section 10.2.3.1.

170. A.H. Vol. I, section 10.2.3.1, provides, in pertinent part, that:

> In reviewing and balancing the criterion regarding public health, safety, welfare and the property of others in section 10.2.3(a), above, the Agency will evaluate whether the regulated activity located in, on, or over wetlands or other surface waters will cause:
>
> (a) *An environmental hazard* to public health or safety or improvement to public health or safety *with respect to environmental issues.* Each applicant must identify potential *environmental* public health or safety issues resulting from their project. (emphasis added)

171. The public interest test is limited to interests that are environmental in nature. In drawing that conclusion, the undersigned relies not only on the plain meaning of the A.H., but also on the well-researched and well-reasoned Order authored by ALJ Bram D.E. Canter in *Martin County and St. Lucie County vs. All Aboard Florida - Operations, LLC; Florida East Coast Railway, LLC and South Florida Water Management District*, Case Nos. 16-5718 and 17-2566 (Fla. DOAH Sept. 29, 2017; Fla. SFWMD Nov. 16, 2017). In *All Aboard Florida*, Judge Canter determined that non-environmental factors may not be considered in a determination related to the public interest test. There is little to improve upon in Judge Canter's Recommended Order, which was adopted "in its entirety" by the South Florida Water Management District, and the following is therefore restated and adopted herein:

> 155. The public interest test was created in 1985 and first codified in section 403.918. When the ERP Program was adopted in 1993, the public interest test was transferred to section 373.414(1). The "whereas" clauses in the law as it appeared in

chapter 93-213, Laws of Florida, have environmental themes.

156. In section 373.414(1), the Legislature added a preamble stating that the test is to be "part of an applicant's demonstration that an activity regulated under this part will not be harmful to the water resources or will not be inconsistent with the overall objectives of the district." § 373.414(1), Fla. Stat. (1993). The overall objectives of a district relate to water resources, their management and protection for flood control, water supply, and maintaining environmental quality. *See* § 373.016(3), Fla. Stat. (2017).

157. In a 2011 report of the Senate Committee on Environmental Preservation and Conservation regarding the ERP Program, it is stated that the first public interest criterion "considers only environmental factors, not economic or social factors." Fla. S. Comm. on Envtl. Pres. & Conservation, Statewide ERP Interim Report 2012-121, at 3 n.18 (2011).

158. The District's interpretation of the public interest test to limit the question "[w]hether the activity will adversely affect the public health, safety, or welfare of the property of others" to consideration of only environmental issues is clearly shown in Section 10.2.3.1 of the Applicant's Handbook:

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

> environmental issues. Each applicant must identify potential environmental public health or safety issues resulting from their project.
>
> * * *

159. In construing the public interest test in section 403.918, the First District Court held that the reference to impacts on the "property of others" is confined to environmental impacts. *Miller v. Dep't of Envt'l Reg.*, 504 So. 2d 1325, 1327 (Fla. 1st DCA 1987).

160. In *Save Anna Maria, Inc. v. Department of Transportation*, 700 So. 2d 113, 116 (Fla 2d DCA 1997), the Second District Court held that the "[r]eview of the public interest criteria is limited to environmental impacts."

161. Although the case of *Avatar Development Corporation v. State*, 723 So. 2d 199, 207 (Fla. 1998), involved a challenge to DEP's authority to enforce permit conditions, the opinion of the Supreme Court is important for this discussion. In *Avatar*, the appellant argued that DEP's authority to enforce permit conditions pursuant to section 403.161 was an unconstitutional delegation of legislative authority because DEP was not adequately guided by statute. In holding that the Legislature had provided sufficient guidance for the exercise of DEP's authority, the Court pointed to the "specific policies" in section 403.021. Those policies relate exclusively to environmental matters. The Court noted that the public interest test in section 373.414 allows DEP to consider public health, safety, and welfare, but explained that DEP's authority is limited to "specific legislative intent" and gave examples of this intent in provisions of chapter 403 that articulate specific environmental objectives.

162. In *Avatar*, the Supreme Court determined that, despite the expansive connotation that may be

associated with "public health, safety, and welfare," these words must be given a limited meaning in section 373.414 in order for the Legislature's delegation of authority to be constitutional. The delegation is constitutional because DEP's authority (and the authority of the water management districts) is limited to environmental matters for which there is legislative guidance in the statutes. There are no "specific policies" and there is no "specific legislative intent" in chapters 373 or 403 to guide DEP or the water management districts in making regulatory decisions based on non-environmental factors associated with public health, safety, and welfare.

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 nonenvironmental 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).[6]

Based on the Recommended and Final Orders entered in *All Aboard Florida*, and the cases cited therein, it is concluded 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."

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

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

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

174. How the public interest scale is to be balanced is not defined. It is not a mathematical formula. To the extent it includes a qualitative element, the sole remaining "environmental" element provided to meet the "public interest" test is not compelling. The reduction in the impairment parameters were those required by the District's water quality standards.[7] In complying with rule 62-330.301(2), DOT has done the bare minimum to qualify for the Permit. That element of simple regulatory compliance is not sufficient to establish that the Project is "clearly in the public interest."[8]

Ultimate Conclusion

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

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

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

[9] A good portion of the evidence regarding the "neutral" nature of elements deemed positive in the TSR was elicited during Petitioner's examination of witnesses. Thus, the result reached herein is a measure of Petitioners meeting their burden of ultimate persuasion to establish their case in opposition to the Permit through the presentation of competent and substantial evidence.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law set forth herein, it is RECOMMENDED that the St. Johns River Water Management District enter a final order denying the application in Environmental Resource Permit No. 103479-2 for a new interchange at Pioneer Trail and Interstate Highway 95.

