SJR 2022-006

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

EDWARD CECE and ANNA CECE,

Petitioners,

and

MARCOS ROMERO,

Intervenor,

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT and CEDAR ISLAND HOMEOWNERS ASSOCIATION OF FLAGLER COUNTY, INC.,

Respondents.
_____/

DOAH Case No. 21-3391

SJRWMD F.O.R. No. 2021-33

FINAL ORDER AND ORDER OF REMAND

The Division of Administrative Hearings, by its designated Administrative Law Judge, the Honorable Garnett W. Chisenhall ("ALJ"), held a formal administrative hearing in the above-styled case on January 12 – 14, 2022. The hearing transcript, in three volumes, was filed on February 14, 2022. The Proposed Recommended Orders ("PROs") were due within 30 days of the ALJ's ruling on: (a) the District's Motion to Strike Late-Disclosed Expert Opinions; and (b) Petitioners' Motion to Strike Certain Expert Witness Testimony. The ALJ ruled on said motions on February 22, 2022. On March 23, 2022, Petitioners filed an unopposed Motion requesting the deadline to file PROs be extended to March 28, 2022, which was granted by the ALJ on March 24, 2022. All four parties filed timely PROs.

On May 2, 2022, the ALJ's issued an Order Denying Petitioners' Motion for Attorney's Fees and Costs.

Also on May 2, 2022, the ALJ submitted a Recommended Order ("RO") to the St. Johns River Water Management District ("District"), a copy of which is attached as Exhibit "A." The RO contains findings of fact and conclusions of law regarding Environmental Resource Permit ("ERP") application 70686-9 to modify stormwater management system calculations for the Cedar Island subdivision to increase in the amount of impervious area allowed on Cedar Island. Petitioners Edward and Anna Cece ("Petitioners"), along with Intervenor Marcos Romero ("Intervenor"), Respondents Cedar Island Homeowners Association of Flagler County, Inc. ("Applicant"), and District staff filed timely exceptions to the Recommended Order[1]. Petitioners and Intervenor filed timely joint responses to the District's and Applicant's exceptions. District staff filed timely responses to Petitioners' and Intervenor's exceptions.

On May 17, 2022, the Applicant waived the timeframes in sections 120.60 and 373.4141, Florida Statutes ("Florida Statutes" or "Fla. Stat."),[2] for issuance of the Final Order in this case until July 29, 2022. On May 26, 2022, District staff filed a Notice of Filing Copy of Waiver of Deadlines with the District Clerk, which attached a copy of the Applicant's May 17, 2022, waiver. On June 6, 2022, Petitioners and Intervenor filed a "Joint Notice of Filing Opposition Papers by the Petitioners and by the Intervenor to the 'Copy of Waiver of Deadlines' Filed by the St. Johns River Water Management District on May 26, 2022."

Following the filing of their exceptions and responses to exceptions, Petitioners and Intervenor made several post-hearing filings[3] which are not considered in this Final Order because they are outside the scope of section 120.57, Florida Statutes.

[1] Petitioners' exceptions numbered one through four were filed on May 9, 2022. On May 16, 2022, Petitioners filed amended exceptions correcting the date of the TSR referenced in paragraph 5 in exception number 1, and adding two additional exceptions – exception numbers 5 and 6.
[2] References to statutes are to Florida Statutes (2021), unless otherwise noted.
[3] The post-hearing submittals include two Demands for Default Judgment and a "Motion for Declaratory Judgment."

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

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 70686-9 ("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. (RO at p. 35).

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, 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 1992); *Heifetz v. Dep't of Bus. Regul.*, 475 So.2d 1277, 1281-82 (Fla. 1st DCA 1997). A finding of fact

[4] The District's Governing Board has, pursuant to the legislative mandate contained in section 373.079(4)(a), F.S., delegated to the Executive Director the authority to take final agency action on permit applications under Part IV of Chapter 373, F.S., except when the recommended final action is substantive denial. *See* Dist. Policy 120, ¶(8) (03/08/22). Because counsel for the Governing Board of the District recommends a limited remand of this matter back to the Division of Administrative Hearings to consider one issue, this matter now comes before the Executive Director for final agency action.

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); C*harlotte Cnty v. IMC Phosphates Co.*, 18 So.3d 1089 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So.2d 61 (Fla. 1st DCA 2007); *Herrin v. Volusia Cnty*., et al. Case No. 11-2527 p. 3 (Fla. DOAH Jan. 24 2012; Fla. DEO March 29, 2012) (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*., Case No. 12-3427 (Fla. DOAH July 3, 2013; Fla. DEP Jan. 15, 2014). 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. et al v. Dep't Env't Pro. & Georgia-Pacific Corp., Case No. 01-2442, 2002 WL 1906114, at *5 (Fla. DOAH July 3, 2002; Fla. DEP Aug. 6, 2002) (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); *Cf. 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.*, 29 F.A.L.R. 4063 (Fla. DEP 2007) (the agency has no substantive jurisdiction over procedural issues, such as whether an issue was properly raised, and over an ALJ's evidentiary rulings); *Lardas v. Dep't of Env't Prot.*, 28 F.A.L.R. 3844, 3846 (Fla. DEP 2005) (evidentiary rulings of the ALJ concerning the admissibility and competency of evidence are not matters within the agency's substantive jurisdiction).

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*., Case. No. 98-3879 (Fla. DOAH March 10, 1999; Fla. DEP April 23, 1999); *Kenneth Walker & R.E. Oswalt d/b/a Walker/Oswalt v. Dep't of Env't Prot.*, Case No. 96-4318BID (Fla. DOAH Dec. 16, 1996; Fla. DEP March 11, 1997); *Worldwide Inv. Grp., Inc. v. Dep't of Env't Prot.*, Case No. 97-1498 (Fla. DOAH Mary 7, 1998; Fla. DEP June 19, 1998). 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 meant to assist the agency in evaluating and ultimately ruling on exceptions by providing legal argument and citations to the record.

Petitioners filed four exceptions to the ALJ's Recommended Order on May 9, 2022, and filed amended exceptions on May 16, 2022, correcting a date in one of the prior-filed exceptions and adding two additional exceptions. On May 17, 2022, the District filed one exception to the Recommended Order and the Applicant filed four exceptions. Petitioners and Intervenor filed timely joint responses to the District's and Applicant's exceptions. The District filed timely exceptions to the Petitioners' amended exceptions and the Intervenor's exceptions. This order makes rulings on each exception.[5]

[5] To the extent that exceptions or responses to exceptions contained exhibits not entered into evidence in this case, that new evidence was not considered in preparation of this Final Order.

IV. RULING ON EXCEPTIONS[6]

A. Ruling on Petitioners' and Intervenor's Exceptions

Petitioners' Exception Nos. 1 and 5 and Intervenor's Exception No. 2 (COLs 88 and 89)

Petitioners' Exception No. 1 and Intervenor's Exception No. 2

In their Exception No. 1, Petitioners take exception to Conclusions of Law ("COL") 88 and 89, which relate to the ALJ's determination that the Applicant made a prima facie case of entitlement to the Permit in accordance with paragraph 120.569(2)(p), Florida Statutes. The gravamen of Petitioners' Exception No. 1 is that the Applicant and the District failed to adequately establish their *prima facie* case in the manner set forth by paragraph 120.569(2)(p), Florida Statutes. Petitioners contend that because the "original" Technical Staff Report (TSR), dated September 30, 2021, is allegedly not available for review through the District's online e-permitting file, the Applicant and the District did not properly submit the "application file" in the manner contemplated by the statute.

Petitioners and Intervenor do not dispute that both the "original" TSR, dated September 30, 2021, as well as the "revised" TSR, dated December 17, 2021, were accepted into evidence in the final hearing for this matter.[7] *See*, Jt. Ex. 2 at 286-294; Jt. Ex. 3; T. 30:09-20. Moreover, this is a *de novo* proceeding intended to formulate final agency action, not to review agency action taken previously or preliminarily. *Young v. Dep 't of Cmty. Aff.,* 625 So.2d 831, 833 (Fla.

[6] 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). 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., Jt. Ex. 2). Citations to the Recommended Order will be designated by "RO" page (p.) or paragraph (¶) number (e.g., RO at 13; RO at ¶ 12). Citations to the District's Applicant's Handbook: Environmental Resource Permit Applicant's Handbook Volume I (General and Environmental) (December 22, 2020) and Volume II (June 1, 2018) will be designated by the abbreviation "AH" followed by the volume number ("Vol. I" or "Vol. II") and the section number (e.g., AH Vol. I §3.4.1(b)). Citations to the parties' exceptions will be referred to "Pet./Intvr./App./Dist. Exception(s) at", "Pet/Intvr./App./Dist. Response to Pet./Intvr./App./Dist. Exception(s) at", followed by the page number. References to Petitioners' Exceptions refer to Petitioners' Amended Exceptions filed with the District on May 16, 2022.

[7] Notably, the "revised" TSR was admitted as *a joint exhibit offered by all four parties*.

1993); *Hamilton Cnty. Bd. of Cnty. Comm 'r v. Dep 't of Env't Regul.*, 587 So.2d 1378, 1387 (Fla. 1st DCA 1991). "Because this is a *de novo* proceeding, and not merely a review of the prior agency action, the parties may present additional evidence not included in the permit application and other documents previously submitted to the [agency] during the permit application review process." *FINR II, Inc. v. CF Indus., Inc.*, Case No. 11-6495, 2012 WL 1564904, at *18 (Fla. DOAH Apr. 30, 2012; Fla. DEP June 6, 2012) (citations omitted).

Moreover, to the extent that Intervenor objects to District staff's characterization of the TSR dated September 30, 2021, as being a "prior draft", the TSR became merely a draft when the District intended agency action was rendered non-final by the filing of Petitioners' Petition for Administrative Hearing. *See* paragraph 120.57(1)(k), Fla. Stat.; *Capeletti Bros. Inc. v. State, Dep't of Transp.*, 362 So.2d 346 (Fla. 1st DCA 1978) (an agency's intended action is merely preliminary and cannot become final until a final order is rendered after an administrative hearing); *Nelson v. Dep't of Agriculture & Consumer Serv.*, 424 So.2d 860 (Fla. 1st DCA 1983) (an intended agency action, once a timely petition for hearing is filed, becomes no action at all); *Miles v. Fla. A&M Univ.*, 813 So.2d 242 (Fla. 1st DCA 2002) (agency's decision does not become final until after the formal administrative hearing is concluded).

It is worth noting that Petitioners' Exception No. 1 is contrary to the position they took in their PRO wherein they proposed the following conclusion of law: "[t]he HOA presented a prima facie case for entitlement to the Modification Permit. Therefore, the burden of ultimate persuasion was on Petitioners to prove their case in opposition to the permit." (Pet. PRO at COL 82). It is also noteworthy that the substance of Petitioners' Exception No. 1 has already been denied in a separate post-trial ruling by the ALJ. *See* Joint Exhibit 3; *see also* Order Denying Petitioners' Motion Alleging Fraud, dated March 7, 2022. To the extent that Petitioners are

seeking to have the District overturn the ALJ's Order through this exception, it is inappropriate and is outside the District's substantive jurisdiction. *Barfield*, 805 So.2d 1008; *Lane*, 29 F.A.L.R. 4063; *Lardas*, 28 F.A.L.R. at 3846.

As discussed in Section III, above, the District may only reject a conclusion of law over which it has substantive jurisdiction, provided the rejection is as, or more reasonable than, the ALJ's conclusion. §120.57(1)(l), Fla. Stat. The District does not have substantive jurisdiction over section 120.569(2)(p), Florida Statutes, and therefore, cannot reject the ALJ's interpretation of that statute. *Matlacha Civic Ass'n, Inc. et al. v. City of Cape Coral and Dep't of Env't Prot.*, DOAH Case No. 18-6752 (Fla. DOAH Dec. 12, 2019; Fla. DEP March 11, 2020); *City of Jacksonville v. Dames Point Workboats, LLC, and Dep't of Env't Prot.*, DOAH Case No. 18-5246 (Fla. DOAH March 1, 2019; Fla. DEP April 12, 2019). Moreover, procedural and evidentiary rulings are the exclusive province of the ALJ, and the District has no authority to modify them. *See Goss*, 601 So.2d at 1235; *Peace River*, 18 So.3d at 1088; *Rogers*, 920 So.2d at 30; *Brown*, 667 So.2d at 979. Even if paragraph 120.569(2)(p) was within the District's substantive jurisdiction, Petitioners and Intervenor have not offered a legal basis for their assertion that the Applicant and District failed to establish their *prima facie* case; therefore, the District is not required to rule on the exception. §120.57(1)(k), Fla. Stat.

Petitioners' Exception No. 5

In Petitioners' Exception No. 5, Petitioners again take exception to COL Nos. 88 and 89 of the Recommended Order, but with additional claims that because the "Original" TSR is allegedly not in the District's online e-permitting file, the District has allegedly "fabricated" evidence and/or committed evidence tampering in contravention of section 918.13, Florida

Statutes. Petitioners also seek a District ruling on their related evidentiary questions contained in paragraphs 101 to 103 of their Amended Exceptions.

