ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

SJR 2012-16

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, Petitioner, v. FRANK H. MOLICA and LINDA M. MOLICA, Respondents.	)	DOAH Case No. 08-4359 SJRWMD F.O.R. No. 2008-44

FINAL ORDER

This matter comes before the Chairman (the Chair) of the Governing Board under the authority delegated by the Board to the Chair "to rule on exceptions to recommended orders and to issue final orders resulting from administrative complaints pursuant to section 373.119, Florida Statutes." *See* District Policy 88-04, ¶ B.4 (as amended on Jan. 10, 2010); *see also* § 373.083(5), Fla. Stat. (2011) (authorizing the Governing Board to delegate the execution of any of its powers, duties, and functions to a member of the Board). This case began with such an administrative complaint. Under District Policy 88-04, therefore, the Chair has considered the recommended and supplemental recommended orders submitted on June 12 and September 21, 2009, respectively, by Donald R. Alexander, the administrative law judge (ALJ) designated by the Division of Administrative Hearings in this matter. Exhibit A attached to this order is a copy of the recommended order; Exhibit B is a copy of the supplemental recommended order. Having also considered the parties' exceptions to each recommended order, and the responses to the exceptions, the Chair enters this final order on behalf of the Governing Board.

APPEARANCES

For Petitioner District	Vance W. Kidder, Esquire
For Respondents Frank H. and Linda M. Molica	Frank Henry Molica, Esquire Frank Henry Molica, P.A. 231 North Courtenay Parkway Merritt Island, Florida 32953-3407 - and - Benjamin Y. Saxon II, Esquire Saxon & Chakhtoura, P.A. 111 South Scott Street Melbourne, Florida 32901-1262

PRELIMINARY STATEMENT

This matter has a long and convoluted procedural history. The District commenced this proceeding as a petitioner under rule 28-106.2015(2) of the Florida Administrative Code by filing and serving its Administrative Complaint and Proposed Order (Complaint) on Respondents Frank H. and Linda M. Molica on August 8, 2008. Paragraphs 4 through 6 of the Complaint alleged that Respondents conducted "land clearing, dredging, and filling in the wetland on [their] property without . . . a [District] permit" and that these activities constituted "the construction and operation of a surface water management system" without a permit, thus violating rule 40C-4.041(2)(b)8. (The rule in question establishes thresholds for requiring an individual or general environmental resources permit under part IV of chapter 373 of the Florida Statutes.) In response to the Complaint, the respondents simultaneously sought both administrative and judicial relief, greatly complicating the proceedings that followed.

The Administrative Proceedings. On August 25, 2008, the respondents timely filed a petition challenging the charges made by the Complaint and raising disputed issues of material fact for resolution through an evidentiary hearing under sections 120.569 and 120.57(1) of the Florida Statutes. Among those disputed issues was Respondents' allegation in paragraph 6 of the

petition that section 373.406 of the Florida Statutes[1] exempted these activities from the requirement to obtain an environmental resources permit. *See* § 373.406(2), Fla. Stat. (2008) (version of the "agricultural" exemption under which the petition was filed; current version differs, as discussed below). Later, Respondents clarified in their amended petition and in their prehearing statement that they were relying on both the general agricultural exemption in subsection 373.406(2) and the "closed agricultural system" exemption in subsection 373.406(3) as exempting the activities at issue from the requirement to obtain a permit. *See* § 373.406(3), Fla. Stat. (2011) (same as in 2008).

After completing discovery, the parties presented their testimony and exhibits at the formal administrative hearing that the ALJ held in Merritt Island, Florida, on March 11-13, 2009, pursuant to notice. After the hearing, they timely submitted their proposed recommended orders for his consideration. On June 12, 2009, the ALJ submitted his recommended order to the District. In that order he made findings of fact, reached conclusions of law, and recommended that the Governing Board enter a final order sustaining the charges in the Complaint and determining that the agricultural exemption in subsection 373.406(2) does not cover Respondents' activities. But both the District and the respondents filed an exception[2] to the recommended order because it did not address the issue whether the closed system exemption under subsection 373.406(3) applies to Respondents' activities. The District also moved for a remand to the ALJ for supplemental findings, conclusions, and an overall recommendation on the applicability of the closed system exemption. The Board accepted the parties' exceptions in question and remanded the matter to the ALJ, who then submitted a supplemental recommended order. In that order, he made supplemental findings of fact and conclusions of law as requested,

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[1] All subsequent textual references to any portion of chapters 120 or 373 are to the Florida Statutes. However, *citation* forms in this order comply with Florida Rule of Appellate Procedure 9.800, including a reference to "Fla. Stat." for any statute.

[2] *See* Dist. Exception 1; Resp. Exception 24.

and recommended that the final order sustain the charges in the Complaint and determine that Respondents are not entitled to any agricultural exemption (i.e., under either subsection (2) or (3)) in section 373.406.

Respondents timely filed exceptions to both the recommended order and the supplemental recommended order, and the District responded to each set of those exceptions but filed no further exception of its own. This final order rules on all of Respondents' exceptions.

The Judicial Proceedings. In the meantime, however, the respondent Molicas had sought judicial relief from the administrative Complaint and the proceedings based on it. First, they commenced an action in August 2008 in circuit court for a declaratory judgment that the District had no jurisdiction over the activities of Respondents that the District had alleged as a basis for the administrative Complaint. Although they maintained in the administrative proceeding that they had a right to a hearing because there *were* material issues of fact, they argued in the court proceeding that there were *no* issues of fact. The District moved the court to dismiss the judicial proceeding because the Molicas had failed to exhaust their administrative remedies (i.e., to complete this administrative proceeding) before seeking judicial relief, but the court denied the motion. The District appealed, attempting to obtain an immediate writ of prohibition to prevent the circuit court from proceeding to a declaratory judgment, but the appellate court denied the District's appeal.

The parties therefore continued to move forward with both the administrative and the judicial proceedings at the same time. In March 2009 the ALJ held the hearing in this matter; in May 2009 the circuit court judge held a hearing on the Molicas' summary judgment motion for issuance of a declaratory judgment that the District lacked jurisdiction to take enforcement against them because their activities were exempt. In June 2009 the ALJ issued his recommended order, with recommended findings of fact to resolve disputed issues of fact,

conclusions of law on legal issues, and an overall conclusion that the respondents' activities were not exempt from permitting requirements. In contrast, the circuit court judge granted the declaratory judgment that same month, based on the respondents' motion for summary judgment—i.e., ruling that there were no genuine issues of material fact and holding as a matter of law that the District lacked jurisdiction because the activities were exempt.

The District appealed the circuit court decision to the Fifth District Court of Appeal. Under the automatic stay of the lower court's decision provided by rule 9.310(b) of the Florida Rules of Appellate Procedure pending the appellate court's review, the District moved ahead in the administrative case. The Governing Board issued an order of remand in August 2009 to the ALJ for additional findings and conclusions to address the applicability of the exemption under section 373.406(3), and the ALJ submitted his Supplemental Recommended Order setting forth such recommended findings and conclusions in late September that year. The District then notified the parties that it would place the matter on the agenda for the Governing Board's consideration of a final order at the regularly scheduled meeting of the Board in December. On December 1, 2009, however, Respondents sought and obtained an "order nisi in prohibition" from the circuit court, ordering the District, its Executive Director, and the Board to cease all further administrative proceedings against Respondents until the District showed good cause for the court to withdraw the order. In compliance with the order nisi, the District did not present a proposed final order in this matter to the Board or its Chair while the appellate proceeding moved ahead. In August 2011, the appellate court decided in favor of the District, holding that the District does have the statutory authority to regulate dredging and filling in wetlands, and reversing the circuit court's declaratory judgment. The appellate court issued its mandate to the circuit court in October, ending the appeal.

The Legislative Amendment of the Agricultural Exemption. As a result of legislation in 2011, however, the course of this dispute took another twist. In chapter 2011-165 of the Laws of Florida, the legislature enacted two amendments affecting the agricultural exemption from the requirement of an environmental resources permit. One of the amendments broadened the scope of the exemption in section 373.406(2), extending the exemption to topographical alterations that may adversely impact wetlands, if the alterations are made for purposes consistent with the normal and customary agricultural practices in the area. The other amendment significantly changed section 373.407 by authorizing the Department of Agriculture and Consumer Services (DACS) to make a binding determination of whether an activity altering the topography of land qualifies for an exemption under section 373.406(2). The provision for such a determination by DACS depends on two conditions: the District and a landowner must be disputing whether the exemption applies to the owner's activities, and either the District or the owner must ask DACS to make a binding determination.