DONE AND ENTERED this 29th day of January, 2024, in Tallahassee, Leon County, Florida.

E. GARY EARLY
Administrative Law Judge
Division of Administrative Hearings
1230 Apalachee Parkway
Tallahassee, Florida 32301
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of January, 2024.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.

Exhibit B

INDIVIDUAL ENVIRONMENTAL RESOURCE PERMIT TECHNICAL STAFF REPORT
6 Oct 2023
APPLICATION #: 103479-2

Applicant: Casey Lyon
FDOT District 5
719 S Woodland Blvd
DeLand, FL 32720-6834
(386) 943-5436

Consultant: Mike Dinardo
300 Primera Blvd
Ste 300
Lake Mary, FL 32746-2145
(407) 242-8650

Tim Vavra
Stantec
4798 New Broad St
Orlando, FL 32814-6436
(407) 587-7559

Project Name: Pioneer Trail / I-95 Interchange

Project Acreage: 74.13

County: Volusia

STR:

Section(s):	Township(s):	Range(s):
4,5,8,9	17S	33E

Receiving Water Body:

Name	Class
Unnamed canal	III Fresh, OFW

Authority:	62-330.020 (2)(d), 62-330.020 (2)(j), 62-330.020 (2)(a), 62-330.020 (2)(i), 62-330.020 (2)(g), 62-330.020 (2)(c) , 62-330.020 (2)(b)
Existing Land Use:	Streams and Waterways(5100), Pine Flatwoods(4110), Cypress(6210), Wet Prairies(6430), Freshwater Marshes(6410), Roads and Highways(8140), Reservoirs(5300), Xeric Oak(4210), Hydric Pine Flatwood(6250), Wetland Forested Mixed(6300)
Mitigation Drainage Basin:	Halifax River
Special Regulatory Basin:	Spruce Creek Basin
Final O&M Entity:	FDOT
ERP Conservation Easements/Restrictions:	No
Interested Parties:	Yes
Objectors:	Yes

Authorization Statement:
Construction and operation of a Stormwater Management System for a 74.13 acre project known as Pioneer Trail / I-95 Interchange as per plans received by the District on February 2, 2022 and December 14, 2022.

Recommendation: Approval
Reviewers: Perry Jennings; Justin Dahl

Section 1: General Project Information

Project Applicant and Sufficient Real Property Interest:
The permit applicant has demonstrated sufficient real property interest in the land upon which the activities proposed under this application will be conducted in accordance with Section 4.2.3(d)(3), A.H. Vol. I.

Project Location and Brief Description:
The project is sited at the present Pioneer Trail overpass at I-95 in parts of Port Orange, New Smyrna Beach, and unincorporated Volusia County. The FDOT proposes to construct a new highway interchange to connect with Pioneer Trail.

Permitting History:
Interstate Highway 95 was constructed in the mid-1960s as a four-lane, limited access highway and antedates state water resource criteria. The Pioneer Trail overpass was constructed as part of the 1960s work. Permit No. 103479-1 was issued February 2010 for the re-alignment of Pioneer Trail, east of I-95.

The present project involves an I-95 segment that was expanded to six lanes by District Permit No. 118421-2 (issued May 2011). That work was accomplished at the project site in 2016.

A surface water management basin that was constructed during 2016 to serve an extension of Williamson Boulevard (Permit No. 134174-1; issued April 2015) will be expanded to create Ponds 1 and 2.

Coastal Zone Management
Issuance of this authorization also constitutes a finding of consistency with Florida's Coastal Zone Management Program, as required by Section 307 of the Coastal Zone Management Act.

Section 2: Engineering

Description of Surface Water Management System:
This application is for the construction of a new inter-change with numerous travel corridor improvements, at the intersection of I-95 and Pioneer Trail in Volusia County, a 74.13-acre project.

Water Quality:
Stormwater treatment via wet detention systems is proposed for the runoff from the project site. The project discharges to an unnamed canal, an Outstanding Florida Waterbody (OFW). An additional 50% treatment and permanent pool volume will be provided in accordance with District criteria for systems discharging to an OFW. Due to site constraints a portion of the project will not be conveyed to a stormwater management system. Compensating treatment is proposed to offset the lack of treatment for these areas.

The ultimate receiving waterbody, Spruce Creek, is an impaired waterbody. Spruce Creek is impaired for dissolved oxygen (DO), nutrients, Iron, Copper, and Enterococci. There is an adopted TMDL that requires a reduction of biochemical oxygen demand (BOD) and total phosphorus. The system, as proposed, will result in a net reduction of total phosphorus, BOD, total iron, and total copper to Spruce Creek.

Because the project is not expected to be a significant source of Enterococci, District presumptive criteria provides for adequate treatment of the stormwater runoff.

Flood Protection:
The surface water management systems are designed to provide for attenuation of the 25-year 24-hour storm event.

Special Basin Criteria:
The project is located in the Spruce Creek Hydrologic Basin. The applicant has demonstrated that the project, as proposed, meets all conditions for issuance of permits pursuant to Section 13.5 of the Applicant's Handbook Volume II:

- Recharge Standard: The Most Effective Recharge Areas will not be impacted by this project.
- Floodplain Storage Criteria: Six Flood Plain Compensation (FPC) ponds are proposed to off-set impacts by the roadway improvements to the 100-year floodplain.
- Stormwater Management Standard: This standard is met since the project does not propose the use of filtration treatment.
- Riparian Habitat Protection Zone standard: Not applicable: no part of the project occurs in the Spruce Creek Riparian Habitat Protection Zone.

Operation and Maintenance:
The applicant FDOT, proposes to operate and maintain the surface water management system, which meets the requirements of Section 12.3.1, A.H. Vol I.