As discussed above, the District only has authority to review the ALJ's conclusions of law contained within the Recommended Order if they are, among other things, within the District's substantive jurisdiction. §120.57(1)(1), Fla. Stat. The District's authority arises out of chapter 373, Florida Statutes. *See generally* §373.069, Fla. Stat. (creation of water management districts), §373.073, Fla. Stat. (duties of the governing board), §373.4131, Fla. Stat. (water management districts have jurisdiction to implement and interpret the statewide environmental resource permitting rules). Chapter 918 of the Florida Statutes provides no authority to water management districts and is thus not within the District's substantive jurisdiction. Insofar as Petitioners are intending to make an argument based on the Florida Evidence Code, the District likewise lacks substantive jurisdiction to review the ALJ's evidentiary decisions. *See Goss,* 601So.2d at 1235; *Peace River,* 18 So.3d at 1088; *Rogers,* 920 So.2d at 30; *Brown,* 667 So.2d at 979. To the extent that the Petitioners seek to have the District make additional or supplemental findings of fact or conclusions of law, the District lacks the ability to do so. *See Fla. Power & Light Co.,* 693 So.2d 1025; *Boulton,* 643 So.2d 1103.

Additionally, as discussed above, both the "Original" and "Revised" TSRs were accepted into evidence at the final hearing for this matter as *joint exhibits.* *See* Jt. Ex. 2, pgs. 286-294; Jt. Ex. 3; T. 30:09-20. To the extent that Petitioners take exception to District staff revising the TSR, this is a *de novo* proceeding intended to formulate final agency action, and an agency is allowed to consider additional material or reconsider previously submitted material as part of a permit application. *See Young,* 625 So.2d at 833; *Hamilton Cnty.*, 587 So.2d at 1387. *See also FINR II Inc.*, 2012 WL 1564904 at *18.

For the reasons stated above, Petitioners' Exception Nos. 1 and 5 and Intervenor's Exception No. 2 are rejected.

Petitioners' Exception No. 2 (FOF 16 and 78-83 and COL 106)

In their Exception No. 2, Petitioners take exception to Findings of Fact ("FOFs") 16 and 78 – 83 and COL 106, arguing that the Dash 9 permit did not specifically seek to modify the aspects of the Dash 3 permit applying the District's Outstanding Florida Waters (OFW) criteria and, therefore, the paragraphs referenced above are outside the scope of the District's review for the Dash 9 permit. Thus, Petitioners argue FOFs 80 – 83 and COL 106 should be stricken.[8]

The District's ability to reject or modify findings of fact is limited to a determination from a review of the entire record that (1) the finding of fact is not based on competent substantial evidence or (2) that the proceedings on which the finding of fact was based did not comply with the essential requirements of the law. §120.57(1)(l), Fla. Stat. If a finding is supported by any competent substantial evidence from which the finding could be reasonably inferred, the finding cannot be disturbed. *Freeze,* 556 So.2d 1204; *Berry,* 530 So.2d 1019. Moreover, 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,* 18 So.3d at 1088; *Rogers,* 920 So.2d at 30; *Brown,* 667 So.2d 977. 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,* 580 So.2d 846.

The Petitioners do not allege the findings of fact are not based on competent substantial evidence or that the proceedings on which the finding of fact was based did not comply with the

[8] Petitioners include FOFs 16 and 79 in Exception No. 2; however, Petitioners agree that FOF 16 is correct, and they do not address FOF 79. Additionally, Petitioners do not request FOF 78 be rejected or modified.

essential requirements of the law as their basis for challenging the FOFs 78 – 83. Rather, Petitioners attempt to reargue their case and have the District reweigh the evidence, which it cannot do. *Goss,* 601 So.2d at 1235; *Peace River,* 18 So.3d at 1088; *Rogers*, 920 So.2d at 30; *Brown*, 667 So.2d 977.

Based on a review of the record, FOFs 78 – 83 are supported by competent substantial evidence in the form of expert testimony and evidentiary exhibits. *See* Jt. Ex. 2, pgs. 13, 17, 19-25; Jt. Ex. 3, pg. 3; T: 336:15-24; 338:13-24; 487:07 – 489:03 (FOF 78); Jt. Ex. 2, pgs. 19-25; Jt. Ex. 3; T. 336:19-24; 338:11-24; 488:11 – 489:03 (FOF 79); Jt. Ex. 3, pg. 3; T. 486:11 – 489:03; 604:15 – 605:23 (FOF 80); T. 337:23 – 338:10; 419:07-25 (FOF 81); T. 68:17 – 69:19; 205:11-17; 206:11-22; 208:21 – 210:07; 212:06 – 213:2; 241:20 – 242:15 (FOF 82). As an ultimate finding of fact, FOF 83 is likewise supported by the competent substantial evidence referenced above.

Petitioners also take exception to COL 106 on the basis that COL 106 is outside the scope of the Dash 9 Permit and should be stricken. The District may only reject a conclusion of law over which it has substantive jurisdiction, provided the rejection is as, or more reasonable than, the ALJ's conclusion. §120.57(1)(l), Fla. Stat. Petitioners do not provide an alternate interpretation of a statute or administrative rule over which the District has substantive jurisdiction that is as or more reasonable than the ALJ's interpretation of the rule. Thus, the District need not rule on this portion of the exception. *Id*.

Based on the above, Petitioners' Exception No. 2 is rejected.

Petitioners' Exception Nos. 3 and 6 (FOF 51 and COLs 96 and 97)

Petitioners' Exception No. 3

In their Exception No. 3, Petitioners take exception to FOF 51 and COLs 96 and 97 contending that the Applicant lacks sufficient real property interest over the land upon which the activities subject to the Dash 9 permit will be conducted and, consequently, that the application does not demonstrate reasonable assurance that it satisfies the District's conditions for issuance contained within Florida Administrative Code Rule 62-330.301(1)(j).

In support of their exception, Petitioners attempt to reargue one of the theories they presented in this case. *See* T. 74:02 – 77:15. The District does not have authority to reweigh the evidence, judge the credibility of witnesses, or to reinterpret the evidence. *See Goss*, 601 So.2d 1235; *Peace River*, 18 So.3d at 1088; *Rogers*, 920 So.2d at 30; *Brown*, 667 So.2d at 979; *see also* RO, COL Nos. 94-95. The ALJ is the ultimate fact finder and unless the finding of fact is not supported by competent substantial evidence it will not be rejected or modified. *See Health Care and Ret. Corp. of America v. Dep't of Health and Rehab. Srvs.*, 516 So.2d 292, 296 (Fla. 1st DCA 1987); *Heifetz*, 475 So.2d at 1281; *Schumacker v. Dep't of Pro. Regul., Div. of Real Estate*, 611 So.2d 75 (Fla. 4th DCA 1992); *Belleau v. State, Dep't Env't Prot.*, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); *Walker v. Bd. of Pro. Eng'r*, 946 So.2d 604, 605 (Fla. 1st DCA 2006); *Gross v. Dep't of Health*, 819 So.2d 997, 1001 (Fla. 5th DCA 2002). Finding of Fact 51 is supported by competent substantial evidence. *See* T. 467:10-25; 558:13 – 559:10. Thus, FOF 51 cannot be rejected or modified. *See Health Care and Ret. Corp.*, 516 So.2d at 296; *Heifetz*, 475 So.2d at 1281; *Schumacker*, 611 So.2d 75; *Belleau*, 695 So.2d at 1307; *Walker*, 946 So.2d at 605; *Gross*, 819 So.2d at 1001.

As a basis for their exceptions to COLs 97 and 98, Petitioners contend the COLs are "irrational and reckless" (Pet. Exception at ¶ 43) and "false and preposterous" (Pet. Exception at ¶¶ 78, 79). Petitioners do not identify a legal basis for their exceptions to COLs 97 and 98, nor do they advance an interpretation of rule 62-330.301(1)(j) that is as or more reasonable than the interpretation contained within the Recommended Order. Thus, the District need not rule on Petitioners' exceptions to COLs 97 and 98. §120.57(1)(l), Fla. Stat.

Petitioners' Exception No. 3 also contains various references to Petitioners' apparent belief that the Dash 9 permit, if authorized, will somehow effectuate a taking. *See* Petitioners' Exceptions at ¶¶ 61-62, 70-72. The District does not have the jurisdiction to adjudicate constitutional claims. *Fla. Hosp. v. Ag. for Health Care Admin.*, 823 So.2d 844, 849 (Fla. 1st DCA 2002); *Mahaney v. Garber Hous. Resorts, LLC and Fla. Dep't of Env't Prot.*, 2019 WL 6492494, at *10 (DOAH Case No. 19-3429; OGC Case No. 19-0310) ("[A]n administrative law judge in this type of proceeding does not have the authority to decide constitutional issues"). Further, these arguments were not raised by the Petitioners' Petition for Administrative Hearing or included in the Joint Prehearing Stipulation for this matter and are therefore outside the scope of this proceeding. *See Mutchnik, Inc. Const. v. Dimmerman*, 23 So.3d 809, 810 (Fla. 3d DCA 2009) ("the trial court committed error when it based its judgement on issues not raised by the parties in the pleading"); *Woodholly v. Fla. Dep't of Nat. Res.*, 451 So.2d 1002, 1004 (Fla. 1st DCA 1984) (issue that was not included in the petition or agreed in the prehearing stipulation could not be injected into the proceeding in the proposed recommended order); *Fla. Dep't of Transp. v. J.W.C. Co., Inc.*, 396 So.2d 778, 789 (Fla. 1st DCA 1981) (petitioner must identify the areas of controversy, allege a factual basis, and move the facts asserted in his petition). Additionally, the Dash 9 permit cannot effectuate a taking because it, by its own terms, does not

purport to "convey to the permittee or create in the permittee any property right, or any right, or any interest in real property . . ." *See* Jt. Ex. 1, pg. 6.

Petitioners' Exception No. 6 (FOF 51)

In their Exception No. 6, Petitioners take renewed Exception to FOF 51, alleging that the District's expert witness committed perjury under section 837.021, Florida Statutes, and therefore, the ALJ reached FOF 51 in error. Petitioners then reiterate their belief that their Motion for Attorney's Fees and Costs was denied in error.

The District does not have jurisdiction over the sections of the criminal code contained within chapter 837, Florida Statutes. Nor can the District make additional findings. *Fla. Power & Light Co.*, 693 So.2d 1025; *Boulton,* 643 So.2d 1103.

As a finding of fact, the District is only permitted to modify the ALJ's findings if it can determine that they are not supported by competent substantial evidence. *Health Care and Ret. Corp.*, 516 So.2d at 296; *Heifetz,* 475 So.2d at 1281; *Schumacker,* 611 So.2d 75; *Belleau,* 695 So.2d at 1307; *Walker*, 946 So.2d at 605; *Gross,* 819 So.2d at 1001. As referenced above, there is competent substantial evidence in the record to support FOF 51. T. 467:10-25; 558:13 – 559:10. The District is not permitted to rule on evidentiary matters or to determine the credibility of witnesses. *See Goss,* 601 So.2d at 1235; *Peace River,* 18 So.3d at 1088; *Rogers,* 920 So.2d at 30; *Brown,* 667 So.2d at 979. As it relates to Petitioners' request that the District review the ALJ's prior Order, the District lacks substantive jurisdiction to review the ALJ's rulings based on chapter 57, Florida Statutes. *See* §57.105(5), Fla. Stat. ("In administrative proceedings under chapter 120, *an administrative law judge* shall award a reasonable attorney's fee and .... Such award shall be a final order subject to judicial review pursuant to s. 120.68. . . .

A voluntary dismissal by a nonprevailing party does not divest *the administrative law judge* of jurisdiction to make the award described in this subsection.") (emphasis added).

Based on the foregoing, Petitioners' Exception Nos. 3 and 6 are rejected.

Petitioners' Exception No. 4
(Order Denying Petitioners' Motion for Attorney's Fees and Costs dated May 2, 2022)

In their Exception No. 4, Petitioners take exception to the ALJ's Order Denying Petitioners' Motion for Attorney's Fees and Costs, dated May 2, 2022 (the "Order"). Petitioners' Motion for Attorney's Fees and Costs was filed pursuant to section 57.105, Florida Statutes, which, as a statute concerning civil procedure, is outside the District's substantive jurisdiction and therefore, cannot be modified by the District. *See* §57.105(5), Fla. Stat. ("In administrative proceedings under chapter 120, *an administrative law judge* shall award a reasonable attorney's fee and . . . Such award shall be a final order subject to judicial review pursuant to s. 120.68. . . . A voluntary dismissal by a nonprevailing party does not divest the *administrative law judge* of jurisdiction to make the award described in this subjection.") (emphasis added). Moreover, chapter 120, Florida Statutes, does not authorize the District to review the ALJ's collateral rulings that are not contained within the Recommended Order. *See* §120.57(1)(k), Fla. Stat. ("The agency shall allow each party 15 days to submit exceptions *to the recommended order*.") (emphasis added). Therefore, Petitioners' Exception No. 4 is rejected.