Upon conclusion of the last appeal in the collateral judicial proceedings in this matter, the Molicas invoked the new binding determination procedure for the dispute over whether the agricultural exemption (as amended) applies in this enforcement case. On January 5, 2012, DACS made its determination and included a notice of rights providing for the filing of a petition for hearing within 21 days from receipt of the notice. The Molicas pointed out a significant typographical error (use of the word "west" instead of "east") in the determination's description of the area on their property in which DACS concluded that Respondents' activities were not exempt under section 373.406(2). DACS staff agreed and sent out an email noting the correction, and DACS issued a corrected order on May 9, 2012, correcting the description and attaching an exhibit to clarify the location of the areas of exempt and non-exempt activities on Respondents' site. A true copy of the corrected Binding Determination is attached to this order as Exhibit C.

Neither the Molicas nor the District filed a petition challenging either the original or the corrected determination. Although the binding determination made (and corrected) by DACS is not part of the record made by the parties before the ALJ in this matter, the determination (as corrected) is now binding on both parties, and the Governing Board[3] must take it into account in the conclusions of law and the overall decision in this final order.

ALJ'S RECOMMENDATION

In the initial recommended order, the ALJ recommended that the Board enter a final order sustaining the charges in the Complaint, determining that Respondents do not qualify for the agricultural exemption under section 373.406(2), and requiring that they take the corrective action set forth in the District's Exhibit 73. A true copy of that exhibit is attached to this order as Exhibit D. In the supplemental recommended order, the ALJ reaffirmed and broadened this recommendation to recommending that the final order determine that Respondents do not qualify for *any* agricultural exemption under section 373.406, including the closed agricultural system exemption in subsection (3) of that statute.

STATEMENT OF THE ISSUES

The general issue before the Board is whether to adopt the ALJ's recommended and supplemental recommended orders together as the Board's final order, subject to the binding determination by DACS on the applicability of the agricultural exemption under section 373.406(2), or to reject or modify the recommended orders in whole or in part, under section 120.57(1)(*l*). More specifically, the issue is whether to sustain the charges in the Complaint that Respondents dredged and filled wetlands on their property without an environmental resources permit or a right to either of the agricultural exemptions that they asserted under subsections

[3] Except where the context otherwise requires, subsequent references to the "Governing Board" or the "Board" in this order mean the Chair, acting on behalf of the Governing Board for this enforcement matter.

373.406(2) and (3). The Board must also consider numerous narrower issues in ruling on each of the exceptions filed by the parties.

EXCEPTIONS AND RESPONSES: AN OVERVIEW

The parties in a proceeding under chapter 120 (commonly known as the Administrative Procedure Act, or APA) have the right to file exceptions to an ALJ's recommended order. *See* §§ 120.57(1)(b), (l), Fla. Stat. (2011). The purpose of exceptions is to identify errors in the recommended order for the agency to consider in issuing its final order. Likewise, the parties have the right to file responses to other parties' exceptions. *See* Fla. Admin. Code R. 28-106.217(3). The purpose of such responses is to help the agency in evaluating and ruling on exceptions and thus in reviewing the recommended order and entering a final order. In general, the more specific that exceptions and responses are in citing to the record and providing legal argument that cites to specific case law or provisions of statutes and rules, the more helpful they are to decision-making by the Governing Board.

Under the standard of review discussed in the next section, the Board may accept, reject, or modify the recommended order within certain limits. When the Board considers a recommended order and the parties' exceptions, its role is somewhat like that of an appeals court. The Board reviews the record for the existence of competent substantial evidence to support the ALJ's findings of fact and evaluates the correctness of the ALJ's conclusions of law on issues within the Board's substantive jurisdiction (i.e., special expertise related to chapter 373 and the District's rules implementing it). In an appeal, a party appealing a lower tribunal's decision must show the appeals court why the decision is incorrect so that the court can rule in the appellant's favor. Likewise, a party filing an exception with the Board must spell out any perceived errors in the ALJ's findings and conclusions and cite to specific portions of the record to support the exception. *See, e.g., Rood v. Hecht*, 21 F.A.L.R. 3979, 3984 (Fla. Dept. of Envtl.

Prot. 1999) (final order) (it is not the agency's responsibility to conduct an independent review of the recommended order and the exceptions to discover which findings a party opposes in its exceptions) (citing *Couch v. Commission on Ethics*, 617 So. 2d 1119, 1124 (Fla. 5th DCA 1993)). To the extent that a party fails to file written exceptions to specific findings or conclusions of a recommended order, the party has waived any objection to them. *See, e.g., Environmental Coalition of Fla., Inc. v. Broward County*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991).

STANDARD OF REVIEW

Section 120.57(1)(*l*) sets forth the general standard of review that the Governing Board must follow in ruling on exceptions and deciding whether to adopt, modify, or reject in whole or part a recommended order that resolves disputed issues of material fact. As discussed below, two parts of the standard apply in this case. One part of the standard applies to the ALJ's recommended findings of fact; the other, to the recommended conclusions of law. (A third part of the standard of review applies only to cases involving a penalty, which the District did not seek here.)

Standard of Review for Findings of Fact. The standard of review under chapter 120 for findings of fact reflects the authority given by the statute to the ALJ rather than the Governing Board to resolve disputed issues of fact. The ALJ alone is the fact finder. *See e.g., Gross v. Department of Health*, 819 So. 2d 997, 1001 (Fla. 5th DCA 2002) ("agency is not permitted to weigh the evidence, judge the credibility of the witnesses, or interpret the evidence to fit [the agency's] ultimate conclusions"); *Heifetz v. Department of Bus. Reg.*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985) (""[i]t is the hearing officer's [i.e., the ALJ's] function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial

evidence"). Under chapter 120, the Governing Board may not reject or modify any finding of fact in the ALJ's recommended order unless the Board

> first determines from a review of the entire record, and states with particularity in the [final] order, that the finding . . . [was] not based upon competent substantial evidence or that the proceedings on which the finding [was] based did not comply with essential requirements of law.

See §120.57(1)(*l*), Fla. Stat. (2011); *Packer v. Orange County Sch. Bd.*, 881 So. 2d 1204, 1206 (Fla. 5th DCA 2004); *Perdue v. TJ Palm Assocs., Ltd.*, 755 So. 2d 660, 665 (Fla. 4th DCA 1999). This standard of review depends on the meaning of "competent substantial evidence" and "essential requirements of law." Florida case law has crystallized the meaning and application of both phrases.

The leading case on the meaning of "competent substantial evidence" is still *De Groot v. Sheffield*, 95 So. 2d 912 (Fla. 1957). There, the Florida Supreme Court combined the concepts of "competent" (i.e., relevant and material) evidence with "substantial evidence" (i.e., "such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred." *See id.* at 916. The court therefore described "competent substantial evidence" as "evidence sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *Id.*; *see, e.g.*, *Perdue v. TJ Palm Assocs.*, 755 So. 2d at 665 (quoting the *De Groot* opinion and following the same approach); *Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm'n*, 671 So. 2d 287, 289 n.3 (Fla. 5th DCA 1996) (describing competent substantial evidence as "not relat[ing] to the quality, character, convincing power, probative value or weight of the evidence but refer[ring] to the existence of some evidence (quantity) as to each essential element and as to the legality and admissibility of that evidence").

Under this standard of review, if competent substantial evidence does support a finding on an issue of fact susceptible of ordinary methods of proof, the finding must stand. An agency may not disturb an ALJ's finding "unless there is *no* competent substantial evidence from which the finding could reasonably be inferred." *See Freeze v. Department of Bus. Reg.*, 556 So. 2d 1204, 1205 (Fla. 5th DCA 1990) (italics in original) (reversing agency's final order in part, because agency had rejected some of the hearing officer's findings and made additional findings); *Berry v. Department of Envtl. Reg.*, 530 So. 2d 1019, 1022 (Fla. 4th DCA 1988) (same, distinguishing factual issues (that simply depend on the credibility of testimony and the weight to be given it) from "ultimate facts" (which "are in essence opinions infused by policy considerations for which the permitting agency has special responsibility and to which [the] court should give greater weight")). The Governing Board may not reweigh evidence admitted in the proceeding, may not resolve conflicts in the evidence, and may not judge the credibility of witnesses or otherwise interpret evidence anew. *See Save Anna Maria, Inc. v. Department of Transp.*, 700 So. 2d 113, 118 (Fla. 2d DCA 1997) (overturning agency's conclusion based on improperly rejecting pure finding of fact by hearing officer [ALJ]); *Florida Sugar Cane League v. State*, 580 So. 2d 846, 851 (Fla. 1st DCA 1991) (neither agency nor court may overturn [ALJ's] finding of fact supported by competent substantial evidence even if the record contains other evidence contrary to the finding); *Heifetz*, 475 So. 2d at 1281-82.