Conditions for Issuance (Engineering):

Rule 62-330.301(1), F.A.C., states that an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, removal, or abandonment of the projects regulated under this chapter:

(a) Will not cause adverse water quantity impacts to receiving water and adjacent lands

(b) Will not cause adverse flooding to on-site or off-site property

(c) Will not cause adverse impacts to existing surface water storage and conveyance capabilities

Pursuant to 3.1, ERP A.H. Volume II, it is presumed that the conditions for issuance (a) through (c) above are met if the systems are designed to meet the standards in subsections 3.2.1, 3.3.1, 3.3.2, 3.4.1, 3.5.1, and 3.5.2, ERP A.H. Volume II.

Calculations were provided demonstrating that the post-development peak rate of discharge will not exceed the pre-development peak rate of discharge generated by the 25-year 24-hour storm event in accordance with Section 3.2.1, A.H. Vol. II.

This project does not propose to alter an existing conveyance system, therefore the presumptive criteria specified in subsection 3.3.1, ERP A.H. Volume II is not applicable.

This project does not propose to reduce the 10-year floodplain storage, therefore the presumptive criteria specified in subsection 3.3.2, ERP A.H. Volume II is not applicable.

This project does not propose any dams that will be greater than six feet in height, therefore the presumptive criteria specified in subsection 3.4.1, ERP A.H. Volume II is not applicable.

This project does not propose to alter the flow of any streams or water course, therefore the presumptive criteria specified in subsection 3.5.1, ERP A.H. Volume II is not applicable.

This project does not propose to lower the groundwater table. Therefore, subsection 3.5.2, ERP A.H. Volume II is not applicable.

(d) Will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters

In evaluating this criterion, District staff considered Section 10.2.2, ERP A.H. Volume I, which states that an applicant must provide reasonable assurances that a regulated activity will not impact the values of wetland and other surface water functions so as to cause adverse impacts to: (a) the abundance and diversity of fish, wildlife, listed species and the bald eagle (*Haliaeetus leucocephalus*); and (b) the habitat of fish, wildlife, and listed species.

In this case, the project with wetland-impact could have resulted in adverse impacts to functions provided by 58.82 wetland acres. However the applicant proposed to offset the impacts by mitigation. A functional analysis Uniform Mitigation Assessment

Method(UMAM) affirmed that the mitigation is sufficient to offset the loss of wetland/surface water functions. Thus, the project with its mitigation plan will not have adverse impacts on wetland/surface water functions.

(e) Will not adversely affect the quality of receiving waters such that the state water quality standards set forth in Chapters 62-4, 62-302, 62-520, and 62-550, F.A.C., including the antidegradation provisions of paragraphs 62-4.242(1)(a) and (b), F.A.C., subsections 62-4.242(2) and (3), F.A.C., and Rule 62-302.300, F.A.C., and any special standards for Outstanding Florida Waters and Outstanding National Resource Waters set forth in subsections 62-4.242(2) and (3), F.A.C., will be violated.

Submitted plans and calculations show that the stormwater system is designed to provide water quality treatment in accordance with Sections 4.1 and 8.0, A.H. Volume II for discharge to Class III and Outstanding Florida Waters. This permit also constitutes a water quality certification under Section 401 of the Clean Water Act, 33 U.S.C. 1341 for the 404 Permit Application SAJ-2017-02279 (SP-VCB).

(f) Will not cause adverse secondary impacts to the water resource.

See "Conditions for Issuance (Environmental)", Section 3, below.

(g) Will not adversely impact the maintenance of surface or ground water levels or surface water flows established pursuant to section 373.042, F.S.

This project does not propose to impact the surface or groundwater levels, or surface water flows established in section 373.042, F.S.

(h) Will not cause adverse impacts to a Work of the District established pursuant to section 373.086, F.S.

This project does not propose to cause an adverse impact to a Work of the District established in section 373.086, F.S.

(i) Will be capable, based on generally accepted engineering and scientific principles, of performing and functioning as proposed

The proposed project has been designed and certified by a registered professional engineer of the state of Florida and is reasonably expected to be capable of performing and functioning as designed.

(j) Will be conducted by a person with the financial, legal and administrative capability of ensuring that the activity will be undertaken in accordance with the terms and conditions of the permit, if issued

The applicant has confirmed that they have the financial, legal, and administrative capability of completing the project in accordance with the conditions of the permit.

(k) Will comply with any applicable special basin or geographic area criteria.

The project occurs within the Spruce Creek Hydrologic Basin and was determined to comply with the basin criteria as described above.

Section 3: Environmental

Habitat Description:

The project area consists largely of undeveloped parcels surrounding I-95 and Pioneer Trail in New Smyrna Beach. A diversity of habitats are onsite including: pine flatwoods, xeric oak, upland cut ditch, reservoir, cypress, hydric pine flatwoods, wetland forested mixed, freshwater marshes, and wet prairies. The wetlands have been severed by I-95, Pioneer Trail, and the Power Line Easement. Even so, the majority of the wetlands onsite are still of moderate quality.

Impacts: *Subsection 10.2.2, ERP A.H. Volume I, states that an applicant must provide reasonable assurances that a regulated activity will not impact the values of wetland and other surface water functions so as to cause adverse impacts to: (a) the abundance and diversity of fish, wildlife and listed species; and (b) the habitat of fish, wildlife and listed species.*

The FDOT proposes to fill 48.80 wetland acres with 10.12 acres of secondary impacts. 58.82 acres of these impacts are considered adverse and will require mitigation as described below. The 0.10 acre impact to W33 meets the criteria of subsection 10.2.2.1, AH. Volume I and is not considered adverse; therefore, no elimination/reduction analysis, cumulative-impacts analysis, or mitigation was required for this impact.