Intervenor's Exception No. 1

In his Exception No. 1, Intervenor adopts Petitioners' May 9, 2021 [sic] Exceptions as his own.[9]

[9] Petitioners' May 9, 2022, Exceptions are identical to Petitioners' Amended Exception numbers 1 – 4, except that Petitioners' Amended Exception No. 4 includes a revised date reference in paragraph 5 of that exception. Petitioners' Amended Exceptions also include two new exceptions – Exception Nos. 5 and 6 – which are not incorporated by reference in Intervenor's Exceptions.

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. *See Palafox,* 2015 WL 3525201at *11. Thus, an exception that simply refers to or attempts to incorporate by reference another exception fails to comply with the statutory requirements of section 120.57(1)(k), Florida Statutes, and need not be ruled on. *Id.*

Notwithstanding the above, the District incorporates its rulings on Petitioners' Exception Nos. 1 – 4, above, herein.

Intervenor's Exception No. 3 (Preliminary Paragraph of RO)

In Intervenor's Exception No. 3, Intervenor takes exception to the preliminary language on page 8 of the Recommended Order immediately before the beginning of FOF 1, which states that the ALJ drafted the Recommended Order in consideration of the "entire record of this proceeding." Intervenor then claims that because the RO does not recite the Order Denying Petitioners' Motion Alleging Fraud on the Court, or the Order Denying Petitioners' Second Motion Alleging Fraud on the Court, both dated March 7, 2022, in the Recommended Order's preliminary statement, Intervenor should be permitted to task the District with ruling on the questions posed in paragraphs 27-30 of Intervenor's Exception No. 3.

Intervenor's Exception No. 3 appears to request that the District make various additional or supplemental findings of fact to be included in the Final Order. This is entirely improper, as the District cannot make additional or supplemental findings of fact. *Fla. Power & Light Co.*, 693 So.2d 1025; *Boulton,* 643 So.2d 1103.

To the extent that Intervenor's Exception No. 3 requests the District to make additional or supplemental conclusions of law, the District is only permitted to reject or modify conclusions of

law at this stage of the administrative process, and as such the District lacks authority to create new conclusions of law. *See* §120.57(1)(l), Fla. Stat. Intervenor's questions appear to relate to Petitioners' Motion Alleging Fraud on the Court, upon which the Administrative Law Judge already ruled, and which are outside the District's substantive jurisdiction. *See e.g., G.E.L. Corp. v. Dep't of Env't Prot.*, 875 So.2d 1257, 1263-64 (Fla. 5th DCA 2004) (Florida Department of Environmental Protection's substantive jurisdiction extends to environmental issues but not to technical matters of law concerning, for example, reviewing an administrative law judge's ruling on a motion for attorney's fees).[10] *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So.2d 1140, 1144 (Fla. 2d DCA 2001) (Florida Department of Environmental Protection did not have substantive jurisdiction to review the administrative law judge's legal conclusion applying the legal doctrine of collateral estoppel).

Based on the foregoing, Intervenor's Exception No. 3 is rejected.

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

District Exception No. 1 and Applicant's Exception Nos. 1, 2, and 4 (COLs 98, 103, 104, and 105)

In its Exception No. 1, District staff take exception to COLs 103, 104, and 105. Similarly, in its Exception Nos. 1, 2, and 4, the Applicant takes exception to COLs 103, 104, and 105, in addition to COL 98. These COLs relate to the ALJ's general determination that the application for the Dash 9 permit does not provide assurance of compliance with Florida Administrative Code rules 62-330.301(1)(a), (b), or (c), because the proposed project has

[10] The Florida Department of Environmental Protection and the state's water management districts, including the St. Johns River Water Management District, are responsible for implementing the statewide environmental resource permitting rules. *See* § 373.4131(2)(a), Fla. Stat. ("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 the department 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 the department under this part. . . .").

existing compliance items pending. The ALJ concluded that the stormwater management system must be modeled based on its *current* condition, rather than the *proposed* condition, for purposes of evaluating whether the modified stormwater management system calculations meet the conditions for issuance. District staff and the Applicant (collectively, "Respondents") take exception to these conclusions of law on generally the same grounds: (1) that Florida Administrative Code rule 62-330.302(2) was not at issue in this case; and (2) in the alternative, if rule 62-330.302(2) was properly at issue in this proceeding then: (a) those conclusions attempt to improperly apply the analysis contemplated by rule 62-330.302(2) to the permitting criteria contained in rules 62-330.301(1)(a), (b), and (c); and (b) the Applicant provided reasonable assurance in accordance with rule 62-330.302(2). Additionally, Respondents request the case be remanded back to the ALJ for findings related to the application of rules 62-330.301(1)(a), (b), and (c) to the *proposed* project, rather than the *existing* condition.

Conclusions of Law 98, 103, 104, and 105 state:

> 98. In addition to demonstrating that it has sufficient real property interest, the Association must also provide reasonable assurance that it will satisfy the applicable criteria set forth in rule 62-330.301, rule 62-330.302, and Volumes I and II of the Applicant's Handbook.
>
> 103. As discussed above in the Findings of Fact, Mr. Mullon's testimony regarding the deficiencies in the modeling is persuasive and is accepted. The District and the Association offered no persuasive reasoning as to how any "reasonable assurances" within the meaning of rule 62-330.301(1) can be drawn from a model using data that does not accurately reflect the current condition of Cedar Island's stormwater management system.
>
> 104. While the District argues that any issues with Cedar Island's stormwater management system may be remedied at some indeterminant time in the future via the District's compliance function, the plain language of rule 62-330.301 unambiguously requires that the required reasonable assurances come from the applicant rather than the District. The Association never expressed any definitive intent that it would bring the system to its design specifications, including having its members correct their encroachments onto the VNBs.

105. For the reasons set forth herein, the application for the Dash 9 permit does not provide reasonable assurances of compliance with rule 62-330.301(a), (b), or (c). Thus, the application must be denied.

In Section I of the District's Exception No. 1, and in Applicant's Exception Nos. 1 and 4, Respondents essentially contend that Petitioners failed to raise the issue of whether reasonable assurance has been provided by the applicant in accordance with rule 62-330.302 (specifically subsection 62-330.302(2)) in their Petition for Administrative Hearing and, therefore, rule 62-330.302 was not properly before the Tribunal. Respondents thus contend rule 62-330.302 cannot be used as a basis for denial. (Dist. Exception No. 1, at p 4; App. Exception Nos. 1 and 4, at pp 2 and 11, respectively). In its Exception No. 1 at footnote 3, District staff point out that its Motion in Limine, which sought to limit the use of evidence related to noncompliance issues associated with the Dash 4 permit and was filed the same day as the Joint Prehearing Stipulation, was not ruled upon until after the conclusion of the final hearing. District staff further contend that this is a procedural matter outside the District's substantive jurisdiction, but raises it to preserve the issue for a future appeal. The Applicant contends in its Exception Nos. 1 and 4 that without giving the parties an opportunity to present evidence and/or argument, the ALJ departed from the essential requirements of law by denying due process (App. Exception No. 1 at p 2; App. Exception No. 4 at pp 9-12), and thus, COLs 98, 104 and 105 departed from the essential requirements of the law.

The ALJ's ruling on the District's Motion in Limine is purely procedural and evidentiary in nature. The District lacks subject matter jurisdiction to overturn an ALJ's ruling on procedural and evidentiary issues. *Barfield,* 805 So.2d 1008, 1012 (the agency lacked jurisdiction to overturn an ALJ's evidentiary ruling); *Lane,* 29 F.A.L.R. 4063 (the agency has no substantive jurisdiction over procedural issues, such as whether an issue was properly raised, and

over an ALJ's evidentiary rules); *Lardas*, 28 F.A.L.R. 3844, 3846 (evidentiary rulings of the ALJ concerning the admissibility and competency of evidence are not matters within the agency's substantive jurisdiction).

Further, an agency may only reject or modify a conclusion of law 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. §120.57(1)(l), Fla. Stat. As discussed above, the District lacks subject matter jurisdiction to overturn an ALJ's ruling on procedural and evidentiary issues. *Id.* While the District cannot rule on procedural and evidentiary issues, it should be noted that the issue of compliance was raised by Petitioners in paragraphs 5.d. and 6.a. of their Amended Petition for Administrative Hearing.

In Section II of the District's Exception No. 1, and in Applicant's Exception No. 2, Respondents contend that, assuming arguendo, if rule 62-330.302(2) was properly at issue in this proceeding, then the Association provided reasonable assurance in accordance with the rule and COLs 103-105 should be modified insofar as those conclusions of law attempt to apply the analysis contemplated by rule 62-330.302(2) to the permitting criteria in rules 62-330.301(1)(a), (b), and (c).

When ruling on an exception to a conclusion of law, the District must follow section 120.57(1)(l), Florida Statutes, which provides:

> The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified.

§120.57(1)(l), Fla. Stat.

Rule 62-330.302(2) is clearly within the District's substantive jurisdiction. *See* §373.4131(2)(a), Fla. Stat. The District has substantive jurisdiction over the interpretation of its rules, including chapter 62-330. *Id.* Additionally, the District has substantive jurisdiction over the enforcement of its rules and should be given deference[11] in its enforcement matters. *Morgan v. Dep't of Env't Prot.*, 98 So.3d 651, 654 (Fla. 3d DCA 2012) ("[A]ppropriate deference must be afforded to the expertise of the agency enforcing state's environmental laws. Diligence does not require 'far-reaching or zealous' prosecution, nor must an agency's prosecutorial strategy coincide with that of the citizen-plaintiff. To second-guess the agency's assessment of the appropriate remedy 'fails to respect the statute's careful distribution of enforcement authority . . .'. There is a presumption of diligence on the part of the agency in prosecution of its cases and this presumption cannot be overcome simply because the agency's prosecution strategy is less aggressive than one would like. *See Karr v. Hefner*, 475 F.3d 1192, 1197 (10th Cir. 2007)" citing *St. Johns Riverkeeper, Inc. v Jacksonville Elec. Auth.*, No. 3:07-CV-739-J-34(TEM), 2010 WL 745494, at *9 (M.D. Fla. Mar. 1, 2010)). Therefore, the District may reject or modify COLs 103-105 as they relate to the application of the analysis contemplated by rule 62-330.302(2), to the permitting criteria contained in rules 62-330.301(1)(a), (b), and (c).

In COLs 103-105, the ALJ concluded that the applicant did not provide reasonable assurances that it meets the conditions for issuance in 62-330.301(a), (b), or (c) because the applicant never expressed a definitive intent that it would bring the system to its design

[11] Discretion over enforcement matters is a different type of deference than the *Chevron*-type deference that is now limited by Article V, Section 21 of the Florida Constitution.

specifications. The ALJ's application of 62-330.302(2) is misplaced under the circumstances of this case.

Rule 62-330.302 is titled *Additional conditions for issuance of individual and conceptual approval permits*. The first part of that rule, subsection 62-330.302(1), requires an applicant provide reasonable assurance that the construction, alteration, operation, and abandonment of a project will meet certain additional environmental criteria, which are not applicable here. However, the second part of the rule, subsection 62-330.302(2), does not require an applicant to provide reasonable assurance of a particular permitting criteria. Rather, subsection (2) requires the District, when determining whether an applicant has provided reasonable assurance that the permitting standards in chapter 62-330 have been met, *to consider* an applicant's violation of any rule adopted under part IV of chapter 373 (which includes chapter 62-330), and efforts taken by the applicant to resolve those violations.

The District's permitting standards applicable to COLs 103 – 105 are found in subparagraphs (1)(a), (b), and (c) of Rule 62-330.301. However, the only reference in rule 62-330.301 to reasonable assurance in the context of rule 62-330.302, is found in section (4), which provides that:

> (4) *The standards and criteria used to determine whether the reasonable assurances required in this section and rule 62-330.302, F.A.C., have been provided . . . are contained in Volume I, incorporated by reference in subsection 62-330.010(4), F.A.C., and Volume II, incorporated by reference in subsection 62-330.010(4), F.A.C., for the applicable District*.

Fla. Admin. Code R. 62-330.310(4) (emphasis added).

When reviewing the Applicant's Handbooks, the only reference to violations in the context of rule 62-330.302 is in section 8.1 of the Applicant's Handbook, Vol. I, which reads:

> 8.1 Purpose
> The criteria explained in this part are those that have been adopted by the Agency in evaluating applications for individual and conceptual approval permits, with the exception of those individual permits described in Rule 62-330.054(4), F.A.C. The staff recommendation to approve any individual or conceptual approval permit will be based upon a determination of whether reasonable assurance has been provided that the activity meets the criteria for evaluation, and whether the applicable permit fee has been submitted. In addition, *the staff recommendation to resolve any violation under Chapter 62- 330, F.A.C., also will be based upon a determination of whether reasonable assurance has been provided that the activity meets the criteria for evaluation in this part*.

(emphasis added).