As for the meaning of the second phrase ("essential requirements of law") in the statutory standard of review for findings noted above, the leading case is *Combs v. State*, 436 So. 2d 93 (Fla. 1983). In *Combs*, the Florida Supreme Court explained this language as part of the larger phrase ("departure from the essential requirements of law") that expresses a highly discretionary standard for judicial review of a circuit court sitting as an appellate court. The court emphasized that the mere existence of legal error does not suffice under this standard; the error must be so

serious that it "violat[es] a clearly established principle of law resulting in a miscarriage of justice." *See id.* at 95-96.

Standard of Review for Conclusions of Law. The standard for the Governing Board's review of certain conclusions of law in a recommended order is less restrictive than the standard for reviewing findings of fact—but more restrictive for other kinds of conclusions of law, as explained below. Under section 120.57(1)(*l*), the Board's final order may reject or modify any conclusion of law (including any interpretation of an administrative rule) over which it has substantive jurisdiction, if the Board states its reasons with particularity and makes a finding that its substituted conclusion is as reasonable as or more reasonable than the rejected or modified conclusion. In interpreting the term "substantive jurisdiction" as it first appeared in the 1996 amendments to the APA (chapter 120), *see* Ch. 96-159, § 19, at 189, Laws of Fla., the courts have continued to interpret the standard of review as requiring deference to the expertise of an agency in interpreting its own rules and enabling statutes. *See, e.g., State Contracting & Eng'g Corp. v. Department of Transp.*, 709 So. 2d 607, 610 (Fla. 1st DCA 1998) (citing *Pan Am. World Airways, Inc. v. Florida Pub. Serv. Comm'n*, 427 So. 2d 716, 719 (Fla. 1983)).

The Board as no authority, however, to modify or reject an ALJ's conclusions of law on issues over which the Board has no substantive jurisdiction (or special agency expertise). For example, the Board has no power to overturn an ALJ's ruling on an evidentiary issue. *See Barfield v. Department of Health*, 805 So. 2d 1008, 1012 (Fla. 1st DCA 2001). Nor may the Board reject an ALJ's ruling on a jurisdictional or procedural issue, *see G.E.L. Corp. v. Department of Envtl. Prot.*, 875 So. 2d 1257, 1263-65 (Fla. 5th DCA 2004), or on the applicability of general legal doctrines such as collateral estoppel or res judicata. *See Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140, 1141-42 (Fla. 2d DCA 2001).

The Governing Board's authority to modify a recommended order does not depend on the filing of exceptions. *See Westchester Gen. Hosp. v. Department of Human Rehab. Servs.*, 419 So. 2d 705, 708 (Fla. 1st DCA 1982). When exceptions are filed, however, they become part of the record before the Board. *See* § 120.57(1)(f), Fla. Stat. (2011). The Board's final order must expressly rule on each exception, aside from any that fails to "identify the disputed portion of the recommended order by page number or paragraph, . . . identify the legal basis for the exception, or . . . include appropriate and specific citations to the record." *See id.* § 120.57(1)(k).

RULINGS ON RESPONDENTS' EXCEPTIONS[4]

Because the ALJ issued both a recommended order and a supplemental recommended order, this order addresses the exceptions to each separately. Respondents filed exceptions to both the initial and the supplemental recommended orders, and the Board has reviewed all those exceptions and addressed each one below.

RULINGS ON EXCEPTIONS TO THE INITIAL RECOMMENDED ORDER

Exception No. 1: Amendment of the Corrective Action

This exception involves two interrelated issues of law, one of which is a mixed question of fact and law. Respondents assert that the ALJ "deviat[ed] from the essential requirements of the law" (Resp. Exceptions to Rec. Order at 1) by allowing the District to amend its Complaint at the hearing, allegedly without reasonable prior notice. The amendment was solely to the corrective action portion of the Complaint, to conform to the evidence presented at the hearing. The evidence giving rise to the amendment was District Exhibit 73, found by the ALJ to be a "slightly revised" version of the corrective action sought by the Complaint to restore the

[4] As noted above, the Board need not further address the District's sole exception in this final order, because the order of remand for a supplemental recommended order granted all the relief sought by that exception.

wetlands or require an after-the-fact permit for the unpermitted activities at issue. *See* Rec. Order at 2; Ex. D *infra*. Respondents objected to the exhibit as something they had not seen before (T. 123-24)[5] but did not respond to the statement by counsel for the District that he had "furnished all exhibits in this form to Mr. Molica" the week before the hearing and did not see how the minor changes in Exhibit 73 would prejudice the respondents (T. 124). The ALJ admitted the exhibit over Respondents' objection (T. 124) but reserved ruling on the motion (T. 145), to allow the parties to address the issue in their proposed recommended orders (T. 139, 141). Although the District did so, the respondents did not. *See* Dist. Proposed Rec. Order at 35-36 (pointing out that the District had listed and identified Exhibit 73 at page 7 of the District's prehearing statement and had provided copies of all the District's exhibits to Respondents before the hearing, and that none of Respondents' objections at the hearing stated that this exhibit was prejudicial).

The first issue to resolve for this exception is whether the Board should grant it based on the respondents' assertion that the ALJ's admission of District Exhibit 73 into evidence deviated from the essential requirements of law. But to state this issue is to resolve it, at least for an agency's final order ruling on an exception to a recommended order. Because admission of an exhibit is a straightforward evidentiary ruling not within the District's substantive jurisdiction (the powers and duties of the Board set forth in chapter 373), the Board has no power to overrule the ALJ's admission of Exhibit 73 as this exception requests. *See, e.g.*, § 120.57(1)(*l*), Fla. Stat. (2011); *Barfield*, 805 So. 2d at 1011-12; *see also* Ex. D *infra* (a true copy of the District's Exhibit 73 at the hearing).

[5] Citations to the record shall take the following forms: (T. xx) for citations to pages of the transcript of testimony at the hearing, Dist. Ex. __, at __ for pages of an exhibit introduced by Petitioner District, and Resp. Ex. __, at __ for citations to pages of an exhibit introduced by Respondents.

The second issue (a mixed question of fact and law) under this exception is whether the ALJ erred in the recommended order by granting the District's oral motion at the hearing to amend the Complaint to conform to the evidence presented there. *See* Rec. Order at 2. Both the facts and the law support the ALJ's ruling to allow the amendment. There is no evidence that the amendment materially changed the issues raised by the pre-amended pleading. The evidence to which the amendment conformed was Exhibit 73, which the ALJ found would "provide greater specificity regarding the formulation of a restoration plan" than in the original corrective action and continue to offer "Respondents the option of seeking an after-the-fact permit" instead of restoring the wetlands. *See* Rec. Order at 16, ¶ 24. Moreover, the ALJ found that "Respondents offered no proof at [the] hearing that [either] the original or [the] revised corrective action is unreasonable" and expressly found that the "revised corrective action is . . . reasonable and designed to address the restoration needs of the property." *See id.* The Board cannot reweigh the evidence and replace these findings by the ALJ with a finding that the slightly revised version of Exhibit 73 prejudiced Respondents in any way. *See Gross*, 819 So. 2d at 1001 & n.4; *Heifetz*, 475 So. 2d at 1281.

In the absence of prejudice to a party opposing a motion to amend a pleading to conform to the evidence, Florida law supports granting such a motion. *See* Fla. R. Civ. P. 1.190(b) (if party objects at trial to evidence outside the issues raised by the pleadings, the court shall freely allow amendment of the pleadings to conform with such evidence "when the merits of the cause are more effectually presented thereby and the objecting party fails to satisfy the court that the admission of [the] evidence will prejudice the objecting party in maintaining an action or defense upon the merits"); *Jefferson Realty v. U.S. Rubber Co.*, 222 So. 2d 738, 741 (Fla. 1969) (upholding amendment of complaint to add another party after plaintiff rested case, because all parties had recognized throughout the trial that the added party was the real party in interest);

Florida E. Coast Ry. v. Shulman, 481 So. 2d 965, 967 (Fla. 3d DCA 1986) (amendment of complaint after plaintiff rested his case was upheld because it did not prejudice railway company, since the basic cause of action had not changed).