An additional 3.11 acres of surface waters will also be impacted. These include roadside ditches and an artificial pond dug in uplands. The ditch and pond impacts meet 10.2.2.2, ERP A.H. Volume I and are not considered adverse; therefore, no elimination/reduction analysis, cumulative-impacts analysis, or mitigation was required for the impacts proposed within those surface waters.

Secondary impacts: *Subsection 10.2.7, ERP A.H. Volume I, contains a four-part criterion that addresses additional impacts that may be caused by a proposed activity: (a)adverse impacts to wetland (and other surface water) functions and water quality violations that may result from the intended or reasonably expected uses of a proposed activity; (b) adverse impacts to the upland nesting habitat of bald eagles and aquatic or wetland dependent listed animal species; (c) impacts to significant historical and archaeological resources that are very closely linked and causally related to any*

proposed dredging or filling of wetlands or other surface waters; and (d) adverse wetland (and other surface) impacts and water quality violations that may be caused by future phases of the project or by activities that are very closely linked and causally related to the project.

The project meets the four secondary impact criteria of subsection 10.2.7, A.H., Volume I, because:

a. The project area is bisected by I-95 running north - south and Pioneer Trail running east - west, and South Williamson Blvd. is just west of the project site. The forested wetlands within the project area are connected to Spruce Creek to the north. However, wildlife habitat and wildlife movement within the area is currently fragmented by these existing roadways, which provides significant barriers. Additionally, based on documentation received by the permittee, FDOT has not identified or been provided a documented, science-based need for a wildlife crossing feature that is supported by USFWS and/or FWC. The USFWS /FWC also determined that there are no documented road kills of wildlife species with high conservation value or within a known area where traversing the roadway creates a potential hazard or motorists and/or wildlife species. FDOT also found that there are no public conservation lands or lands under perpetual conservation or agricultural easement on both sides of the road. This would be needed to achieve successful use of a wildlife crossing feature, as the FDOT would not want to funnel wildlife to private lands that may be developed. Therefore, District staff conclude that there is not a need for an additional wildlife crossing feature.
b. no evidence was observed that the upland portions of the site are being utilized by bald eagles or aquatic and wetland dependent listed species for nesting and denning; The Florida Fish and Wildlife Conservation Commission (FWC) staff reviewed the permit application (FWC comment letter dated August 15, 2022) and determined that the habitat of two upland species (the gopher tortoise and the Florida pine snake) may be affected, however, these species are not listed aquatic or wetland dependent. District staff did not observe any bald eagle nests within the site or in close proximity. Section 3.4.A.2.2 of the Environmental Resource Permitting Document received with the application on February 2, 2022, determined the closest documented eagle nest (VO121) is approximately 2.5 miles to the east of the project boundary and the project will adhere to the U.S. Fish and Wildlife Service National Bald Eagle Management Guidelines. Therefore, District staff conclude that adverse impacts to the upland nesting habitat of bald eagles and aquatic or wetland dependent listed animal species will not occur.
c. the applicant provided documentation from the Florida Division of Historical Resources (Appendix G of the Environmental Resource Permitting Document received with the application on February 2, 2022) that they concurred with a FDOT Cultural Resource Assessment Survey that showed no adverse impacts to cultural resources will occur; and
d. there are no known future phases or expansion, or very closely linked and causally related on-site or off-site activities that would result in adverse impacts.

Elimination/Reduction of Impacts: *Pursuant to Subsection 10.2.1.1, ERP A.H. Volume I, the applicant must implement practicable design modifications to reduce or eliminate adverse impacts to wetlands and other surface waters. A proposed modification that is not technically capable of being completed, is not economically viable, or that adversely affects public safety through endangerment of lives or property is not considered "practicable". Alternatively, an applicant may meet this criterion by demonstrating compliance with subsection 10.2.1.2.a. or 10.2.1.2.b., ERP A.H. Volume I.*

The permittee provided alternative design analysis that included three build designs. All three designs had similar wetland and surface water impacts. The design selected, referred to as Partial Cloverleaf 2 Alternative (Alt 3), included minimal involvement with contaminated sites, best traffic operations and highest public support/preference. This alternative provided very similar impacts to wetlands and no impacts to listed wildlife. The impacts proposed here were minimized to the extent practicable to realize a safe, functional interchange on a six-lane interstate highway, and therefore meets Subsection 10.2.1.1, A.H., 10.2.1.2(b), Vol I.

Pursuant to Section 10.2.1.2(b), Vol I., an applicant may propose mitigation that implements all or part of a plan that provides regional ecological value and that provides greater long term ecological value than the area of wetland or other surface water to be adversely affected. The permittee offered to purchase mitigation bank credits from Farmton North Mitigation Bank and Lake Swamp Mitigation Bank. Both of these banks met the criteria for establishing a mitigation bank pursuant to Rule 62-342.400, F.A.C. Both mitigation banks provide regional ecological value and greater long term ecological value (than the wetlands proposed to be impacted by this project) by retaining a connection to an Outstanding Florida Water, plus their on-site wetlands, which serve to treat runoff and remove contaminants, also provide for downstream detrital transport and thus enhance wildlife utilization. Both mitigation banks also have a perpetual management plan, which includes a prescribed burn program. The wetlands to be impacted within the project have been fragmented by I-95, existing Pioneer Trail, Williamson Blvd, an FP&L easement, and FDOT ponds. In addition, the subject wetlands have become increasingly surrounded by development (such as Shell Point Colony, ERP Individual Permit No. 156663-4; Woodhaven, ERP Individual Permit No. 99970-7; Coastal Woods, ERP Conceptual Permit No. 109884-6; Turnbull Crossings, ERP Individual Permit No. 151739-1), which will increase the possible spread of exotic and nuisance vegetation species on the subject wetlands and limit the possibility of beneficial prescribed burns. Therefore, the purchase of mitigation bank credits from Farmton North and Lake Swamp Mitigation Banks will provide regional ecological value and greater long term ecological value within the same drainage basin than the wetlands proposed to be impacted by this project.