Thus, in a case such as this, when a project is out of compliance and a modification to the permit is proposed to resolve the violation, section 8.1 of the Applicant's Handbook, Vol. I, requires a determination by the District that reasonable assurances have been provided that the resolution activity, i.e., the proposed permit modification, meets the applicable conditions for issuance in rules 62-330.301 and 62-330.302. To apply these rules differently may lead to impractical, and in some cases, unreasonable results. For example, if a hypothetical permit applicant were to construct a regulated system that deviates from the permitted plans but is still independently permittable via an after-the-fact permit, under the interpretation contemplated by COL Nos. 103-105, the District would not be able to authorize that existing permittable system without first requiring the permit applicant to achieve compliance by modifying that system to match the previously permitted plans. In effect, the permit applicant would be forced to deconstruct its already existing, desired, and independently permittable system to match the previously authorized plans to achieve compliance before then reconstructing the already-existing system that was demonstrated to be permittable.

Moreover, under section 8.1 of the Applicant's Handbook, Vol. I, full compliance with the District's rules and permits is not a condition for issuance.[12] Rather, the District is simply required to "*consider* the applicant's violation of any rules adopted pursuant to … Part IV, Chapter 373, F.S., and efforts taken by the applicant to resolve these violations." *See* Fla. Admin. Code R. 62-330.302(2). If a proposed project to resolve a violation meets the conditions for issuance, then the permit should be granted under section 8.1. The District has substantive jurisdiction over its enforcement program and, thus, the "toolbox" of mechanisms by which enforcement may be accomplished. In this case, District staff determined that the appropriate tool for resolving the pending impervious surface compliance item was a District permit modification.

The analysis applied by the ALJ in COL 103 – 105 is more akin to situations when a permit applicant has an existing permit for a system that is out of compliance and that permit applicant applies for a permit to construct an entirely different project at another location. In that type of case, it may be appropriate for the District to consider the applicant's "expression of definitive intent" along with efforts (or lack thereof) taken by the applicant to resolve the existing or past violations because it shows the applicant's willingness (or unwillingness) to comply with the permits it obtains.

[12] An agency is required to follow its rules as written, not as the agency might wish to modify them. *Boca Raton Artificial Kidney Ctr., Inc. v. Dep't of Health and Rehab. Serv.*, 493 So.2d 1055, 1057 (Fla. 1st DCA 1986); *Vantage Healthcare Corp. v. Ag. for Health Care Admin.*, 687 So.2d 306, 308 (Fla. 1st DCA 1997); *Collier Cnty. Bd. of Cnty. Comm'r v. Fish and Wildlife Conser. Comm'n*, 993 So.2d 69 (Fla. 2d DCA 2008). After promulgating a rule that interprets a statute, the agency may not change its interpretation of that statute without first amending its rule pursuant to established rulemaking procedures. *Cleveland Clinic Fla. Hosp. v. Ag. for Health Care Admin.*, 679 So.2d 1237, 1242 (Fla. 1st DCA 1996), *rev. denied, S. Broward Hosp. Dist. v. Cleveland Clinic Fla. Hosp.*, 695 So.2d 701 (Fla. 1997). Unless and until the District's rules are either amended or declared invalid in a successful rule challenge, the District must follow its rules that interpret the statutes governing ERP applications. *Id.*

In this case, the ALJ found that the District's compliance process is a separate, but parallel process to the District's permitting process. (RO, FOF 23). The Applicant was in the process of addressing the compliance items identified prior to the filing of the petition in this case. (RO, FOF 33). The Applicant submitted its application to modify its permit on June 4, 2021, approximately one month after the District sent the Applicant a "Compliance Investigation – Next Steps – Cedar Island" letter. (RO, FOFs 29, 30). The permit modification that is the subject of this proceeding was intended to address the impervious surface compliance issue as a change to the amount of impervious surface authorized under the permit, which requires a modification to the permit. RO, FOF 33, 36[13] ("In sum, the compliance process for the Dash 4 permit was already in process when the Association submitted the application for the Dash 9 permit"; "The modification is intended to address the increased lot imperviousness on lots that have been built and to specify the lot imperviousness for the lots yet to be built."). Thus, by applying the District's rule criteria, including the criteria in rule 62-330.301(1)(a), (b), and (c), to the activity proposed to resolve the violation (i.e., the permit modification), District staff did consider the applicant's past compliance as required by Applicant's Handbook, Vol. I, section 8.1.

As to the remainder of the later-found compliance issues (the violations associated with the pond elevation, weir and skimmer structures, and the top-of-berm elevations and encroachments into the vegetated natural buffers), the ALJ found them to be ones that can be corrected through repair and routine maintenance, which does not require a permit. (RO, FOF 26, 31, 33). Moreover, the deadline for the Applicant to respond to the District's compliance assistance letter did not run until after the time of the final hearing in this case. (RO, FOF 31).

[13] As noted above, Petitioners' exception to FOF 33 was rejected. No exception was taken to FOF 36.

Thus, even if an expression of definitive intent to conduct routine maintenance was necessary, a finding that the Applicant failed to show its intent to bring the stormwater system into compliance was premature.

Additionally, both the Applicant and the District have the necessary authority to bring the system into compliance. *See* RO, FOF 54 and COL 97.

The application of rule 62-330.302(2) as set forth above, is a more reasonable application than that contained in the Recommended Order.

In a case like this where there are associated compliance items, it may be appropriate to add a condition to the proposed permit to address any lingering concerns regarding the resolution of those pending compliance items. It is within the District's purview to add such conditions. *See* Fla. Admin. Code R. 62-330.350(2); *Avatar Dev. Corp. v. State*, 723 So.2d 199, 204 (Fla. 1998) (DEP utilizes its expertise and special knowledge to flesh out the Legislature's stated intent to prevent pollution by creating rules, regulations, and permit conditions necessary to effectuate the Legislature's overall policy of preventing and controlling pollution in the infinite variety of situations that may occur in which Florida's natural environment may be threatened.); *Jacobs v. Far Niente II, LLC*, 2013 WL 1853775, at *14, FOF 83 (A permit condition to ensure that the yard drains remain capped is appropriate and warranted.).

In section III of the District's Exception No. 1 and in Applicant's Exception No. 2, Respondents contend the case should be remanded back to the ALJ for consideration of whether the *proposed* project meets the conditions for issuance in Florida Administrative Code rules 62-330.301(1)(a), (b), and (c).

Due to the way he applied rule 62-330.302(2) to the facts of this case, the ALJ determined that the stormwater management system shall be modeled in its *current* condition,

rather than the *proposed* condition, for purposes of evaluating whether the modified stormwater management system calculations met the conditions for issuance. As discussed above, the pending compliance items do not automatically demonstrate a lack of reasonable assurances that the District's permitting criteria will be met. Accordingly, the appropriate modeling to consider in this case is the *proposed* condition.

This is consistent with rule 62-330.060(2), which requires the District to assess reasonable assurance based on the "proposed activities" in the permit application – not the currently existing system. *See* Fla. Admin. Code R. 62-330.060(2). ("The application must include all material requested in the application form . . . and other information needed to provide reasonable assurance that the *proposed activities* meet the conditions for issuance in Rule 62-330.301, F.A.C., the additional conditions for issuance in Rule 62-330.302, F.A.C., and the Applicant's Handbook." (emphasis added)). The Applicant's Handbook, Volume II, Section 2.0, also requires reasonable assurance that "the *proposed* activities will meet the criteria in rules 62-330.301 and 62-330.302" and that the project "[w]ill be capable, based on generally accepted engineering and scientific principles, of being performed and functioning *as proposed*." §§ 2.0 and 2.0(i), A.H., Vol. II.

Section 2.0 of the Applicant's Handbook, Vol. II, summarizes the criteria of subsection 62-330.301(1), F.A.C., with subsections 2.0(a)-(c) corresponding to subparagraphs 62-330.301(1)(a)-(c). *See* §2.0, A.H., Vol. II. Under section 3.1, A.H., Vol. II, projects that 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" "shall have a rebuttable presumption that they meet the criteria for issuance in paragraphs 2.0(a)-(c)." §3.1, A.H., Vol. II. Notably, under subsection 3.2.1(a)-(b), for applicable projects an applicant has to demonstrate that the "post-development peak discharge rate must not exceed the pre-

development peak rate of discharge" for certain storm events (the "mean annual 24-hour" and "25-year frequency, 24-hour duration"). §§ 3.2.1(a)-(b), Applicant's Handbook, Vol. II (emphasis added). If the fact-finder did not allow consideration of the post-development peak rate of discharge (i.e., the condition of the proposed project), then an applicant could not demonstrate that it meets sections 2.0(a)-(c), A.H., Vol. II, and hence subparagraphs 62-330.301(1)(a)-(c). By looking only at the existing condition, an applicant could almost never succeed in providing reasonable assurance that it meets the permitting criteria, unless it already constructed a sufficient stormwater pond and system without a permit. It is well established that when the language of a statute or rule is clear and unambiguous and conveys a clear and definite meaning, the statute or rule must be given its plain and obvious meaning. *See GTC, Inc. v. Edgar*, 967 So.2d 781, 785 (Fla. 2007).

During the final hearing, the Applicant submitted modeling and calculations based on the proposed project. *See* RO, FOF 61-64. However, there are no findings as to whether the modeling and calculations for the proposed project meet the conditions for issuance in rules 62-330.301(a), (b), or (c). Therefore, a remand of this matter to the ALJ is warranted for further proceedings to determine whether the project as *proposed* meets the aforementioned conditions for issuance. *See, Putnam Cnty. Env't Council, Inc.,* 2002 WL 1906114 at *8.

The application of Florida Administrative Code Rule 62-330.302(2), as set forth above, is a more reasonable application than that contained in the Recommended Order.

Based on the above, the District rejects Applicant's Exception Nos. 1 and 4 and rejects in part District's Exception No. 1 (regarding the ALJ's evidentiary rulings) and accepts Applicant's Exception No. 2 and the remainder of District's Exception No. 1 to COLs 103-105 to the extent necessary for a remand to DOAH for such further proceedings as are deemed necessary and

appropriate to determine whether the Applicant has provided reasonable assurance that its *proposed* project meet the conditions for issuance of a permit in Florida Administrative Code rules 62-330.301(1)(a), (b), and (c).

Additionally, as stated later below, inclusion of additional permit condition(s) should be considered if there is ultimately a recommendation to issue a permit in this case.

Applicant's Exception No. 3 (FOF 33)

In its exception No. 3, the Applicant takes exception to FOF 33 because it does not distinguish between "the two compliance processes that are referenced in the FOF of the RO." The Applicant contends that it is the issues raised in the December 22, 2021, compliance assistance letter that the ALJ relied upon in concluding that reasonable assurance was not provided pursuant to rule 62-330.301 and Applicant's Handbook, Vol. II, Section 2.0. The Applicant further contends that FOF 33 is not accurate and is inconsistent with FOF 28 and 31 to the extent that it implies that the compliance process for the Dash 4 permit was already in process when the Applicant filed the Dash 9 permit because it does not identify which compliance process it is referring to. This is not a proper exception to a FOF. A FOF can only be modified or rejected if it is not supported by competent substantial evidence or does not comply with the essential requirements of the law. *See*, §120.57(1)(l), Fla. Stat. Finding of Fact 33 is supported by competent substantial evidence (T: 456:03 – 457:09; 540:08-24), and thus, cannot be disturbed. §120.57(1)(l), Fla. Stat.

The Applicant also contends this is prejudicial because it implies that the compliance issues raised in the December 22, 2021, compliance assistance letter were already in process at the time the permit was filed, a fact that appears to be critical to COL 104-105. As discussed in the ruling on District's Exception No. 1 and Applicant's Exception Nos. 1, 2, and 4, above, it is

not the failure to distinguish between the two compliance processes that is the error, it is the misapplication of rule 62-330.302(2) to rule 62-330.301(1)(a), (b), and (c), to the facts in this case. Moreover, FOF 33 can be construed in a manner that is consistent with FOFs 28 and 31. Notably, FOF 29 refers to a compliance letter dated April 5, 2021, and FOF 30 notes that "the Association sought the permit modification at issue on June 4, 2021."

For the reasons stated, Applicant's Exception No. 3 is rejected.

ACCORDINGLY, IT IS HEREBY ORDERED:

This case is remanded to DOAH for such further proceedings as are deemed necessary and appropriate, which may include the following:

1. Determine whether permit application number 70686-9 meets the conditions for issuance of a permit under Florida Administrative Code rules 62-330.301(1)(a)-(c), based on the *proposed* condition of the stormwater management system (rather than its existing condition);

2. If the application meets the conditions for issuance, consider whether it would be appropriate to include a permit condition specifying which plans apply to the permit (for operation and maintenance purposes); and

3. If the application meets the conditions for issuance but there are existing violations at the project site, consider whether it would be appropriate to include an additional permit condition[14] similar to the following:

[14] Such a condition should not be used as a substitute for determining upfront whether the applicant provided reasonable assurance of meeting applicable permitting criteria. *Compare Metro Dade Cnty. v. Coscan Fla., Inc.*, 609 So.2d 644, 648 (Fla. 3d DCA 1992)(ALJ erred in relying on removal agreement (if water quality violation occurred) instead of determining upfront whether proposed project would cause a water quality violation) *with City of Jacksonville v. Dames Point Workboats, LLC*, 2019 WL 2437541 at *25, DOAH Case No. 18-5246 (FDEP April 12, 2019)("… ALJ's finding . . . is consistent with the holding in *Coscan*, because the ALJ examined the anticipated effects of the permit conditions before finding the permit conditions of the proposed Project provided reasonable assurances regarding compliance with water quality standards").