Even if the facts and the law did not support the ALJ's ruling on the amendment of the Complaint at the hearing, the Board's authority to grant the exception and overturn that ruling would be questionable at best, under the standard of review of an ALJ's conclusions of law set forth in section 120.57(1)(*l*), as discussed above. The question raised by this exception to the administrative procedure followed by the ALJ in ruling on the motion to amend goes beyond the substantive jurisdiction of the Board under chapter 373 (as does the evidentiary ruling discussed above). Despite requiring consideration of some substantive elements, the ruling on a motion to amend a pleading is essentially procedural. *See* Fla. Admin. Code R. 28-106.202 (Uniform Rule of Administrative *Procedure* authorizing amendments of petitions upon order of the ALJ); *id.* § 28-106.2015 (requiring that administrative complaint in enforcement action be considered a petition initiating proceedings, thus making the rule on amendments of petitions applicable to amendments of administrative complaints); *cf.* Fla. R. Civ. P. 1.190(b) (judicial rule of *procedure* authorizing amendments of pleadings at trial to conform to the evidence).

In sum, Respondents having failed to present the ALJ with any evidence at the hearing or any post-hearing argument or proposed findings on this issue, they can hardly complain now about the ALJ's resolution of it. On this record, and under the standards for an agency head's review of an ALJ's findings of fact and conclusions of law, the Board has no basis for overturning either of these rulings by the ALJ and thus must deny Respondents' Exception 1.

Exceptions 2-20. Respondents state that these nineteen exceptions (out of a total of twenty-four) to the initial recommended order all assert that the excepted finding or conclusion lacks the support of competent substantial evidence and that some of the exceptions assert

additional grounds. Exceptions 2 through 15 object to findings of fact, while the rest object to conclusions of law and the overall recommendation. Because of the different standards of review that apply to findings and conclusions, the Board will address each of these groups separately.

Exceptions to Findings of Fact

Under the well-settled case law and the statutory standard of review, the Governing Board must reject Respondents' Exceptions 2 through 15 because competent substantial evidence does support each of the findings of fact covered by those exceptions, as shown below.

Exception 2: The Direction of Water Flow

Respondents take exception to the finding in paragraph 2 of the recommended order that the historical flow of water in the area was from north to south, coming onto Respondents' property from the north and crossing their property to the drainage ditch bordering their property on the south. Although there is conflicting evidence in the record on this issue, the finding must stand because some competent substantial evidence supports the finding (T. 82-82, 523 [testimony of Mark Crosby and Philip Molica]; Resp. Ex. 10). The Board has no authority to reweigh the evidence, under the standard for an agency's review of findings of fact in an ALJ's recommended order.

Exception 3: Respondents' Dredging and Filling on Their Property

This exception objects to the finding in paragraph 5 of the recommended order that in 2004, Respondents began clearing their land, including the removal of soil along with the vegetation and roots, followed by placement of new soil or fill in the eastern half of the property where the excavation occurred. As the District pointed out in response to this exception, Respondent Frank Molica himself admitted that such excavation occurred on his property in 2004 (and the filling in 2006 or 2007), conducted by persons that he hired for those purposes (T.

44-47). Because competent substantial evidence in the record supports the finding in paragraph 5, the Board has no basis for rejecting or modifying it.

Exception 4: Impact on Wetlands on Respondents' Property

Respondents re-argue the evidence in attacking the finding in paragraph 6 of the recommended order that one of the District's witnesses observed vegetation and muck soil in a disturbed area on Respondents' property and standing water in the ditch along the south boundary of the property "and concluded that wetlands were being impacted." Because competent substantial evidence (T. 287-88, 310-11; Dist. Exs. 12, 22, 48-50, 52) supports this finding, the Board has no authority to disturb it.

Exception 5: Location of the On-Site Wetlands; Denial of Access

In this exception to the finding in paragraph 7 of the recommended order, Respondents first make much ado about the location of the wetlands that two of the District's witnesses observed on Respondents' property in 2004. Respondents cite to a letter referring to the location as being in the "rear" (or eastern portion) of the property and agree that wetlands are present there, but disagree that wetlands are present in the central portion of their property. In paragraphs 7 and 11 of the recommended order, the ALJ found that wetlands were present in both the central and the eastern portions of the property. The letter cited by Respondents (mistakenly as Petitioner District's Exhibit 2, which actually is an expert witness's resume) is not in evidence. Even if it were, the Governing Board would have no authority to weigh it against the testimony of the District's expert witnesses (one from the DEP, the other formerly from Brevard County staff) who actually visited the site in 2004 and identified the location of the wetlands. That testimony and the exhibits accompanying it constitute competent substantial evidence supporting the wetland location finding, which the Board therefore cannot overturn. *See* T. 287-88, 308, 310-11; Dist. Exs. 12, 22, 48-50, 52.

At the end of this exception, Respondents also contest the finding in paragraph 7 that regulatory personnel were unable to inspect the property again and delineate the wetlands because Respondent Frank Molica denied them access to the property until ordered to do so in 2008 during the discovery process in this proceeding. Competent substantial evidence likewise supports this finding and precludes the Board from disturbing it. *See* Resp. Exs. 2A, 2B; Order Granting Amended Request [to Enter Land and Inspect] (Oct. 10, 2008).

Exception 6: County's Code Enforcement Action Against Respondents

Respondents apparently disagree with the portion of paragraph 8 finding that neither DEP nor the District was involved in the action brought against Respondents by Brevard County to enforce its County Code "prohibitions in functional wetlands." However, Respondents do not assert that either DEP or the District was a party to that proceeding or that the matter addressed chapter 373 or any of the District's rules. The sole basis offered for the exception is an allegation that the County and DEP were consulting with each other about the matter, and that the County employee who signed the notice of violation was emailing a District employee called as a witness in the present case. Respondents do not cite to a portion of the record to support these statements and do not explain how these alleged facts are material here, even if true. Thus, Respondents have provided the Board with no basis at all for modifying or rejecting the finding.

Exception 7: Timing of the Exemption Claim and the District's Response

This exception attacks two portions of paragraph 9 of the recommended order. Respondents first object to the ALJ's finding that they told DEP "[a]t some point in time, but presumably after the site visit in 2004," that they were "conducting an agricultural operation." They object that the finding conflicts with the evidence that on the first site visit they informed DEP of their agricultural use. In support of this objection, Respondents cite to two pages of the transcript as "undisputed" evidence that they did advise DEP and the County of their agricultural

operation. The first page cited has nothing to do with the subject of this exception (T. 304). The testimony on the second page cited shows the witness's recalling that Respondent Mr. Molica had told the witness at the 2004 site visit that the Respondents were going to replace citrus trees with palms (T. 326). This is not an assertion that Respondents were specifically engaged in the occupation of agriculture. The same witness went on at once to qualify his testimony by stating that he recalled Respondent Molica as having discussed several options for using the land. These included not only replacing the citrus trees with palms, but also going back to citrus, among "a number of practices" that could be implemented on the land, which the respondents had discussed with the witness's supervisor after December 14, 2004, the time of the site visit (T. 326). Thus, the cited testimony actually supports the ALJ's finding that "at some point in time" Respondents informed DEP of their agricultural operation.

Exception 7 then attacks the finding (in another part of paragraph 9 of the recommended order) on the reason for and the effect of the District's not responding to Respondents' letter of August 15, 2005, to the District until two years later. The respondents' letter had claimed that they were lawfully engaging in agricultural activities, had an agricultural exemption under chapter 193 of the Florida Statutes (i.e., for ad valorem taxation), and had not diverted or impounded any surface waters (Resp. Ex. 2A). Without pointing to any support in the record, Respondents assert in this exception that "the obvious reason" for the District's delaying enforcement was that the District had confirmed that the respondents were conducting agricultural activities on the property, and that the "prejudice cause[d] by the delay is obvious." However, competent substantial evidence supports the ALJ's finding that the delay had resulted from staff's having to handle numerous pending permits during the building boom in 2005 and 2006 and from confusion over whether DEP or the District had jurisdiction to handle the enforcement (T. 161-65, 168, 170-72). The ALJ also found there that was no evidence that the

District ever agreed that Respondents' activities were lawful and no evidence that the delay in responding to the letter from Respondents in 2005 prejudiced them in any way. *See* Rec. Order at 10, ¶ 9. Because this is an express finding that no evidence supports the position of the Respondents on this issue, it was incumbent on them to point out the existence of such evidence with particularity. Instead, the only evidence that they cite in support of this objection is testimony that the District referred the matter to DEP and that there was a delay of two years before the District responded to the respondents' letter (T. 170-71). They cite to no support in the record for their assertions about the reason for the District's referral of the letter to DEP or the prejudice from the District's responding to it. Given the glaring failure of this exception to point out such evidence, the Board has no basis for rejecting the ALJ's finding that such evidence was never presented.