Mitigation: ***According to*** *10.3.1.2, ERP A.H. Vol. 1, mitigation can be conducted on-site, off-site, or through the purchase of credits from a mitigation bank, or through a combination of approaches, as long as it offsets anticipated adverse impacts to wetlands and other surface waters and meets all other criteria for permit issuance.*

The FDOT will obtain a total of 35.57 UMAM credits as followed: 31.03 forested freshwater UMAM mitigation credits and 1.35 herbaceous freshwater UMAM mitigation credits have been debited from the Farmton North Mitigation Bank, and 3.19 forested freshwater UMAM mitigation credits from the Lake Swamp Mitigation Bank.

Financial Assurance Mechanism:
N/A

Off-Site Mitigation:
N/A

Cumulative Impacts: *Subsection 10.2.8, ERP A.H. Volume I, requires applicants to provide reasonable assurances that their projects will not cause unacceptable cumulative impacts upon wetlands and other surface waters within the same drainage basin as the project for which a permit is sought. This analysis considers past, present, and likely future similar impacts and assumes that reasonably expected future applications with like impacts will be sought, thus necessitating equitable distribution of acceptable impacts among future applications. Under section 10.2.8, ERP A.H. Volume, when an applicant proposes mitigation that offsets a project's adverse impacts within the same basin as the impacts, the project does not cause unacceptable cumulative impacts.*

The proposed mitigation fully offsets the proposed impacts and is located within the same drainage basin (#17, Halifax River) as the impact wetlands, so no unacceptable cumulative impacts will occur, pursuant to Section 10.2.8, ERP A.H. Vol. I.

Conditions for Issuance (Environmental):

Rule 62-330.301(1), F.A.C., states that an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, removal, or abandonment of the projects regulated under this chapter:

(d) Will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters

In this case, the project with wetland-impact could have resulted in adverse impacts to functions provided by 58.82 wetland acres. However the applicant proposed to offset the impacts by mitigation as described above. A functional analysis Uniform Mitigation

Assessment Method(UMAM) affirmed that the mitigation is sufficient to offset the loss of wetland/surface water functions. Thus, the project with its mitigation plan will not have adverse impacts on wetland/surface water functions.

-

(f) Will not cause adverse secondary impacts to the water resources.

As noted previously, the project complies with all four parts of 10.2.7, ERP A.H. Vol. 1, i.e., mitigation was provided to compensate for function loss; no protected species use nearby uplands for nesting/denning; no significant historical resources occur on-site; and the project neither requires nor implies future improvements that could adversely affect wetlands/surface waters.

Additional Conditions for Issuance (Environmental)

Rule 62-330.302(1) states that in addition to the conditions in Rule 62-330.301, F.A.C., to obtain an individual permit, an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, repair, removal, and abandonment of a project:

(a) Located in, on, or over wetlands or other surface waters will not be contrary to the public interest, or if such activities significantly degrade or are within an Outstanding Florida Water (OFW), are clearly in the public interest, as determined by balancing the following criteria as set forth in sections 10.2.3 through 10.2.3.7, ERP A.H. Volume I:

A small portion of the project consisting primarily of approximately 308 feet of the east access road and a small portion of the eastern floodplain compensating pond, FPC-1A, which are located upstream to the southern section line of Section 4, Township 17S, Range 33E pursuant to Rule 62-302.700(9)(i)(33)(a), F.A.C., are within the Spruce Creek OFW, and therefore the project must be clearly in the public interest. In determining whether the proposed project is clearly in the public interest, the District shall consider and balance the following criteria:

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

In reviewing and balancing this criterion, the District will evaluate whether the activity located in, on, or over wetlands or other surface waters will cause:

(a) An environmental hazard to public health, safety, or improvement to public safety with respect to environmental conditions;
(b) Impacts to areas classified by the Department of Agriculture and Consumer Services as approved, conditionally approved, restricted or conditionally

restricted for shellfish harvesting;
(c) Flooding or alleviate existing flooding on the property of others; and
(d) Environmental impacts to property of others.

The project will result in an improvement to public health and safety by providing alternative routes to evacuate coastal populations facing imminent hurricane impacts. The surface water management system was designed to comply with all criteria necessary to preclude flooding of offsite properties, adverse drainage of surface waters, and degradation of water quality in downstream waters. The project is not located in an area classified by the Department of Agriculture as approved, conditionally approved, restricted or conditionally restricted for shellfish harvesting. The applicant is proposing to increase the roadway crown of Pioneer Trail to provide improved roadway resiliency and reduce the risk of flooding. Finally, the proposed project will result in a net reduction of total phosphorus to Spruce Creek, which is impaired for phosphorus. Therefore, this factor is in favor of the public interest. [10.2.3.1, A.H., Vol. I].

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

The District's review of this factor is encompassed within the review under section 10.2.2, A.H., Vol. 1, which requires that an applicant provide reasonable assurances that a regulated activity will not impact the values of wetland and other surface water functions so as to cause adverse impacts to: (a) the abundance and diversity of fish, wildlife, listed species and the bald eagle (*Haliaeetus leucocephalus*); and (b) the habitat of fish, wildlife, and listed species. The District determined that mitigation was provided to compensate for permanent loss of ecological functions to valued wildlife habitats within the project. A functional analysis provided by the permittee affirmed that the mitigation is adequate to offset the loss. Therefore, this factor is neutral. [10.2.3.2, A.H., Vol. I].