The increased impervious area, based on the calculations received by the District on June 4, 2021, as authorized by this permit, shall not take effect until all outstanding compliance items referenced in the District's December 22, 2021, Compliance Assistance Offer Letter have been addressed to the satisfaction of the District as confirmed by the District in writing. *See* District Compliance Item no. 1396589. To satisfy this condition, within 30 days of completing all the work required to address the outstanding compliance items, permittee shall submit to the District Form 62-330.310(1), "As-Built Certification and Request for Conversion to Operation Phase," demonstrating that such compliance has been achieved. The Form must be certified by a Florida licensed professional engineer. After inspection of the site by the District, if all outstanding compliance items have been fully addressed, the District shall send a letter to the permittee confirming compliance with this condition.

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT

By: _____
Michael A. Register, P.E.
Executive Director

RENDERED this 28th day of July, 2022.

By: Heather Middleton 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:

Petitioners, Pro Se
Edward and Anna Cece
580 Shearwood Drive
Flagler Beach, Florida 32136
intrapro@yahoo.com

Intervenor, Pro Se
Marcos Romero
561 Shearwood Drive
Flagler Beach, FL 32136
marcosromero@bellsouth.net and
marcosromero650@gmail.com

Respondent Cedar Island Homeowners Association of Flagler County, Inc.
c/o Jay W. Livingston, Esquire
Livingston & Sword, P.A.
391 Palm Coast Parkway SW #1
Palm Coast, FL 32137
jay.livingston314@gmail.com

Respondent St. Johns River Water Management District
c/o Jessica Quiggle, Esquire and
Steven Kahn, Esquire
St. Johns River Water Management District
P.O. Box 1429
Palatka, FL 32178-1429
jquiggle@sjrwmd.com
skahn@sjrwmd.com

on this 28th day of July, 2022.

Karen Ferguson

Exhibit "A"

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EDWARD CECE AND ANNA CECE,

Petitioners,

and

MARCOS ROMERO,

Intervenor,

vs. Case No. 21-3391

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT AND CEDAR ISLAND HOMEOWNERS ASSOCIATION OF FLAGLER COUNTY, INC.,

Respondents.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted on January 12 through 14, 2022, in Palatka, Florida, before Garnett W. Chisenhall, a duly designated Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioners:

Edward J. Cece, pro se[1]
580 Shearwood Drive
Flagler Beach, Florida 32136

[1] William Earnshaw represented Petitioners from the outset of the instant case through the final hearing. On February 14, 2022, Mr. Earnshaw moved to withdraw as Petitioners' counsel, citing irreconcilable differences. The undersigned issued an Order on February 16, 2022, granting that Motion.

For Intervenor:

Marcos Antonio Romero, pro se
561 Shearwood Drive
Flagler Beach, Florida 32136

For Respondent St. Johns River Water Management District:

Jessica Pierce Quiggle, Assistant General Counsel
Steven J. Kahn, Assistant General Counsel
St. Johns River Water
Management District
4049 Reid Street
Palatka, Florida 32177

For Respondent Cedar Island Homeowners Association of Flagler County, Inc.:

Jay William Livingston, Esquire
Livingston & Sword, PA
391 Palm Coast Parkway Southwest, #1
Palm Coast, Florida 32137

STATEMENT OF THE ISSUE

Whether the Cedar Island Homeowners Association of Flagler County, Inc. ("the Association") has provided reasonable assurances justifying issuance of Environmental Resource Permit ("ERP") No. 70686-9 ("the Dash 9 permit"), which approves modified stormwater management system calculations for the Cedar Island subdivision ("Cedar Island").

PRELIMINARY STATEMENT

On September 30, 2021, the St. Johns River Water Management District ("the District") issued a notice of its intent to issue the Dash 9 permit to the Association. The Dash 9 Permit is a modification of an existing operation and maintenance ERP, Permit No. 70686-4 ("the Dash 4 permit"), in that it approves modified stormwater management system calculations for Cedar

Island. If the Dash 9 permit goes into effect, it would increase the amount of impervious area allowed on Cedar Island.

On October 22, 2021, Edward and Anna Cece ("the Ceces" or "Petitioners") filed a Petition for Administrative Hearing seeking to challenge the District's decision to issue the Dash 9 permit to the Association. The Ceces set forth the following allegation pertaining to how the District's decision implicated their substantial interests:

> Petitioners own the parcel at 580 Shearwood Dr, within [Cedar Island] in Flagler Beach, Florida. This has been Petitioners' primary residence since December of 2015. Petitioners' parcel is comprised of bound lots #1 and #3. The modification application submitted by [the Association] seeks to modify the maximum impervious surface area for all of the lots within Cedar Island, including Petitioners' parcel. The stormwater management system serves Petitioners' parcel, and any modification has the potential to impact Petitioners' property, but the specific request will limit the future use of Petitioners' property by limiting the impervious surface area for Petitioners' individual lot while disproportionately adding impervious area to other lots.
>
> All lot owners within Cedar Island are obligated to be members of [the Association]. [The Association] is the permittee regarding [District] Permit 70686-4. The Permit allowed for 38.06% impervious limitation. [The Association]'s Architectural Criteria allowed for a 35% per lot impervious limitation. In December of 2019, when less then half of the 32 lots were developed, Petitioners became aware of [the Association] permitting impervious overbuilding well in excess of the Permit's 38% limitation. In June of 2020, [Mr. Cece] initiated [District] inquiry number 1396589 expressing his concern that a pattern of impervious overbuilding would overload the Stormwater

> Management System and result in neighborhood flooding as the community became fully developed.
>
> The District's approval to allow an average impervious limitation amounting to 46.45% instead of the designed 38.07% will place the community at risk for potential flooding which would directly affect Petitioners' property interests.

After the District referred this matter to DOAH for a formal administrative hearing, the Ceces filed a Motion on November 12, 2021, requesting that the Association be added as a Respondent. The undersigned issued an Order on November 17, 2021, granting that Motion.

The undersigned issued a Notice of Hearing on November 18, 2021, scheduling the final hearing for January 12, 2022.

On November 19, 2021, Marcos Romero filed a Motion requesting to intervene in the instant case. In support thereof, Mr. Romero alleged that he lives on Cedar Island and opposes issuance of the Dash 9 permit. On December 20, 2021, the undersigned issued an Order granting Mr. Romero's Motion. However, the aforementioned Order specified that Mr. Romero would be unable to raise new issues and would have to accept the record and pleadings as they exist.

On December 28, 2021, the District filed a Motion seeking official recognition of Florida Administrative Code Chapter 62-330; the Environmental Resource Permit Applicant's Handbook, Volume I ("Applicant's Handbook, Volume I");[2] and the Permit Information Manual,

[2] The Applicant's Handbook, Volume I applies to the Florida Department of Environmental Protection and every water management district in Florida.

Volume II ("Applicant's Handbook, Volume II").[3] The undersigned issued an Order on December 29, 2021, granting the aforementioned Motion.

On January 3, 2022, the District filed a Motion in Limine seeking to have Petitioners and Mr. Romero precluded from offering testimony regarding economic damages. The District also sought to have Petitioners and Mr. Romero precluded from: (a) raising issues related to Permit No. 70686-3; and (b) presenting evidence that the Association has failed to comply with conditions set forth in the Dash 4 permit.

After a telephonic status conference on January 5, 2022, the undersigned issued a Notice on January 7, 2022, extending the hearing through January 13, 2022.

The final hearing was convened as scheduled on January 12, 2022. At the outset of the final hearing, the undersigned announced that he would reserve ruling on the District's Motion in Limine.

After conferring with the parties toward the close of business on January 13, 2022, the undersigned extended the final hearing to January 14, 2022.

Petitioners presented testimony from Edward Cece and Lee Mullon. Petitioners' Exhibits 10 through 12, 15, 19, and 21 were accepted into evidence. The undersigned reserved ruling on the District's relevancy objections to Petitioners' Exhibits 6, 8, 13, 16, 17, and 25. The District's objections to Petitioners' Exhibits 13 and 25 are sustained. The District's objections to Petitioners' Exhibits 6, 8, 16, and 17 are overruled.

[3] The Applicant's Handbook, Volume II, applicable in and utilized by the District, is included as part of the District's Permit Information Manual.

Intervenor testified on his own behalf, and Intervenor's Exhibits 1 through 4 were conditionally accepted into evidence subject to the undersigned considering the District's relevancy objections to Intervenor's Exhibits 1 through 4. The objections to Intervenor's Exhibits 1 and 4 are now sustained. The objections to Intervenor's Exhibits 2 and 3 are overruled. The District presented testimony from Cammie Dewey. The undersigned accepted the following exhibits from the District into evidence: 1 (along with the responses to the District's Request for Admissions), 6 through 9, 11 (along with the copy of Mr. Mullon's report attached thereto), and 14. The Association presented testimony from Steve Buswell. Association Exhibits 3, 4, and 7 were conditionally accepted into evidence subject to the undersigned ruling on the District's relevancy objections. The undersigned hereby overrules the District's relevancy objections to Association Exhibits 3, 4, and 7.

Joint Exhibits 1 through 4 were accepted into evidence.

On January 21, 2022, the District filed a Motion requesting that the undersigned strike certain opinions offered by Mr. Mullon because they were not disclosed during his deposition. On February 1, 2022, Petitioners filed a Motion requesting that the undersigned strike certain portions of Ms. Dewey's and Mr. Buswell's expert testimony as not being based on any scientifically reliable principals or methods. In support thereof, Petitioners cited *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993).

On February 8, 2022, Petitioners filed a "Motion for Attorney's Fees and Costs." In support thereof, Petitioners cited section 57.105, Florida Statutes (2021), and asserted that "[t]he claim made by the District that [the Association] has a sufficient real property interest or has otherwise provided sufficient proof of a real property interest sufficient to support the issuance of

the Permit is not supported by the material facts necessary to establish the claim or defense." The undersigned denied that Motion via an Order issued simultaneously with the instant Recommended Order.

The three-volume final hearing Transcript was filed on February 14, 2022. On February 19, 2022, the undersigned issued an Order stating that the parties' proposed recommended orders shall be filed within 30 days of the date that the undersigned rules on: (a) the District's Motion to Strike Late-Disclosed Expert Opinions; and (b) Petitioners' Motion to Strike Certain Expert Witness Testimony.

On February 22, 2022, the undersigned issued an Order ruling on the pending motions to strike and the District's pending Motion in Limine. With the exception of Mr. Mullon's opinions regarding the geotechnical report and whether it provided reasonable assurances for the Dash 9 permit, the undersigned ruled that the testimony and evidence at issue in the aforementioned motions could be considered. The February 22, 2022, Order Ruling on Pending Motions is adopted herein as though set forth in full.

On March 23, 2022, Petitioners filed an unopposed Motion requesting that the deadline for the parties' proposed recommended orders be extended to March 28, 2022. The undersigned issued an Order on March 24, 2022, granting the aforementioned Motion. On March 28, 2022, all four parties filed timely Proposed Recommended Orders.

On April 1, 2022, Petitioners filed a Motion seeking leave to amend their previously-filed Proposed Recommended Order. Petitioners' Amended Proposed Recommended Order was attached to the aforementioned Motion. On April 4, 2022, Petitioners filed a Motion seeking leave to further amend the Amended Proposed Recommended Order that was attached to their

April 1, 2022, Motion. The District filed a Response to the April 4, 2022, Motion stating it had no objection to the April 1, 2022, Motion because the District "could not identify any potential source of prejudice inherent to Petitioners' request in that motion." However, the District did object to the April 4, 2022, Motion as an attempt to admit new evidence into the proceeding. On April 5, 2022, the undersigned issued an Order denying the April 4, 2022, Motion. The undersigned issued a separate Order on April 5, 2022, granting the April 1, 2022, Motion and noting that the Proposed Recommended Order attached to the April 1, 2022, Motion would be considered during the preparation of the undersigned's Recommended Order.[4]

Because the instant case involves a permit application, the law currently in effect applies. Therefore, unless noted otherwise, all statutory references shall be to the 2021 version of the Florida Statutes. *See Lavernia v. Dep't of Pro. Regul.*, 616 So. 2d 53 (Fla. 1st DCA 1993).

FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing, stipulated facts, the entire record of this proceeding, and matters subject to official recognition, the following Findings of Fact are made:

The Parties

1. Petitioners are residents of Flagler County and own the real property identified as 580 Shearwood Drive, Flagler Beach, Florida 32136, which is known as lots 1 and 3 in Cedar Island.

2. Marcos Romero owns the real property identified as 561 Shearwood Drive, Flagler Beach, Florida 32136, which is known as Lot 8 in Cedar Island.