Exception 8: Acceptance of the District's Evidence on Wetlands

This exception objects to paragraphs 12 and 13 of the recommended order. First, Respondents criticize the finding that the parties presented conflicting evidence on the wetlands issue and the ALJ's acceptance of the District's evidence as the more credible and persuasive, showing "that the areas where dredging and filling occurred in the eastern and central parts of the property meet the test for a wetland." The criticism is that the ALJ did not specify the conflicting evidence in question and the reason for viewing particular evidence as more credible and persuasive than other specific evidence. Competent substantial evidence must support each finding and conclusion in a recommended order, but Respondents cite to no statutory or case law authority (and the Board is aware of none) requiring an ALJ to recite the evidence that supports each finding and conclusion or to explain why the ALJ found some evidence more credible and persuasive than other evidence. *See, e.g.*, 120.57(1)(k), Fla. Stat. (2011) (ALJ must submit recommended order consisting of findings of fact, conclusions of law, and recommended

disposition; *Gross v. Department of Health*, 819 So. 2d at 1000 (same). In contrast to the language in that same subsection stating than "an agency need not rule on an exception that does not clearly identify . . . appropriate and specific citations to the record," this statute does not refer to any duty of the ALJ to recite evidence or explain why it was more credible than other evidence). To the contrary, the very next subsection of that statute forbids an agency to modify or reject a finding a fact "unless the agency first determines from a review of the entire record . . . that the finding [was] not based upon competent substantial evidence," in pertinent part. *See* § 120.57(1)(*l*), Fla. Stat. (2011). Together, for purposes of ruling on an exception asserting that no competent substantial evidence supports a finding or conclusion, these two subsections place the burden of reciting such evidence on the agency itself (and implicitly, on any party opposing the exception)—not on the ALJ. In this case, because competent substantial evidence (in the testimony of District witnesses Crosby, Richardson, and Hart) supports the wetland finding in paragraph 12 of the recommended order, the finding must stand.

Respondents then take issue with the finding in paragraph 13 based on the testimony of District witness Richardson that the soil where the dredging and filling had occurred was hydric, indicative of a wetland. The respondents state that the testimony of both parties' soil experts was consistent and go on to recite the evidence supporting their position. But the test for rejecting or modifying findings of fact is not whether any contrary evidence exists but whether any competent substantial evidence supports them. Such evidence supports this finding (T. 210-49). As for Respondents' argument that the wetland filling had occurred before Respondents purchased the property, Respondents' own witness (Sawka) testified that two filling events had occurred (T. 658, 653-54) and admitted that the upper (more recent) layer could have taken place in 2004 or 2005 (T. 666-67) as the District maintains. Competent substantial evidence therefore supports the findings in both paragraph 12 and paragraph 13, and this exception too lacks merit.

Exception 9: Presence of Wetland Vegetation

In Exception 9, Respondents disagree with the finding in paragraph 14 of the recommended order that the swamp tupelo, red maple, American elm, and holly trees on the site "are all wetland canopy species and provide further support for the District's position." Competent substantial evidence (the testimony of Hart) fully and directly supports this finding, precluding any modification or rejection of it (T. 377-79, 431).

Exception 10: Hydrologic Indicators

Once again, Respondents argue in this exception (to paragraphs 15 and 16) that certain findings lack the support of any competent substantial evidence and that the ALJ should have made different findings based on the evidence that the respondents presented. Paragraph 15 of the recommended order finds that there is algal matting on the surface of Respondents' property and that such matting results not from rainfall per se but from flooding that lasts long enough for algae to grow in the water, then remain as a mat on the ground surface after the flooding subsides. Paragraph 16 finds that trees on the property have "lichen lines on them, . . . indicators of seasonal high water inundation elevations in wetlands." As with the exceptions discussed above, the Board must reject Respondents' Exception 10 because competent substantial evidence (the testimony of Crosby, Lindsay, and Hart) supports the findings in both paragraph 15 (T. 103, 105, 108, 383-84, 390) and paragraph 16 (T. 65, 74, 98, 368-69, 384, 390-93).

Exception 11: The Number of Potted Palms and the Putative Marketing Plan

Respondents disagree with the ALJ's finding in paragraph 20 that Respondents had approximately fifty small potted palm trees in a small cleared section of the property in 2006 and a comparable number of them there in 2009, based on the photographs in Respondents' Exhibit 21. Respondents assert that the photographs show "hundreds of palms" on the site. The parties agree that Exhibit 21 is the only competent substantial evidence relating to this finding, aside

from one witness's agreement with a question stating that there are "quite a lot" of palms sitting on the property (T. 757). Respondents presented the photographs as a stand-alone exhibit, without offering the testimony of any witness explaining the vantage point, perspective, and date of each photograph. Without such testimony, despite District counsel's having no objection at the hearing to the photographs because "[t]hey accurately represent what's on the property at this . . . time" (T. 762), the parties left it to the ALJ to draw inferences from the photographs based on his own estimate of how much overlap (of the palms shown) exists from photograph to photograph. Thus, the actual number of the potted palms on the site may have been larger or smaller than 50 in either 2006 or 2009 (or both years), but the photographs are some competent substantial evidence supporting the ALJ's estimate of that number in paragraph 20. Under the standard of review, the Board is not free to re-estimate the number of palms on the site (by re-evaluating the evidence), and therefore cannot grant this portion of Respondents' Exception 11.

Respondents also note in this exception that there is no evidence in the record for the ALJ's further finding in paragraph 20 that Respondent "Molica stated that a marketing plan for the sale of palm trees has been developed, which was simply a goal of selling trees after they were ten years old." In reviewing the entire record, the Board has found no evidence of a statement by Molica that he had developed a marketing plan, let alone one with the specific criterion of selling palms only after they reached ten years of age. The Board therefore grants this portion of Exception 11 and rejects the finding of the putative statement as unsupported by competent substantial evidence. *See* § 120.57(1)(*l*), Fla. Stat. (2011) (authority for agency to reject finding of fact if agency first determines from review of entire record and states with particularity in the order that the finding of fact was not based on competent substantial evidence).

Exception 12: Agricultural Avocation, Not Occupation

Respondents likewise attack the findings in paragraph 21 as lacking the support of any evidence. The ALJ found that there was no evidence that Respondents had ever sold any citrus fruit or a single palm tree and that their activities on the site were an avocation, not an occupation. Respondents admit in this exception that they have not yet sold any palm trees. The issue then is whether the ALJ was correct in finding no evidence that Respondents had sold any citrus fruit. They cite only to a single page of testimony (T. 698) as support for their asserting that they had sold citrus fruit for an unacceptably low price. But close examination of both that page and its context in the pages just before and after it shows that the testimony in question did not state that anyone actually bought Respondents' fruit or paid them anything. Instead, this testimony explained how the drop in the price of navel oranges at about the time that Respondents' trees were getting to be of bearing age (T. 696) made it hard in general for small growers like Respondents to find anyone to pick their fruit or to receive an acceptable return on their investment in production (T. 697-99). Respondent Frank Molica himself stated on the record that "[n]o one would buy my oranges because no one would pick them" (T. 45). This admission is competent substantial evidence that supports the ALJ's finding 21, removing any basis for rejecting or modifying the ALJ's finding.

Exception 13: Inconsistency with the Practice of Agriculture

The ALJ found in paragraph 22 that

> [t]here is no evidence that dredging and filling in wetlands is a normal agricultural practice, or that it is consistent with the practice of horticulture, including the growing of exotic palm trees. [Respondents'] agronomist acknowledged that he has never been associated with an application to conduct agricultural or horticultural activities that involve the filling of wetlands. Moreover, extensive dredging, filling, and removal of vegetation were not necessary to accommodate the small area on which the potted plants sit. The more persuasive evidence supports a finding that the topographic alterations on the property are not consistent with the practice of agriculture.