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

In reviewing and balancing this criterion, the District will evaluate whether the activity located in, on, or over wetlands or other surface waters will:
(a) Significantly impede navigability. The District will consider the current navigational use of surface waters and will not speculate on uses that may occur in the future.
(b) Cause or alleviate harmful erosion or shoaling.
(c) Significantly impact or enhance water flow.

The project is not located in navigational waters and will not impede navigability, and does not propose activities that would cause harmful erosion, shoaling, or significant impacts to water flow. Additionally, the applicant is required to comply with erosion control best management practices and the permit includes a condition requiring the applicant to protect wetland areas and waterbodies outside

the specific limits of construction from erosion, siltation, scouring or excess turbidity, and dewatering. Therefore, this factor is neutral. [10.2.3.3, A.H., Vol. I].

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

In reviewing and balancing this criterion, the District will evaluate whether the activity located in, on, or over wetlands or other surface waters will cause:
(a) Adverse effects to sport or commercial fisheries or marine productivity.
(b) Adverse effects or improvements to existing recreational uses of a wetland or other surface waters, which may provide boating, fishing, swimming, waterskiing, hunting and bird watching.

The project area is not navigational and is not used for boating or commercial fishing. Therefore, this factor is neutral. [10.2.3.4, A.H., Vol. I].

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

The system is a permanent feature that will be maintained in perpetuity. Additionally, the proposed mitigation bank credits to offset the impacts are from regionally significant mitigation banks that are encumbered by permanent conservation easements and will exist in perpetuity. Therefore, this factor is neutral. [10.2.3.5, A.H., Vol. I].

6. Whether the activities will adversely affect or will enhance significant historical and archeological resources;

No adverse impacts to cultural resources are anticipated. The District solicited comments from the Division of Historical Resources, and the permit includes a condition to cease activities and contact the Division of Historical Resources should unexpected artifacts be encountered during ground-breaking activities. Therefore, this factor is neutral. [10.2.3.6, A.H., Vol. I].

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

Mitigation was provided to compensate for permanent loss of ecological functions to valued wildlife habitats within the project. A functional analysis provided by the permittee affirmed that the mitigation is adequate to offset the loss. Additionally, both mitigation banks provide regional ecological value and greater long term ecological value (than the wetlands proposed to be impacted by this project) by retaining a connection to an Outstanding Florida Water, plus their on-site wetlands, which serve to treat runoff and remove contaminants, also provide for downstream detrital transport and thus enhance wildlife utilization. Both mitigation banks also have a perpetual management plan, which includes a prescribed burn program. The wetlands to be impacted within the project have been fragmented by I-95, existing Pioneer Trail, Williamson Blvd, an FP&L easement, and FDOT ponds. In

addition, the subject wetlands have become increasingly surrounded by development (such as Shell Point Colony, ERP Individual Permit No. 156663-4; Woodhaven, ERP Individual Permit No. 99970-7; Coastal Woods, ERP Conceptual Permit No. 109884-6; Turnbull Crossings, ERP Individual Permit No. 151739-1), which will increase the possible spread of exotic and nuisance vegetation species on the subject wetlands and limit the possibility of beneficial prescribed burns. Therefore, the purchase of mitigation bank credits from Farmton North and Lake Swamp Mitigation Banks will provide regional ecological value and greater long term ecological value within the same drainage basin than the wetlands proposed to be impacted by this project. Therefore, this factor is neutral. [10.2.3.7, A.H., Vol. I].

Therefore, District staff having balanced the above criteria, it has been determined that the project meets the criteria set forth in sections 10.2.3 through 10.2.3.7, ERP A.H. Volume I, and is clearly in the public interest.

(b) Will not cause unacceptable cumulative impacts upon wetlands and other surface waters as set forth in sections 10.2.8 - 10.2.8.2 of ERP A.H. Volume I.

In this case, mitigation was proposed in the same drainage basin as the impacts. Therefore, no adverse cumulative impacts are presumed to result by rule 10.2.8 (a), ERP A.H. Volume I.

(c) Located in, adjacent to or in close proximity to Class II waters or located in Class II waters or Class III waters classified by the Department of Agriculture and Consumer Services as approved, restricted, conditionally approved, or conditionally restricted for shellfish harvesting will comply with the additional criteria in section 10.2.5 of Volume I, as described in subsection 62-330.010(5), F.A.C.

The proposed activities do not occur in, adjacent, or close to Class II or Class III waters subject to shellfish regulation as described above.

(d) Involving vertical seawalls in estuaries or lagoons will comply with the additional criteria provided in section 10.2.6 of Volume I.

The project does not include any vertical seawalls and is otherwise removed from any estuaries or lagoons.

Wetland Summary Table

Pioneer Trail Interchange (New) Governmental/Institutional, Roadway

		Acres
Total Surface Water, Upland RHPZ and Wetlands in Project		
Wetlands		58.920
OSW		3.110
Upland RHPZ		0.000
	Total	62.030
Impacts that Require Mitigation		
Dredged or Filled		2.800
Dredged or Filled		7.530
Dredged or Filled		0.410
Dredged or Filled		2.540
Dredged or Filled		5.270
Dredged		11.590
Dredged or Filled		0.440
Dredged or Filled		11.510
Dredged or Filled		1.930
Dredged or Filled		2.490
Dredged or Filled		1.620
Dredged or Filled		0.320
Dredged or Filled		0.050
Dredged or Filled		0.200
Secondary		10.120
	Total	**58.820**
Impacts that Require No Mitigation		
Wetlands		0.100
Ponds		0.770
Ditches		2.340
	Total	**3.210**
Mitigation		
On-Site		
	Total	**0.000**
Off-Site		
	Total	**0.000**
Mitigation Bank UMAM Credits		**Reserved Credits 35.57**
Lake Swamp Mitg Bank - UMAM,17,Forested Freshwater		**3.19**
Farmton North - UMAM,17,Forested		**31.03**

Freshwater
Farmton North - UMAM,17,Herbaceous 1.35
Freshwater

Section 4: Conclusion

The applicant has provided reasonable assurance that the proposed project meets the conditions for issuance of permits specified in rules 62-330.301 and 62-330.302, F.A.C.