[4] The undersigned also considered the Proposed Recommended Orders filed on March 28, 2022, by Intervenor, the District, and the Association.

3. The Association is the homeowners' association for Cedar Island by virtue of the Declaration of Covenants and Restrictions recorded January 18, 2002, in Flagler County, Florida.

4. The District is a special taxing district of the State of Florida, created, granted powers, and assigned duties under chapter 373, Florida Statutes. The District's duties include the administration and enforcement of ERP requirements for the management and storage of surface waters pursuant to chapter 62-330.

The Cedar Island Subdivision and Its Stormwater Management System

5. Cedar Island is a 32-lot subdivision located in Flagler Beach, Florida. It consists of developed and vacant lots. As of December 2021, 18 homes on the lots had been fully constructed, three were under construction, and 11 lots were undeveloped.

6. The land upon which Cedar Island is located forms a peninsula with the Intracoastal Waterway to the west and a tributary of the Intracoastal Waterway, known as Mirror Lake, to the east. Mirror Lake and the Intracoastal Waterway connect at the southern end of Cedar Island.

7. The section of the Intracoastal Waterway to the west of Cedar Island is within the Tomoka Marsh Aquatic Preserve and is designated as an Outstanding Florida Water ("OFW").

8. Impervious surfaces are artificial, non-pervious surfaces that water cannot naturally percolate through or penetrate. Concrete, asphalt, and roofing shingles are examples of impervious surfaces. Water that strikes an impervious surface will "run off." That has significant implications for a residential subdivision because the aforementioned "run off" can cause damage or flooding issues. Adding impervious surface through additional development of a residential area increases the volume of stormwater runoff and leads to a corresponding increase in the amount of pollution carried by that stormwater runoff. In other words, larger amounts of impervious surfaces are generally correlated with larger amounts of stormwater runoff

that a stormwater management system will be expected to accommodate. Accordingly, residential subdivisions such as Cedar Island need a stormwater management system.

9. Cedar Island's stormwater management system consists of: (a) two interconnected wet detention ponds ("Ponds A and B") located on common area property owned by the Association; and (b) a series of 25-foot wide vegetative natural buffers ("VNB")[5] located within a conservation easement toward the rear of the majority of the lots in the community.

10. Lee Mullon, Petitioner's expert,[6] explained the two aspects of how wet detention ponds treat stormwater:

> One is the treatment volume. The other's the permanent pool volume. So the longer you hold on to water – so the longer a particle of water is in the pond, the more opportunity for treatment to occur and the cleaner the water would be before it [is] discharged. So that's considered the residence side. So how long, you know, a particle of water resides in a wet detention pond. The longer that it's held there, the cleaner or more treated that water would be before being released, and that's tied to the permanent pool volume.
>
> The treatment volume, with what we just looked at, helps to ensure that when you get a storm event, water – that kind of dirty stormwater that comes in [but] does not immediately discharge off site through that control (indiscernible). So they play together, the permanent pool volume and the treatment volume. But it's all to help ensure that water, that dirty stormwater, that gets into the pond stays in there for a reasonable amount of time before discharging. That way sediments that come into the pond have an opportunity to settle out and stay – and, you know, filter out to the pond bottom,

[5] The VNBs on Cedar Island are vegetated hill slopes.

[6] Mr. Mullon was accepted as an expert in the fields of civil engineering and stormwater management as they relate to land development engineering, such as residential/commercial developments and stormwater management environmental resource systems.

> as well as for other biologic functions that can occur that can reduce, say, the nutrient concentrations before discharging.

11. The stormwater discharge from Cedar Island through the VNBs to the west and south flows into the Tomoka Marsh Aquatic Preserve. Therefore, the discharge from those VNBs goes directly into an OFW and must satisfy the enhanced standards associated with direct discharges into an OFW. Those enhanced standards will be discussed in further detail below.

12. Water from Pond A flows to Pond B. Water from Pond B is discharged easterly to Mirror Lake via a weir.

13. Mr. Mullon described a weir as follows:

> It's a device that holds back water, so that if you have a reservoir, or a pond, until you fill up – you can fill up that reservoir, or pond, up to an elevation. All that water is kind of held in that system. Once the weir – it's just an opening that allows discharge to occur. So this is basically, a low point within that control structure, that once water fills up that pond sufficiently, it discharges over that weir.
>
> And this is important, because, if ponds don't have any kind of control mechanism, then there's a flood risk, because they'll fill up with water, and then that subdivision, or whatever the development is, could flood. So this is the device that allows water to discharge off site so as not to flood the development. So it's a water qual – it's a flood control structure.
>
> And so, as you can imagine, the wider the weir is, the more water is able to flow through. So something that's 40-foot wide is going to be able to flow much faster, or more flow rate is able to occur, than if something were only 24 foot. You know, think about a garden hose versus a fire hose. A fire hose is much bigger, so it's able to flow a lot faster. You're able to get a lot more water out quicker.

Cedar Island's Permitting History

14. Cedar Island's stormwater management system was originally authorized by Permit No. 70686-1, issued on October 11, 2001, to Emerald Coast Development Partners, LLC. That permit authorized the construction of a stormwater management system for a 32-lot single-family residential subdivision consisting of VNBs and two wet detention ponds.

15. Permit No. 70686-2 transferred ownership of the stormwater management system to Cedar Island, LLC on December 5, 2001.

16. Permit No. 70686-3 ("the Dash 3 permit") was issued on May 17, 2004, and was intended to modify the existing surface water management system to meet the enhanced criteria for discharge to an OFW. The Technical Staff Report for the Dash 3 permit noted that "[t]he existing [stormwater management system serving Cedar Island] discharges into the Tomoka Marsh State Preserve, an [OFW]."

17. The Dash 3 permit indicated that Cedar Island's stormwater management system was to serve a total impervious area for all of Cedar Island, including the lots and roads, of 128,505 square feet. That amounts to a maximum of approximately 38.06% impervious area within Cedar Island.

18. The Dash 3 permit included a condition that the proposed stormwater management system "must be constructed and operated in accordance with the plans received by the District on August 15, 2001 and as amended by the plans received by the District on September 9, 2003 and the plans received by the District on March 15, 2004."

19. The Dash 4 permit was issued on May 3, 2005, and authorized the transfer of the operation and maintenance of the stormwater management system to the Association. The Dash 4 permit, as modified, governs the stormwater management system. If granted, the Dash 9 permit will modify the Dash 4 permit.

The Current Condition of the Stormwater Management System

20. No current or recent survey of Ponds A or B or the VNBs has been performed by the Association. The only evidence of the dimensions of Cedar Island's stormwater management system comes from "as-built" plans dated June 5, 2002. Those plans were created when the stormwater management system was initially constructed and were submitted as part of the application for the Dash 9 permit.

21. The as-built plans show discrepancies between the stormwater management system's design and its actual construction. Pertinent differences between the system's design and actual construction include the following: (a) Pond A was constructed to a depth of between -4.2 feet and -4.7 feet instead of the designed -6 feet; (b) Pond B was constructed to a depth of -4.3 feet instead of the designed -8 feet; (c) the crested elevation of the weir is 4.29 feet rather than the design of 4.51 feet; and (d) the weir was constructed to a width of 24 feet instead the designed 40 feet.[7]

22. The District inspected the stormwater management system on December 3, 2021, and found several compliance issues such as: (a) accumulation of sediments in Ponds A and B, which reduces the permanent pool volume's treatment capacity; (b) erosion of the top of the berm elevation for both Ponds A and B, which is inconsistent with the design;

[7] Mr. Mullen explained why as-built characteristics often differ from their design: "So before – to get context, before construction occurs, there's a design – especially when nothing exists, you know, other than the native land and system. An engineer will develop a design, and based on their engineering plan, they will, essentially, make determinations of really the geometry of, you know, the site, at what elevation the buildings are going to go and what elevation the roads and the road drains are going to go, in order to drain the properties without flooding, and so if the buildings are located too low, so they would flood, et cetera. But that's just in the design. When it gets built, contractors are not perfect. There's always some deviation between what the engineer designed and what was actually constructed. And so, after construction occurs, an as-built survey takes place. And so, this is, typically, a survey or some measurements that were taken by a surveyor or – preferably a surveyor, sometimes an engineer, that, you know, measures what the contractor actually built the system to. So, for instance, what was the finished floor of a house. You know, if it's too low, then it might flood."

and (c) numerous areas of clearing or encroachment into the VNBs, which reduces their effectiveness to perform as intended.

The District's Efforts to Bring the Stormwater Management System into Compliance

23. The District's compliance process is separate, but parallel, to the District's permitting process. The District's compliance staff confers with the permitting engineers for technical guidance and rule application as needed.

24. When the District is notified that a site is inconsistent with a permit (whether it be by a member of the public or by virtue of a District staff member's observation), the District will contact the permittee.

25. If a project is not constructed in accordance with the permitted plans, or if maintenance needs to occur in order to bring the project into compliance, a compliance assistance letter is sent to the permittee asking the permittee to bring the project into compliance or obtain the proper permit modification.

26. A permit is not required for routine maintenance of systems legally in existence.

27. On June 26, 2020, Mr. Cece sent a letter to Brad Purcell, who was the District's ERP manager for its compliance group at the time, expressing his concern that new construction in Cedar Island would lead to the subdivision exceeding the 38.06% impervious area allowed within Cedar Island.

28. The District responded by sending the Association a letter dated October 15, 2020. The aforementioned letter was entitled "Compliance Assistance Offer" and referenced the Dash 4 permit. The District noted that it had received notice from a concerned citizen, and that a subsequent review by staff indicated that the lot development pattern within Cedar Island was inconsistent with the Dash 4 permit. The letter stated that its purpose was "to inform you of this violation and to offer you compliance assistance as a means of resolving the issue. Please respond in writing by October 29, 2020."

29. Mr. Purcell sent a letter dated April 5, 2021, to the Association's attorney. The letter was titled "Compliance Investigation – Next Steps – Cedar Island," and stated the following:

> Thank you for discussing by phone the ongoing investigation and next steps related to resolving the possible non-compliance with the above referenced permitted project. As you know, the project development patterns appear to have exceeded the capacity of the stormwater system, violating District rules and specific conditions of the current permit. Those conditions are:
>
> This permit authorizes the operation of the surface water management system as permitted and constructed. It does not authorize modifications to the existing system or the addition of stormwater discharge from areas outside the permitted project boundaries. (Condition 13)
>
> All operation and maintenance shall be as set forth in the plans, specifications, and performance criteria contained in this permit. (Condition 15)
>
> The District has provided your consulting engineer with staff's initial assessment of the development's stormwater system capacity. The approved water quality treatment calculations specify that the project was designed with an overall limitation of approximately 38% impervious surface without considering the value of the natural vegetated buffer. I have discussed the opportunity for the Homeowner's Association to provide a preliminary engineering report that outlines the current development intensity and possible solutions in the event the development is deemed to be inconsistent with the permit conditions.
>
> In addition, it has come to the District's attention that new construction is underway on lot 12, which is located at 598 Springdale Drive. This construction activity [ ] may exacerbate the current development intensity conditions. Therefore, it is recommended that no further

> construction activities occur within the subdivision until this investigation can be completed.
>
> Please note, violations of Florida Statutes or administrative rules may result in liability for damages and restoration, and the judicial imposition of civil penalties. Section 373.129, Florida Statutes, authorizes the District to enforce its rules and permits through legal action as necessary, and to seek substantial civil penalties per offense per day for violations of its rules or permits.
>
> Again, the District appreciates your continued cooperation in resolving this matter, please provide written confirmation by Thursday, April 8, 2021 that the District will receive the engineering report and any additional information related to the new construction on or before Friday, April 20, 2021.

30. As noted in the Preliminary Statement, the Association sought the permit modification at issue on June 4, 2021.

31. On December 22, 2021, Cammie Dewey, the District's chief engineer for permit review in the District's regulatory division, issued a letter to the Association entitled "Compliance Assistance Offer." Ms. Dewey's letter referenced the Dash 4 permit and stated the following:

> District staff inspected the Cedar Island [stormwater detention] ponds A and B, and select[ed] spot locations of the vegetated natural buffer on December 3, 2021. During this inspection and a review of the file the following non-compliance items were noted:
>
> Accumulation of sediments has occurred in both Ponds A and B, therefore reducing the permanent pool volume's treatment capability of the pond system. Normal maintenance procedures for a wet detention pond include periodic removal of the accumulation of the sediments.

Based upon the 2002 as-built survey and observations during the site inspection, the weir and skimmer structures (dimensions and elevation) of Pond B are not in accordance with the sequence 1 permit. Maintenance of these structures must occur to restore the pond system to its permitted condition.

Based upon the 2002 as-built survey, the top of the berm elevation for both ponds may have experienced erosion and therefore the design top of [the] berm elevation is not consistent with the permitted design. Maintenance of the berm is needed to restore the pond system to its permitted condition.

At each of the locations where the vegetated natural buffer was inspected, various activities by the individual homeowners have occurred within the limits of the buffer, including: removal or relocation of the easement markers; clearing and removal of ground cover vegetation; and, placement of recreational items. The limits of the vegetated natural buffer need to be established and markers placed so any items within the buffer can be removed and plantings can occur to restore the natural vegetative cover.