Rec. Order at 15, ¶ 22. Respondents argue against this finding, stating that they did not dredge or fill wetlands but only cleared trees and filled holes, and that clearing is a normal agricultural practice. They urge that their photographic evidence shows that no disturbance of the property took place. The rulings on Exceptions 3, 4, and 8 above dispose of that argument. The Board has rejected all three of those exceptions, since competent substantial evidence supports the findings of paragraphs 5, 6, and 12 of the recommended order (as well as the similar finding in paragraph 18, to which Respondents did not except) that dredging and filling of wetlands on the property did occur. The same evidence supports that portion of the finding here and makes it proof against rejection or modification.

Still at issue in this exception are the ALJ's findings (1) that there is no evidence in the record that dredging and filling in wetlands is a normal agricultural practice or is consistent with the practice of horticulture, and (2) that the topographic alterations Respondents made on their property are not consistent with the practice of agriculture. The evidence cited by Respondents to rebut the first finding relates to clearing, fencing, contouring, soil preparation, plowing, planting, harvesting, and construction of access roads in general but not to dredging and filling in wetlands per se as a normal agricultural practice. As for the second finding, Respondents' evidentiary citations relate to clearing of trees and filling of the holes left by the tree removal, but the record contains competent substantial evidence (T. 747) supporting the ALJ's finding that Respondents' topographic alterations on their property are not consistent with the normal practice of agriculture. The Governing Board therefore denies Exception 13.

Exceptions 14 and 23: Obstruction of the Natural Flow of Surface Water

In these two exceptions, Respondents assert that there is no evidence for the finding in paragraph 23 that their filling of the wetlands obstructed the natural flow of surface water and likely was for that predominant purpose. Both exceptions argue that there is no evidence to

support the finding that Respondents filled their property and obstructed the flow of water. Because competent substantial evidence (T. 82-84, 95-96, 109, 140, 525, 529-30, 609, 622, 625, 654, 742-43) does support this finding, however, these two exceptions likewise fail.

Exception 15: Reasonableness of the Revised Corrective Action

The ALJ found in paragraph 24 that the District's "revised corrective action is reasonable and designed to address the restoration needs of the property." He therefore approved it. Although Exception 15 ostensibly opposes this finding, Respondents never address the reasonableness of the corrective action itself. Instead, they merely repeat their argument in Exception 1 against the ALJ's allowing the District to introduce Exhibit 73 (setting forth the revised corrective action) and granting of the District's motion to amend the Complaint to replace the original corrective action in conformance with the evidence at the hearing—i.e., Exhibit 73 and the testimony explaining it. As explained in the ruling on Respondents' Exception 1 above, the Board has no authority to overturn an ALJ's evidentiary or procedural rulings and thus has no power to grant this exception.

Exception 16: Construction of a Surface Water Management System

Respondents take this exception to the finding of ultimate fact in paragraph 27 (ostensibly a conclusion of law) that if the dredging and filling occurred in a wetland, the "activity constituted the construction and operation of a surface water management system requiring an [environmental resources permit]." *See* Rec. Order at 17, ¶ 27. Like the other exceptions discussed above, this one asserts that the District presented no evidence to support this mixed finding of fact and conclusion of law. Respondents cite to the rule (40C-4.021(7)) defining "construction" ("any activity including land clearing, earth moving or the erection of structures which will result in the creation of a system") and to one page of the transcript where

their witness Kern testified that he did not see any storm water management system on the property (T. 575).

Although paragraph 27 of the recommended order functions as both a finding of ultimate fact and a conclusion of law, the legal framework of statutes and rules underpins both the finding and the conclusion. The Governing Board will therefore address that framework first. The Board begins by noting that it has the authority to modify such a conclusion of law within the substantive jurisdiction of the Board to interpret its enabling statutes in chapter 373, as well as its rules. *See* § 120.57(1)(*l*), Fla. Stat. (2011); *Deep Lagoon Boat Club, Inc. v. Sheridan,* 784 So. 2d 1140, 1144 (Fla. 2d DCA 2001) (upholding decision of DEP Secretary on ALJ's conclusions of law, since he ratified those within DEP's substantive jurisdiction and refrained from overturning the ALJ's conclusion on an issue beyond DEP's substantive jurisdiction, whether the doctrine of collateral estoppel applied to the petitioner).

As for the applicable statutes and rules for determining whether an activity constitutes the construction and operation of a surface water management system, the Board observes that Respondents have overlooked most of them. Despite citing to the rule defining "construction," Respondents did not refer to the ALJ's citation to another subsection of the same rule (40C-4.021(27)) that is directly relevant to the issue whether Respondents' dredging and filling in wetlands constitute a regulated system. That subsection expressly defines both "surface water management system" (the term used in the paragraph at issue) and the word "system" by itself as "includ[ing] areas of dredging or filling, as those terms are defined in subsections 373.403(13) and 373.403(14)." Those statutes in turn both refer to activities in wetlands:

> (13) "Dredging" means excavation, by any means, in surface waters or wetlands, as delineated in s. 373.421(1).
>
> (14) "Filling" means the deposition, by any means, of materials in surface waters or wetlands, as delineated in s. 373.421(1).

Reading all these definitions together according to their plain meaning, the Board concurs with the ALJ's conclusion in paragraph 27 that if the area in which the activities occurred was a wetland, they constituted the construction of a surface water management system. The Board also agrees that construction of such a system in wetlands required an environmental resources permit, unless exempted under section 373.406. *See* Fla. Admin. Code R. 40C-4.041(2)(b)8 (a "permit is required prior to the construction . . . [or] operation . . . of a surface water management system which . . . [i]s wholly or partially located in, on, or over any wetland").

As for the respondents' attack on the factual component of paragraph 27, the Governing Board's rulings on Exceptions 3 through 5 and 8 through 10 show that competent substantial evidence does support the finding that Respondents dredged and filled in wetlands on their property. Accordingly, the Board must reject Exception 16 as well.

Exception 17 to "[a]ll of paragraph 28"

Respondents do not give any reason for this exception (other than including it in the group (Exceptions 2 through 20) objecting to portions of the recommended order allegedly lacking the support of any competent substantial evidence. To facilitate any future review of this order, the Board will rule on this exception despite having no duty to rule on such an exception that fails to "include appropriate and specific citations to the record," as required by section 120.57(1)(k). Paragraph 28 of the recommended order is essentially a finding of ultimate fact (though ostensibly a conclusion of law) that "Respondents dredged and filled wetlands on their property without first obtaining an [environmental resources permit]." Under the standard of review, the Board must treat this "conclusion of law" as a finding of fact. *See Pillsbury v. Department of Health & Rehab. Servs.*, 744 So. 2d 1040, 1041-42 (Fla. 2d DCA 1999) (obligation of agency to honor ALJ's "findings of fact cannot be avoided by categorizing a contrary finding as a conclusion of law") (citing *Kinney v. Department of State*, 501 So. 2d 129,

132 (Fla. 5th DCA 1987)). As discussed in the ruling on Exception 16 immediately above, competent substantial evidence supports the findings on this same issue to which Respondents objected in Exceptions 3 through 5 and 8 through 10. The same evidence supports this conclusion of law by the ALJ, with which the Governing Board concurs. The Board denies Exception 17.

Exception 18 to "[a]ll of paragraph 30" and
Exception 19 to "[a]ll of paragraph 31"

Exception 18. Respondents' only explanation for this exception is that the "finding" (as described by Respondents, but labeled a conclusion of law by the ALJ) is contrary to the testimony of their witness Humphreys. Most of paragraph 30 of the recommended order sets forth several ostensible conclusions of law that the Board must treat as findings of ultimate fact, *see Pillsbury v. Department of Health & Rehab. Servs.*, 744 So. 2d at 1041-42, based on the ALJ's acceptance of the "more persuasive" of the conflicting evidence presented by the parties. In paragraph 30, the ALJ finds that Respondents are not engaged in the occupation of agriculture, that the topographic alterations on the property are not consistent with the practice of agriculture, and that Respondents made the alterations for the predominant purpose of impounding or obstructing surface waters. These findings depend on the same competent substantial evidence that supports the findings to which Respondents objected in Exceptions 11 through 14 above. That same evidence precludes the Board from disturbing these ultimate findings, too.