Conditions

1. All activities shall be implemented following the plans, specifications and performance criteria approved by this permit. Any deviations must be authorized in a permit modification in accordance with Rule 62-330.315, F.A.C. Any deviations that are not so authorized may subject the permittee to enforcement action and revocation of the permit under Chapter 373, F.S.

2. A complete copy of this permit shall be kept at the work site of the permitted activity during the construction phase, and shall be available for review at the work site upon request by the District staff. The permittee shall require the contractor to review the complete permit prior to beginning construction.

3. Activities shall be conducted in a manner that does not cause or contribute to violations of state water quality standards. Performance-based erosion and sediment control best management practices shall be installed immediately prior to, and be maintained during and after construction as needed, to prevent adverse impacts to the water resources and adjacent lands. Such practices shall be in accordance with the State of Florida Erosion and Sediment Control Designer and Reviewer Manual (Florida Department of Environmental Protection and Florida Department of Transportation June 2007), and the Florida Stormwater Erosion and Sedimentation Control Inspector's Manual (Florida Department of Environmental Protection, Nonpoint Source Management Section, Tallahassee, Florida, July 2008), which are both incorporated by reference in subparagraph 62-330.050(9)(b)5, F.A.C., unless a project-specific erosion and sediment control plan is approved or other water quality control measures are required as part of the permit.

4. At least 48 hours prior to beginning the authorized activities, the permittee shall submit to the District a fully executed Form 62-330.350(1), "Construction Commencement Notice," (October 1, 2013) (http://www.flrules.org/Gateway/reference.asp?No=Ref-02505), incorporated by reference herein, indicating the expected start and completion dates. A copy of this form may be obtained from the District, as described in subsection 62-330.010(5), F.A.C., and shall be submitted electronically or by mail to the

Agency. However, for activities involving more than one acre of construction that also require a NPDES stormwater construction general permit, submittal of the Notice of Intent to Use Generic Permit for Stormwater Discharge from Large and Small Construction Activities, DEP Form 62-621.300(4)(b), shall also serve as notice of commencement of construction under this chapter and, in such a case, submittal of Form 62-330.350(1) is not required.

5. Unless the permit is transferred under Rule 62-330.340, F.A.C., or transferred to an operating entity under Rule 62-330.310, F.A.C., the permittee is liable to comply with the plans, terms and conditions of the permit for the life of the project or activity.

6. Within 30 days after completing construction of the entire project, or any independent portion of the project, the permittee shall provide the following to the Agency, as applicable:

   a. For an individual, private single-family residential dwelling unit, duplex, triplex, or quadruplex — "Construction Completion and Inspection Certification for Activities Associated with a Private Single-Family Dwelling Unit" [Form 62-330.310(3)]; or

   b. For all other activities — "As-Built Certification and Request for Conversion to Operation Phase" [Form 62-330.310(1)].

   c. If available, an Agency website that fulfills this certification requirement may be used in lieu of the form.

7. If the final operation and maintenance entity is a third party:

   a. Prior to sales of any lot or unit served by the activity and within one year of permit issuance, or within 30 days of as-built certification, whichever comes first, the permittee shall submit, as applicable, a copy of the operation and maintenance documents (see sections 12.3 thru 12.3.4 of Volume I) as filed with the Florida Department of State, Division of Corporations and a copy of any easement, plat, or deed restriction needed to operate or maintain the project, as recorded with the Clerk of the Court in the County in which the activity is located.

   b. Within 30 days of submittal of the as- built certification, the permittee shall submit "Request for Transfer of Environmental Resource Permit to the Perpetual Operation and Maintenance Entity" [Form 62-330.310(2)] to transfer the permit to the operation and maintenance entity, along with the documentation requested in the form. If available, an Agency website that fulfills this transfer requirement may be used in lieu of the form.

8. The permittee shall notify the District in writing of changes required by any other regulatory District that require changes to the permitted activity, and any required modification of this permit must be obtained prior to implementing the changes.

9. This permit does not:

    a. Convey to the permittee any property rights or privileges, or any other rights or privileges other than those specified herein or in Chapter 62-330, F.A.C.;

    b. Convey to the permittee or create in the permittee any interest in real property;

    c. Relieve the permittee from the need to obtain and comply with any other required federal, state, and local authorization, law, rule, or ordinance; or

    d. Authorize any entrance upon or work on property that is not owned, held in easement, or controlled by the permittee.

10. Prior to conducting any activities on state-owned submerged lands or other lands of the state, title to which is vested in the Board of Trustees of the Internal Improvement Trust Fund, the permittee must receive all necessary approvals and authorizations under Chapters 253 and 258, F.S. Written authorization that requires formal execution by the Board of Trustees of the Internal Improvement Trust Fund shall not be considered received until it has been fully executed.

11. The permittee shall hold and save the District harmless from any and all damages, claims, or liabilities that may arise by reason of the construction, alteration, operation, maintenance, removal, abandonment or use of any project authorized by the permit.

12. The permittee shall notify the District in writing:

    a. Immediately if any previously submitted information is discovered to be inaccurate; and

    b. Within 30 days of any conveyance or division of ownership or control of the property or the system, other than conveyance via a long-term lease, and the new owner shall request transfer of the permit in accordance with Rule 62-330.340, F.A.C. This does not apply to the sale of lots or units in residential or commercial subdivisions or condominiums where the stormwater management system has been completed and converted to the operation phase.