The purpose of this letter is to inform you of this violation and to offer you compliance assistance as a means of resolving the issue. Please respond in writing by January 21, 2022. Your written response should include the following:

Describe the steps that will be taken to resolve the non-compliance issue and provide a timeline to complete each non-compliance issue.

District staff offers to attend an [Association Board meeting] to explain to the homeowners that have a vegetated buffer within their lot the purpose of the buffer and the importance to protect the buffer.

> It is the District's desire that you are able to document compliance or corrective actions concerning the violations so that this matter can be closed without additional enforcement. However, failure to comply in a timely manner will result in the initiation of formal enforcement proceedings.

32. The District considers restoration of the pond bottom elevations to be routine maintenance. The District considers the issues with the weir and skimmer structures, and the top-of-berm elevations, to be ones that can be corrected through repair and routine maintenance.

33. In sum, the compliance process for the Dash 4 permit was already in process when the Association submitted the application for the Dash 9 permit. The District intended to complete the permitting process prior to finalizing the compliance process, but the instant litigation caused the District to pursue permitting and compliance simultaneously.

34. If the Association does not comply with the conditions of its permit, the District can issue a follow-up letter, contact the Association to collaborate on other compliance options, or eventually pursue enforcement proceedings in court.

The Proposed Modifications to the Dash 3 Permit

35. In November of 2020, the Association contacted Steven Buswell of Parker Mynchenberg & Associates, Inc. ("PMA") in order to determine how much impervious surface area was allowed in Cedar Island. In June of 2021, Mr. Buswell prepared and submitted the Association's application for approval of the Dash 9 permit. If authorized, the Dash 9 permit would have the effect of increasing the maximum allowable amount of impervious coverage for the entire area serviced by Cedar Island's stormwater

management system from 38.06% to 44.28% impervious.[8]

36. The modification is intended to address the increased lot imperviousness on lots that have been built and to specify the lot imperviousness for the lots yet to be built. However, the application does not contemplate any changes to the original design of Cedar Island's stormwater management system as described in the Dash 1 permit.

37. In preparing the application for the proposed Dash 9 permit, Mr. Buswell first determined the impervious area on the lots in Cedar Island that had already been developed. That involved a site inspection and an overlay of current aerials of the developed lots over a to-scale survey using AutoCAD.

38. An AutoCAD technician at PMA overlaid the information gathered from the aerials and the to-scale survey and then overlaid the current Google Earth aerial to make sure that it was to scale and matched up. The technician then determined the existing impervious area for each developed lot within Cedar Island.

39. Mr. Buswell then determined the maximum allowable impervious area that could be directed towards the stormwater system and performed calculations associated with the VNBs.

40. Using the design conditions from the Dash 1 permit, including the same storage relationships, overflow elevations, weir length, permanent pool calculations, etc., Mr. Buswell ran the calculations to determine the maximum allowable impervious area for Cedar Island. Those calculations

[8] The amended Technical Staff Report states that "[t]he project includes the modification of the impervious area for each lot as contained within the calculations submitted June 4, 2021. The District was notified that some of the lot development included an impervious footprint that exceeded the original design calculations. After discussions with [the Association] and their design consultant, the Dash 9 application was submitted. The modification is to address the increased lot imperviousness on lots that have been built and to specify the lot imperviousness for the lots remaining to be built. No changes to Ponds A and B or the vegetated upland buffer are proposed."

indicated that the maximum impervious area for Cedar Island can be increased from 38.06% to 44.28%. Mr. Buswell's calculations did not account for the differences in the stormwater management system as designed and the action conditions noted by the as-built survey.

41. The application for the Dash 9 permit contemplates that the Association, through its Architectural Review Board, will administer the future allocations of the remaining impervious area on a lot-by-lot basis.

The Association's Real Property Interest

42. As explained in more detail below under the Conclusions of Law section, an applicant seeking an ERP must have a sufficient real property interest over the land upon which the activities subject to the application will be conducted.

43. The Association holds a quitclaim deed demonstrating that Tracts A, B, and C, which includes Ponds A and B, have been conveyed to the Association. Thus, the Association owns Ponds A and B.

44. The Association's real property interest over Ponds A and B and the VNBs is evidenced by the Declaration of Covenants and Restrictions for Cedar Island ("Declaration"). For instance, Article II, Section 2.9 of the Declaration defines "Surface Water or Stormwater Management System" as follows:

> Section 2.9 Surface Water or Stormwater Management System. A system which is designed and constructed or implemented within the Property to control discharges which are necessitated by rainfall events, incorporating methods to collect, convey, store, absorb, inhibit, treat, use or reuse water to prevent or reduce flooding, overdrainage, environmental degradation, and water pollution or otherwise affect the quantity and quality of discharges from the system, as permitted pursuant to Chapters 40C-4, 40-C-40, or 40C-42, F.A.C. or regulations of similar import. For purposes of this Declaration, the Surface Water or Stormwater Management System shall be

> deemed to be a part of the Common Area and shall include any drainage swales located within the Property.

45. Article V, Section 5.1 of the Declaration states that the developer agreed that all common areas owned by the developer "shall be conveyed or assigned to the Association."

46. Article V, Section 5.4 of the Declaration provides that the Association "shall be responsible for the maintenance, operation and repair of the Surface Water or Stormwater Management System."

47. Under Article V, Section 5.5 of the Declaration, the Association has "an easement in, on, over and upon those portions of the Property [that] may be reasonably necessary for the purpose of maintaining the Common Area, including the Surface Water or Stormwater Management System."

48. As for the VNBs, Article X, Section 10.21 of the Declaration provides that they are part of Cedar Island's Stormwater Management System. That section further provides that "[n]o removal of nuisance plant species, and no replanting shall occur within the Buffer or any adjoining wetland area, without the prior written approval of the Association."

49. Article X, Section 12.6 of the Declaration notes that the Association "shall be solely responsible for all of the Developer's obligations and responsibilities for maintenance of the [stormwater management system] pursuant to all applicable Permits and the plat of the Subdivision."

50. Article IV of the Association's Articles of Incorporation mandates that the Association's powers include,

> the power to levy and collect adequate assessments against the Members for the costs of maintenance and operation of the [stormwater management system]. Such assessments shall be used for the maintenance and repair of the [stormwater management system], including but not limited to, work within retention areas, drainage structures and drainage easements.

51. The District's expert witness, Cammie Dewey,[9] testified that the land upon which the activities subject to the Dash 9 permit will be conducted is determined in reference to the location or locations where a given permit applicant has proposed to conduct regulated activities, such as construction. Ms. Dewey then explained that because the Dash 9 permit only seeks to authorize a modified set of stormwater calculations for Cedar Island's stormwater management system, the area where the proposed project would be conducted is the area where the stormwater system is physically located. As a result, Ms. Dewey is of the opinion that the Association is only required to demonstrate a sufficient real property interest over Ponds A and B and the VNBs.

52. The Association has the authority to approve and control improvements on the individual lots within Cedar Island through the architectural control covenants set forth in the Declaration.

53. The Association's Architectural Review Board ("ARB") has the ability to allocate impervious surface area to individual lots within Cedar Island. If the ARB chooses to deviate from the impervious area assigned to a specific lot by the Dash 9 permit, then the ARB would have to reduce the impervious surface area on other lots to ensure compliance with the maximum impervious surface area allowed in the Dash 9 permit. If the ARB wants to exceed the maximum impervious surface area allowed by the Dash 9 permit for all of Cedar Island, then it would have to apply for another modification from the District.

54. In sum, the Quitclaim Deed and the Declaration establish that the Association has sufficient real property interest over the land upon which the activities authorized by the Dash 9 permit will be conducted. The Quitclaim Deed and the Declaration also establish that the Association has sufficient

[9] Ms. Dewey was accepted as an expert in stormwater engineering, compliance, and regulatory permitting for the District. She has worked for the District for nearly 35 years. Since 2010, Ms. Dewey has acted as the chief engineer for the permit review engineers in the District's regulatory division.

rights and powers, including financial, legal, and administrative, to ensure that the activities authorized by the Dash 9 permit will be undertaken and that any separate compliance items will be addressed.

Findings Regarding the Dash 9 Permit Application

55. As noted above, Mr. Buswell's first step in his analysis of Cedar Island's existing impervious surface was to identify the amount of currently existing impervious surface throughout the subdivision. That task was accomplished by utilizing a to-scale survey of the project area, overlaying that with Google Earth aerial imagery, and then using AutoCAD to diagram the geometry of the existing impervious structures in order to calculate the total existing impervious area within Cedar Island. Mr. Buswell then calculated the maximum amount of impervious area that could be handled by Cedar Island's stormwater management system without potentially violating the District's regulations.

56. Mr. Mullon performed a similar analysis of Cedar Island's existing impervious surfaces and concluded that Mr. Buswell's estimate was approximately ten percent less than the actual amount.

57. Mr. Mullon's analysis caused him to be concerned that a full build out of the lots in Cedar Island may result in more impervious area than the stormwater management system can handle.

58. However, Mr. Mullon's analysis used roughly the same methodology as Mr. Buswell's. Also, Mr. Mullon's analysis assumed several areas were impervious without being certain those areas were actually impervious.

59. In sum, Petitioners failed to prove, by a preponderance of the evidence, that any error in Mr. Buswell's estimation of the amount of existing impervious surface in Cedar Island leads to a lack of reasonable assurances.

60. As discussed in more detail under the Conclusions of Law section, rule 62-330.301 requires, in pertinent part, that an applicant demonstrate that its proposal will not cause: (a) adverse water quantity impacts to receiving waters and adjacent lands; (b) adverse flooding to on-site or off-site

property; or (c) adverse impacts to existing surface water storage and conveyance capabilities.

61. In order to assess those factors, Mr. Buswell modeled the highest rate of stormwater flow leaving Cedar Island before it was developed and the post-development peak rate of discharge with Cedar Island at its potential maximum impervious build out.[10] However, the post-development modeling reflected the stormwater system in its design condition rather than the stormwater system in its "as-built" state.

62. Mr. Buswell also accounted for the several sub-basins located throughout Cedar Island so that he could "micro-model" the VNBs for each area that drains to it.

63. According to Mr. Buswell, the proposal will not cause adverse water quantity impacts to receiving waters and adjacent lands because the modeling indicated that the post-development peak rate of discharge would not exceed the pre-development peak rate of discharge.

64. Mr. Buswell[11] is also of the opinion that the proposal will not cause flooding to on-site or off-site property and that there will be no adverse impacts to existing surface water storage and conveyance capabilities.

65. As discussed above, the Association's determination that the maximum impervious area for Cedar Island can be increased from 38.06% to 44.28% is based on the design conditions from the Dash 1 permit rather than the "as built" survey dated June 5, 2002.

---

[10] In permitting stormwater management systems, or elements thereof, the District is guided by the principle that post-development stormwater volume cannot exceed pre-development stormwater volume ("the Pre/Post Requirement"). Stormwater in Cedar Island is directed into Ponds A and B or through the VNBs to satisfy the Pre/Post Requirement. Ponds A and B are connected, with discharges from Pond A flowing to Pond B. Discharges from Pond B go to Mirror Lake. Areas of Cedar Island that cannot drain to the ponds because of elevations or topography drain through the VNBs. Cedar Island's stormwater management system maintains water quality by treating stormwater in Ponds A and B before it discharges into Mirror Lake. Treatment is also provided via the VNBs that use the infiltration methodology.

[11] The parties stipulated that Mr. Buswell is an expert in subdivision stormwater system design and engineering.

66. Petitioner's expert, Mr. Mullon, is concerned that differences between the measurements from the 2002 as-built survey and the design measurements utilized in the Dash 9 permit application will affect the proposed stormwater calculations.

67. Also, given the amount of time since the stormwater system was built, it is likely that silt and sediment have accumulated in Ponds A and B, thus further reducing their depth from their design specifications.

68. Dredging the ponds to remove accumulated sediment would be routine maintenance. Deepening the ponds would be a simple matter of excavating dirt.

69. Mr. Mullon offered the following critique about the Association's expert running a model using the design numbers for weir length and width as opposed to the "as-built" numbers:

> Q: So would that – if the goal of – well, if the goal was to create a model that runs to reflect what the condition of the pond actually is that was built, would this model, using those numbers, after reviewing the as-builts, would that, actually, be what this is?
>
> A: So no. So I would say that these two values are amongst the most important two values you can have in this type of model. If those are incorrect, then you can't sufficiently judge what the model output is giving. So all of these values potentially go – are numbers in a computer software [model], and that computer software spits out the answer. And the important answer, for purposes of this permit, would really be two things. One, how much – what is the peak rate of discharge from the site, because that is regulated under ERP, the reasonable assurance criteria. So you can't exceed a certain peak discharge rate. So that would directly impact that.
>
> And the second thing would be the stage and the pond itself. That's important, as I said earlier, because you don't want to flood your own

> development. So you want to make sure that the model represents reality, so that you're not causing flooding conditions within the subdivision, but you also need to make sure that you're not discharging water too quickly, because that to is regulated by the ERP criteria.
>
> Q: And based on your review of this and your opinion, does this model, as it reflects what's intended to reflect a reality, does this give a reasonable assurance that the real – the system, as it sits today, meets the reasonable assurance criteria?
>
> A: No. It would – I would say – in my opinion would be no. The model would need to be – those values would need to be adjusted, as well as other potential input values in the model and then rerun. Essentially, re-execute the software to see what the new results are. Then you would compare that against what they're allowed to discharge and how, you know, high up the water's allowed to get in the pond to see if it's in compliance with that criteria. Yeah, looking at these values, it's impossible for me to say if the model would fail or pass, so to speak, without those numbers being updated and rerun.