To complete the rulings on Exception 18, however, the Board must also consider the conclusion of law in the last sentence of paragraph 30 that Respondents are not entitled to an exemption. Because the language of the findings refers to topographic alterations for the predominant purpose of obstructing surface waters, the ALJ's conclusion in paragraph 30 applies

only to the "agricultural exemption" under section 373.406(2),[6] which uses the same terms. In Exception 19, Respondents have objected to paragraph 31, which likewise concludes (and in more detail) that this exemption does not apply to the dredging and filling of the wetlands in this case. The ruling on Exception 19 will thus apply equally to this conclusion of law in paragraph 30, the subject of Exception 18.

Unlike Exception 18, Exception 19 lacks the support of any statement of a reason for it other than its being part of the group (Exceptions 2 through 20) objecting to portions of the recommended order as lacking the support of any competent substantial evidence. Again, the Board will rule nevertheless on this exception to facilitate future review of this order, despite Respondents' failure to comply with section 120.57(1)(k) by "includ[ing] appropriate and specific citations to the record."

Exception 19. Paragraph 31 of the recommended order addresses an argument by Respondents in their proposed recommended order that the decision in *A. Duda & Sons, Inc. v. St. Johns River Water Mgmt. Dist.*, 17 So. 3d 738 (Fla. 5th DCA 2009), requires a conclusion that the agricultural exemption applies to Respondents' activities. They rely on the *Duda* court's statement that "**if** Duda constructed a drainage ditch for a purpose consistent with the practice of agriculture and **if** the predominant effect of the drainage ditch was to lower the groundwater table level, then the construction of the drainage ditch would be exempt from the District's permitting requirements." *Id.* at 744 (emphasis added). But the two "if" clauses in the court's statement are important conditions. If either of those conditions is not true, then the exemption does not apply. The ALJ points out in paragraph 31 his previously having found that the predominant purpose of the activities was not to carry out agriculture or horticulture but to obstruct surface water runoff. Based on those findings, the ALJ concluded that the agricultural

[6] The ALJ addressed the exemption for closed agricultural water management systems (*see* § 373.406(3)) only in the Supplemental Recommended Order, as discussed in more detail below.

exemption of section 373.406(2) does not apply to the topographical alterations of Respondents' property, and the Board concurs with that conclusion. The amendment to section 373.406(2) in 2011 does not compel a different result. The amendment continues to limit the exemption by requiring that the topographical alterations must have been made "for purposes consistent with the normal and customary practice of such occupation in the area" and must not have been "for the sole or predominant purpose of impeding or diverting the flow of surface waters or adversely impacting wetlands. *See* § 373.406(2), Fla. Stat. (2011). As noted above, however, the ALJ expressly found that the activities at issue here were for the predominant purpose of obstructing surface water runoff, not to practice agriculture or horticulture. One of the common meanings of "obstruct" is to impede. The legislature's replacement of "obstructing" with "impeding" does not materially change the agricultural exemption or undermine in any way the ALJ's finding of ultimate fact about Respondent's predominant purpose for the activities at issue here. The Board therefore rejects both Exception 18 and Exception 19.

Exception 20 "to all of the recommendation"

Exception 20 objects to the whole overall recommendation of the ALJ's recommended order and offers no argument or other support for the objection. At heart, the recommendation rests on the ALJ's conclusion that the agricultural exemption does not apply to Respondents' dredging and filling in wetlands. The ALJ based that recommendation on the findings of fact and conclusions of law he had reached in the recommended order. Respondents took exception to many of those findings and conclusions, and the Board has ruled on all those exceptions. Having ruled on all those exceptions, especially on Exceptions 18 and 19 on the inapplicability of the agricultural exemption, and in view of the Respondents' failure in this exception to state any reason to reconsider the position taken in those rulings, the Board denies Exception 20.

Exception 21: Lack of a Prehearing Order

In this exception, Respondents complain that a miscarriage of justice has resulted from the ALJ's failure to enter a prehearing order setting forth the issues to be heard. The Board has no authority to redress such an alleged procedural defect outside the Board's substantive jurisdiction. *See G.E.L. Corp.*, 875 So. 2d at 1263-65. To facilitate review of this order, however, the Board will point out several considerations that Respondents appear to have overlooked in this exception.

As they themselves note, the ALJ did enter an order of prehearing instructions that called for either a joint prehearing stipulation of the issues of fact and issues of law to be decided or each party's separate statement of the issues. It is common practice in administrative proceedings determining the substantial interests of a party for the ALJ to require a prehearing stipulation of the parties' positions, the agreed facts, and the issues of law and fact, among other items. *See* The Florida Bar, *Florida Admin. Practice* § 4.28, at 4-26 (8th ed. 2009). In this case, the parties filed separate statements, and each party was responsible for preparing its own statement and reading the other's before the hearing began. Moreover, the prehearing order required counsel for each party to confer with the other no later than twenty days before the hearing to discuss the possibility of settlement and prepare a prehearing stipulation. The order instructed the parties to stipulate to as many facts and issues as possible, and set forth the parties' opposing positions and concise statements of the issues of fact and issues of law to be litigated. The requirement of a prehearing conference and stipulation was completely consistent with rule 28-106.209 of the Uniform Rules of Administrative Procedure in the Florida Administrative Code. Respondent Frank Molica is one of the two attorneys representing the respondents, and they both were responsible for conferring with counsel for the District to discuss the issues and narrow them if possible—and for preparing for the hearing if the efforts to confer and reach agreement were unsuccessful. Respondents do not assert that they ever asked the ALJ for a prehearing conference

before him to clarify or narrow the issues, nor that they asked for such clarification and narrowing of issues at the start of the hearing—nor at any time during it. Respondents can hardly complain now that they had a different understanding of the issues from the District's. The separate prehearing statements made that plain, as a joint stipulation would likewise have done, since it would have contained all the issues raised by either party, whether or not stated separately.

Respondents point to two exhibits (attached to their exceptions) to support their arguments about the facts related to this exception. Exhibit 1 to their exceptions is a letter from counsel for the District dated December 5, 2007. From that letter they quote a statement purporting (despite a *triple* negative) to recognize that Respondents are engaged in agriculture on the site, but they fail to quote the very next sentence in the letter, which points out that "filling or excavating in a wetland is not considered consistent with the practice of agriculture [or] silviculture." This sentence states the District's position on the core issue of this case, addressing the affirmative defense raised in general language by Respondents themselves in their amended request for a hearing—whether section 373.406(2) exempted their dredging and filling from permit requirements. *See* Resp. Amended Petition ¶ 6 (Sept. 23, 2008).

Moreover, the statement purporting to recognize that Respondents were engaged in agriculture appears in a pre-enforcement letter seeking permission to visit the property to further investigate the activities—not in a prehearing statement made after completion of discovery and setting forth the issues to be tried. Respondents fail to show how they could reasonably believe that any statements (let alone one taken out of context) in such a letter could govern the scope of issues to resolve in this proceeding, which had not yet commenced at the time of that letter. Such a pre-enforcement letter could hardly take precedence over the Complaint that the District filed eight months later, let alone the prehearing statement that the District filed seven months after

the Complaint. *See* Dist. Prehearing Statement ¶ 7.d (Mar. 4, 2009) ("Issues of Fact Which Remain to [B]e Litigated: d) Whether the Molicas engage in the occupation of agriculture, silviculture, floriculture, or horticulture on their property").

Neither does Exhibit 2 (a receipt for the sale of 42 boxes of oranges in 1993) to the exceptions provide any support for this exception. Respondents did not present that exhibit to the ALJ, and it is not in the record.

Based on all these considerations, the Board must reject this exception to the lack of a prehearing order, and the Board would do so even if it had the authority to overturn an ALJ's procedural rulings. *But see G.E.L. Corp.*, 875 So. 2d at 1263-65 (agency does not have substantive jurisdiction over ALJ's procedural rulings).

Exception 22: Failure to Allow Closing Argument

In this exception, Respondents urge that the ALJ's failure to allow them to make a closing argument departed from the essential requirements of law. For three reasons, this exception likewise has no merit. First, Respondents have not shown that the ALJ actually denied permission for a closing argument. Respondents cite to no evidence in the record that they asked for a closing argument or that the ALJ denied such a request, and the Board has found none. Under section 120.57(1)(k), the Board "need not rule on an exception that does not . . . include appropriate and specific citations to the record." Second, section 120.57(1)(b) provides for all parties to have "an opportunity . . . to present argument on all issues" but does not speak of (let alone create a right to) closing arguments per se. Respondents have had numerous opportunities to make arguments during these proceedings—in motions, objections, and especially the proposed recommended orders and the exceptions to the recommended and supplemental recommended orders. Even assuming for the sake of argument that Respondents had asked for and were denied closing argument off the record (a circumstance that they have not even

asserted), they have not shown that the putative denial has or would have prejudiced them in any way. Third, this exception again invites the Board to second-guess an ALJ's procedural rulings. As explained above, the Board has no authority to do so, *see G.E.L. Corp.*, 875 So. 2d at 1263-65, and therefore denies this exception.