13. Upon reasonable notice to the permittee, District staff with proper identification shall have permission to enter, inspect, sample and test the project or activities to ensure conformity with the plans and specifications authorized in the permit.

14. If prehistoric or historic artifacts, such as pottery or ceramics, projectile points, stone tools, dugout canoes, metal implements, historic building materials, or any other physical remains that could be associated with Native American, early European, or American settlement are encountered at any time within the project site area, the permitted project shall cease all activities involving subsurface disturbance in the vicinity of the discovery. The permittee or other designee shall contact the Florida Department of State, Division of Historical Resources, Compliance Review Section (DHR), at (850) 245-6333, as well as the appropriate permitting agency office. Project activities shall not resume without verbal or written authorization from the Division of Historical Resources. If unmarked human remains are encountered, all work shall stop immediately and the proper authorities notified in accordance with Section 872.05, F.S. For project activities subject to prior consultation with the DHR and as an alternative to the above requirements, the permittee may follow procedures for unanticipated discoveries as set forth within a cultural resources assessment survey determined complete and sufficient by DHR and included as a specific permit condition herein.

15. Any delineation of the extent of a wetland or other surface water submitted as part of the permit application, including plans or other supporting documentation, shall not be considered binding unless a specific condition of this permit or a formal determination under Rule 62-330.201, F.A.C., provides otherwise.

16. The permittee shall provide routine maintenance of all components of the stormwater management system to remove trapped sediments and debris. Removed materials shall be disposed of in a landfill or other uplands in a manner that does not require a permit under Chapter 62-330, F.A.C., or cause violations of state water quality standards.

17. This permit is issued based on the applicant's submitted information that reasonably demonstrates that adverse water resource-related impacts will not be caused by the completed permit activity. If any adverse impacts result, the District will require the permittee to eliminate the cause, obtain any necessary permit modification, and take any necessary corrective actions to resolve the adverse impacts.

18. A Recorded Notice of Environmental Resource Permit may be recorded in the county public records in accordance with Rule 62-330.090(7), F.A.C. Such notice is not an encumbrance upon the property.

19. This permit for construction will expire five years from the date of issuance.

20. At a minimum, all retention and detention storage areas must be excavated to rough grade prior to building construction or placement of impervious surface within the area to be served by those facilities. To prevent reduction in storage volume and percolation rates, all accumulated sediment must be removed from the storage area prior to final grading and stabilization.

21. All wetland areas or water bodies that are outside the specific limits of construction authorized by this permit must be protected from erosion, siltation, scouring or excess turbidity, and dewatering.

22. The operation and maintenance entity shall inspect the stormwater or surface water management system once within two years after the completion of construction and every two years thereafter to determine if the system is functioning as designed and permitted. The operation and maintenance entity must maintain a record of each required inspection, including the date of the inspection, the name and contact information of the inspector, and whether the system was functioning as designed and permitted, and make such record available for inspection upon request by the District during normal business hours. If at any time the system is not functioning as designed and permitted, then within 30 days the entity shall submit a report electronically or in writing to the District using Form 62-330.311(1), "Operation and Maintenance Inspection Certification," describing the remedial actions taken to resolve the failure or deviation.

23. This permit does not authorize the permittee to cause any adverse impact to or "take" of state listed species and other regulated species of fish and wildlife. Compliance with state laws regulating the take of fish and wildlife is the responsibility of the owner or applicant associated with this project. Please refer to Chapter 68A-27 of the Florida Administrative Code for definitions of "take" and a list of fish and wildlife species. If listed species are observed onsite, FWC staff are available to provide decision support information or assist in obtaining the appropriate FWC permits. Most marine endangered and threatened species are statutorily protected and a "take" permit cannot be issued. Requests for further information or review can be sent to FWCConservationPlanningServices@MyFWC.com.

24. Before the start of any construction, the permittee must provide the District with documentation demonstrating that 31.03 forested freshwater UMAM mitigation credits and 1.35 herbaceous freshwater UMAM mitigation credits have been debited from the Farmton North UMAM Mitigation Bank. If the permittee does not successfully complete the transaction to obtain the mitigation credits from the Mitigation Bank, the permittee must obtain a permit modification to provide alternative mitigation.

25. Before the start of any construction, the permittee must provide the District with documentation demonstrating that 3.19 forested freshwater UMAM mitigation credits have been debited form the Lake Swamp Mitigation Bank. If the permittee does not successfully complete the transaction to obtain the mitigation credits from the Mitigation Bank, the permittee must obtain a permit modification to provide alternative mitigation.

26. The proposed project must be constructed and operated as per plans received by the District on February 2, 2022, and December 14, 2022.

27. In accordance with Section 4.2.3.(d), ERP Applicant's Handbook, Volume I, work cannot begin until proof of sufficient real propety interest is provided to the Agency.

28. Thirty days prior to initiation of construction, the permittee shall submit a detailed erosion and sediment control plan to the District for written approval. The plan shall detail all erosion and sediment control measures to be implemented both during and after construction. At a minimum the plan shall include:

    a. Identification of any areas where any dewatering will be performed during construction;

    b. Details of specific erosion and sediment control measures to be implemented to control the discharge of turbid water due to any dewatering activities; and

    c. Construction sequencing and location of all areas of material stockpiling and equipment staging: and

    d. Details of all erosion and sediment control measures to be implemented during each sequence of construction.

    Construction shall not commence until the permittee receives written approval of the plan from the District.

29. Before the start of any construction, the permittee must schedule a pre-construction meeting on site with District staff the environmental consultant, and the contractor to review the permit conditions, plans and environmental concerns.