70. According to Mr. Buswell, the weir could be raised about three inches and the skimmer could be reconstructed to match the design width. The District considers such work to be routine maintenance.

71. Mr. Mullon's concerns regarding the modeling are compelling. The District and the Association offered no persuasive reasoning as to why the model submitted with the application for the Dash 9 permit provided the "reasonable assurances" required by rule 62-330.301(1) when the data on which that model is based does not accurately reflect the current condition of Cedar Island's stormwater management system.

72. As noted above, Cedar Island's stormwater management system also utilizes VNBs. Because the VNBs discharge into an OFW, the runoff volume

from the 3-year, 1-hour storm (2.6 inches of rain falling within one hour) is required to infiltrate without any water traveling outside the VNB.

73. The model used by the Association to measure the effectiveness of the VNBs is from a prior version of the Applicant's Handbook, Volume II that was removed in the early 2000s and never replaced. Thus, the current version of the Applicant's Handbook, Volume II does not contain any guidelines for evaluating VNBs.

74. The District utilized the swale[12] methodology to evaluate the effectiveness of the Cedar Island VNBs to meet the infiltration requirements pertaining to 2.6 inches of rain falling within one hour. The swale methodology is contained in Section 27.0 of the Applicant's Handbook, Volume II.

75. Mr. Mullon's critiques of how the Association and the District evaluated the VNBs did not demonstrate that those evaluations were fundamentally flawed. Thus, Petitioners did not demonstrate by a preponderance of the evidence that the Association's or District's evaluation of the VNBs was deficient.

76. As discussed in more detail in the Conclusions of Law section, rule 62-330.301 also requires an applicant to provide reasonable assurances that the proposal "[w]ill not adversely affect the quality of receiving waters" to the point of violating certain state water quality standards. Special and additional standards apply if a stormwater management system directly discharges into an OFW. A "direct discharge" is defined as a point or non-point discharge which enters an OFW without an adequate opportunity for mixing and dilution.

77. With regard to water quality standards, there is special protection for waters deemed to be OFWs. During the final hearing, the parties disagreed

[12] The Applicant's Handbook, Volume II, Section 2.1(u), defines a "swale" as a manmade trench meeting specified design standards that is planted with or has stabilized vegetation suitable for soil stabilization, stormwater treatment, and nutrient uptake.

over whether Ponds A and B on the east side of Cedar Island directly discharge into an OFW.

78. The Association's application for the Dash 9 Permit indicates that a portion of Cedar Island's stormwater management system directly discharges into an OFW and a portion does not. Specifically, the VNBs along the western boundary of Cedar Island discharge directly into the Intracoastal Waterway, which, in that area, is designated as an OFW. Pond B discharges into Mirror Lake which, though not a listed OFW, eventually connects to the Intracoastal Waterway.

79. The portion of the VNBs that discharge directly into an OFW apply the additional standards associated with OFW criteria.

80. Ms. Dewey is of the opinion that Ponds A and B, which discharge to the east of Cedar Island into Mirror Lake, do not "directly discharge" into the Tomoka Marsh Aquatic Preserve, an OFW to the west of Cedar Island. While Ms. Dewey acknowledged that Mirror Lake is a perennial watercourse, she is of the opinion that waters discharged into Mirror Lake have an adequate opportunity for mixing and dilution before reaching the Tomoka Marsh Aquatic Preserve. Ms. Dewey reviewed aerial imagery of the vicinity, extrapolated the depth and approximate acreage of the watercourse that eventually flows into the Tomoka Marsh Aquatic Preserve, and then approximated the permanent pool volume of that area to make this determination.

81. According to Mr. Buswell, Mirror Lake's size, and the back and forth flows created by the tidal movement, provide a sufficient opportunity for adequate mixing of the stormwater discharged from Pond B into Mirror Lake before it reaches an OFW.

82. Mr. Mullon opined that Ponds A and B directly discharge into an OFW because the Dash 3 permit applied the OFW criteria to them. Also, Mr. Mullon could not find a section of the District's Applicant Handbook that explains how to determine if a project has an adequate opportunity for

mixing and dilution. Petitioners also argue that Ponds A and B should be considered to directly discharge into an OFW because a nearby project, the Pal and Irma Parker Park,[13] was considered to directly discharge into an OFW.

83. Petitioners did not prove by a preponderance of the evidence that receiving waters will be adversely affected if the application for the Dash 9 Permit is granted.

CONCLUSIONS OF LAW

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

85. This is a de novo proceeding intended to formulate final agency action. It is not intended to review action taken earlier and preliminarily. § 120.57(1)(k), Fla. Stat.; *Young v. Dep't of Cmty. Aff.*, 625 So. 2d 831, 833 (Fla. 1993).

86. The pertinent standard of proof is the preponderance, or "greater weight," of the evidence. *S. Fla. Water Mgmt. Dist. v. RLI Live Oak, LLC*, 139 So. 3d 869 (Fla. 2014).

87. The Association's ERP application must comply with chapter 62-330 and Part IV of chapter 373. It must also comply with Volumes I and II of the Applicant's Handbook. Rule 62-330.315(3) requires that any application for a major modification of an existing ERP shall be submitted and processed in the same manner as a new permit application. As a result, the Dash 9 permit application shall be reviewed using the same criteria as a new application.

88. The Dash 9 permit was issued pursuant to chapter 373. A petitioner challenging such a permit has the burden of ultimate persuasion after the applicant has presented a prima facie case for entitlement to the permit by entering into evidence the application, relevant supporting material, and the agency staff report or notice of intent to issue the permit. Section 120.569(2)(p), Florida Statutes, provides that

[13] The Pal and Irma Parker Park is to the east of Cedar Island across Mirror Lake.

> [f]or 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 license, permit, 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. The permit applicant and agency may, on rebuttal, present any evidence relevant to demonstrating that the application meets the conditions for issuance.

89. In the instant case, the Association established a prima facie case for issuance of the Dash 9 permit once the application file, the supporting documentation, the Technical Staff Report, and the proposed permit modification were accepted into evidence. As a result, the ultimate burden shifted to Petitioners and Intervenor to prove, by a preponderance of the evidence, that the Association failed to provide reasonable assurances that the pertinent standards for issuance of the Dash 9 permit had been satisfied.

Standing of Petitioners and Intervenor

90. In order to have standing, a party's substantial interests must be affected by the proposed agency action. § 120.52(13)(b), Fla. Stat. A prospective party must demonstrate that he or she will suffer an injury in fact and that the injury is of a type or nature which the proceeding is

designed to protect. *See Agrico Chem. Co. v. Dep' t of Envtl. Reg.*, 406 So. 2d 478, 482 (Fla. 2d DCA 1981).

91. Petitioners and Intervenor have demonstrated by a preponderance of the evidence that their substantial interests are implicated by the Dash 9 permit. As discussed above, Petitioners and Intervenor have demonstrated that there is more than a speculative possibility that the Dash 9 permit could cause adverse flooding to their property.

The Association Has Sufficient Real Property Interest to Apply for the Modification Permit.

92. Rule 62-330.301(1)(j) requires an applicant to provide reasonable assurances that the project at issue "[w]ill 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 ... ." Rule 62-330.060(3) requires that an applicant seeking an ERP have a sufficient real property interest over the land upon which the activities subject to the application will be conducted. The rule states that

> [t]he applicant must certify that it has sufficient real property interest over the land upon which the activities subject to the application will be conducted, as required in Section A of Form 62-330.060(1) and Section 4.2.3(d) of the Applicant's Handbook Volume I. The applicant or the applicant's authorized agent must sign Part 4.A. of the application, and the applicant must sign Part 4.B. If the applicant's authorized agent signs Part 4.A, the applicant also must sign Part 4.C.

93. Section 4.2.3 of the Applicant's Handbook, Volume I, provides in pertinent part that applications, such as the one for the Dash 9 permit, must include "[d]ocumentation of the applicant's real property interest over the land upon which the activities subject to the application will be conducted." It continues by stating that interests in real property include, as relevant to this proceeding:

> 1. The applicant being the record title holder.
>
> 2. The applicant being the holder of a recorded easement conveying the right to utilize the property for a purpose consistent with the authorization requested in the permit application.

94. Petitioners argue that the Dash 9 permit is seeking to increase the amount of impervious area that can be placed on individual lots within Cedar Island. In other words, Petitioners argue that the activity at issue will occur on the individual lots rather than the stormwater management system. Because the Association has no ownership interest in the individual lots, Petitioners argue that the Association lacks the ownership interest needed to apply for the Dash 9 permit.

95. However, Petitioners cite no precedent to support their argument. The Dash 9 permit applies to the stormwater management system and its ability to manage stormwater generated from Cedar Island and to ensure the stormwater does not adversely affect waters of the state. The Association has a sufficient ownership interest in the regulated system. That is all that is required.

96. In sum, the Quitclaim Deed and the Declaration establish that the Association has sufficient real property interest over the land upon which the activities authorized by the Dash 9 permit will be conducted. In the instant case, no activities will be authorized because the Association is not proposing to modify the stormwater management system.

97. The Quitclaim Deed and the Declaration also establish that the Association satisfies rule 62-330.301(1)(j)'s requirement by having sufficient rights and powers, including financial, legal, and administrative, to ensure that the activities authorized by the Dash 9 permit will be undertaken and that any separate compliance items will be addressed.

Reasonable Assurances

98. In addition to demonstrating that it has a sufficient real property interest, the Association must also provide reasonable assurances that it will satisfy the applicable criteria set forth in rule 62-330.301, rule 62-330.302, and Volumes I and II of the Applicant's Handbook.

99. Reasonable assurance means "a substantial likelihood that the project will be successfully implemented." *Metro. Dade Cnty. 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).

100. Section 2.0 of the Applicant's Handbook, Volume II, references "reasonable assurances" and states in pertinent part that "an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, removal, or abandonment of a project within [the District]: (i) Will be capable, based on generally accepted engineering and scientific principles, of being performed and functioning as proposed."

101. In the instant case, Petitioners have argued that the Association has not satisfied the conditions set forth in rule 62-330.301(1)(a), (b), (c), and (e). Each condition will be separately analyzed below.[14]

102. Rule 62-330.301(1)(a) requires an applicant to provide reasonable assurances that its project "[w]ill not cause adverse water quantity impacts to receiving waters and adjacent lands." Rule 62-330.301(1)(b) requires that construction, operation, and maintenance of the project will not cause

[14] As discussed in the Findings of Fact section, Mr. Buswell and Mr. Mullon used substantially the same analysis method to estimate the amount of impervious surface currently on Cedar Island. Petitioners failed to prove by a preponderance of the evidence that any error in Mr. Buswell's estimation leads to a lack of reasonable assurances.

adverse flooding to on-site or off-site property. Rule 62-330.301(1)(c) requires that there be no "adverse impacts to existing surface water storage and conveyance capabilities."

103. As discussed above in the Findings of Fact, Mr. Mullon's testimony regarding the deficiencies in the modeling is persuasive and is accepted. The District and the Association offered no persuasive reasoning as to how any "reasonable assurances" within the meaning of rule 62-330.301(1) can be drawn from a model using data that does not accurately reflect the current condition of Cedar Island's stormwater management system.

104. While the District argues that any issues with Cedar Island's stormwater management system may be remedied at some indeterminant time in the future via the District's compliance function, the plain language of rule 62-330.301 unambiguously requires that the required reasonable assurances come from the applicant rather than the District. The Association never expressed any definitive intent that it would bring the system to its design specifications, including having its members correct their encroachments onto the VNBs.

105. For the reasons set forth herein, the application for the Dash 9 permit does not provide reasonable assurances of compliance with rule 62-330.301(a), (b), or (c). Thus, the application must be denied.

106. Rule 62-330.301(1)(e) requires that the project not adversely affect an OFW. As discussed above, the testimony from Mr. Buswell and Ms. Dewey indicated that discharges from Cedar Island into Mirror Lake had an adequate opportunity for mixing before coming into contact with the OFW to the west of Cedar Island.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the St. Johns River Water Management District deny the Cedar Island Homeowners Association of Flagler County, Inc.'s application for ERP Permit No. 70686-9.

DONE AND ENTERED this 2nd day of May, 2022, in Tallahassee, Leon County, Florida.

Garnett Chisenhall

G. W. CHISENHALL
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Filed with the Clerk of the
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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.

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.