Exception 23: Repetition of Exception 14

This exception essentially repeats Exception 14, arguing that no evidence supports the findings in paragraph 23 of the recommended order. The Governing Board has denied both these exceptions, as discussed in the ruling on Exception 14 above.

Exception 24: Failure to Rule on the Closed System Exemption

As discussed above at page 3, the Board previously granted this exception by remanding to the ALJ for the requisite findings of fact, conclusions of law, and overall recommendation on the applicability of the closed system exemption. The ALJ's supplemental recommended order supplied the missing findings, conclusions, and recommendation (thus, "ruling" on the closed system exemption), and Respondents then filed seven exceptions to that order (the District filed none). The next section addresses those exceptions by Respondent.

RULINGS ON RESPONDENTS' EXCEPTIONS TO THE SUPPLEMENTAL RECOMMENDED ORDER (SRO)

Exception No. 1: Denial of Respondents' Motion to Abate

When Respondents filed their exceptions to the SRO on October 1, 2009, they were still proceeding in circuit court with their collateral challenge to the District's enforcement action, as discussed above at pages 4 and 5. On the basis of the court's declaratory judgment that the District lacked authority under chapter 373 to take enforcement against Respondents, they moved the ALJ to abate the administrative enforcement action. In the SRO, the ALJ denied the motion to abate, and the respondents took exception to that denial, asserting that the circuit court's decision is the law of this case unless overturned on appeal. By overturning the circuit

court's judgment, the Fifth District Court of Appeal has done just that. It rejected Respondents' ground for the motion to abate and thus removed the reason for this exception. The time for the respondents to appeal the district court's decision has expired, and that decision is final. The Board therefore denies Exception 1.

Exception 2: Post-SRO Motion for New Trial

In this exception, Respondents complain that the initial recommended order contains gross factual errors, as asserted in their motion for new trial (or rehearing) filed after the SRO was entered. Respondents then incorporated that motion as a part of this exception. Thus, the standards for reviewing an exception apply to the Board's review of the motion.

The motion essentially disagrees with the ALJ's findings of fact and raises again Respondents' objection (previously stated in Exception 21 to the initial recommended order) to the lack of a pretrial order setting forth the issues to be tried. For the same reasons as stated in the ruling on Exception 21 above, this Exception 2 (i.e., the motion for a new trial or rehearing) to the SRO has no merit. The Board has no substantive jurisdiction over such a procedural issue. *See G.E.L. Corp.*, 875 So. 2d at 1263-65. Moreover, Exhibit 1 to the motion is the same letter attached as Exhibit 1 to Respondents' exceptions to the initial recommended order, discussed above in the ruling on Exception 21. Although such a pre-enforcement letter might be evidence of the position of the District before it completed its investigation, it cannot take precedence over the parties' filings in this proceeding. As in Exception 21, Respondents' motion ignores that the Complaint, the respondents' amended request for hearing, and the prehearing statements govern the scope of the issues actually raised in this proceeding. As for the affidavit of Respondent Frank Molica attached as Exhibit 2 to the motion, the Board cannot consider it now, because (like the receipt attached as Exhibit 2 to Exception 21), Respondents failed to make the affidavit part of the record before the ALJ. Thus, the same rationale as that for the Board's rejection of

Exception 21 to the recommended order (see pages 30-32 above) applies to this exception (the motion for a new trial), too, aside from paragraph 10 of the motion.

Paragraph 10 of the motion fares no better. It does nothing more than express disagreement with the portion of the SRO adopting the District's argument about "a requirement of water," without any explanation of what water requirement they are referring to, what specific argument they oppose, or why they disagree with it. Apparently, Respondents disagree here (as they do expressly in Exception 3, discussed in detail below) with the ALJ's conclusion of law in paragraph 10 of the SRO that Respondents' activities do not qualify for the "closed system" agricultural exemption (from the requirement for an environmental resources permit) under section 373.406(3). The ALJ based that conclusion on his findings that there was no reservoir or works on Respondents' property requiring water or maintenance of a water level in it. Respondents do not offer any support for their disagreement, either here or in Exception 3. The Board concurs with the ALJ's conclusion, which rests firmly on the plain language of the statutes, as discussed in the ruling on Exception 3 below. Accordingly, the Board finds no merit in any part of Exception 2 to the SRO and rejects it.

Exception 3: ALJ's Statutory Constructions of Sections 373.403(6) and 373.406(3)

This exception is no more than an unsupported and general expression of disagreement with the ALJ's conclusions of law construing these two statutes. The Board cannot discern from this vague exception the Respondents' own construction of these statutes, nor any support for Respondents' disagreement with the ALJ. Thus, Exception 3 fails to provide the Board with any basis for overturning the ALJ's conclusions in construing and applying the statutes at issue. Nevertheless, the Board will review all the ALJ's conclusions of law in the SRO for consistency with the Board's own interpretation of these two statutes establishing a permitting exemption for agricultural closed systems.

Conclusions of Law 7 and 8 of the SRO do no more than quote the two statutes at issue, and Conclusion 9 construes the term "closed system" as having four requirements:

> A closed system "requires water," requires a "reservoir or works," and requires that a water level be maintained in the reservoir or works. Also, by its very nature, a closed system cannot discharge water off-site.

Supp. Rec. Order 4-5, at ¶ 9. The Board concurs with the ALJ's statement of three of those requirements (the first two and the fourth stated above) but must rephrase the statement of the third requirement, as explained below.

The Board agrees that a "closed system" as defined by statute requires water, as well as a reservoir or works. Section 373.403(6) defines "closed system" as meaning "any reservoir or works located entirely within agricultural lands owned or controlled by the user . . . which ***requires water*** only for the filling, replenishing, and maintaining the water level thereof" (emphasis added). The statutory definition of "reservoir" in section 373.403(4) uses one of the word's most common meanings, as "any artificial or natural holding area which contains or will contain the ***water*** impounded by a dam" (emphasis added). *Merriam-Webster's Collegiate Dictionary* 1059 (11th ed. 2005) (definition **1a** of *reservoir*: "a place where something is kept in store: as **a** : an artificial lake where ***water*** is collected and kept in quantity for use") (emphasis added). Section 373.403(5) defines "works" as "all artificial structures, including, but not limited to, ditches, canals, conduits, channels, culverts, pipes, and other construction that connects to, ***draws water from, drains water into, or is placed in or across waters*** in the state" (emphasis added). Under these statutes, then, water and one or more structures to store or use it are integral requirements for any system that could qualify as a "closed system."

The Board also agrees with the ALJ's conclusion that because a closed system is by its very name "closed," and by definition is "located entirely within agricultural lands owned or controlled by the user," it must not be capable of discharging off the property. The Fifth District

Court of Appeal upheld this interpretation in *Corporation of the President of the Church of Jesus Christ of Latter-Day Saints v. St. Johns River Water Management District*, 489 So. 2d 59, 60 (Fla. 5th DCA 1986) [hereinafter *Latter-Day Saints*]; *see also Suggs v. Southwest Fla. Water Mgmt. Dist.*, Case No. 08-3530 (DOAH Feb. 19, 2009; SWFWMD Apr. 3, 2009) (system that discharges surface water or ground water is not a closed system)..

As for the ALJ's conclusion that a closed system "requires that a water level be maintained in the reservoir or works," the Board must modify that statement. The Board has substantive jurisdiction to do so, since the conclusion at issue is interpreting one of the Board's substantive enabling statutes, an exemption from the requirement of a surface water management permit (under the environmental resources permitting program of part IV of chapter 373). Section 373.406(3) exempts closed systems from part IV but not from part II (requiring a consumptive use permit to use water), which a farmer might need to meet to fill, replenish, or maintain the water level of an agricultural closed system:

> (3) Nothing herein [i.e., in part IV of chapter 373, requiring environmental resources permits], or in any rule, regulation, or order adopted pursuant hereto, shall be construed to be applicable to construction, operation, or maintenance of any agricultural closed system. ***However, part II of this chapter*** ["Permitting of Consumptive Uses of Water"] ***shall be applicable as to the taking and discharging of water for filling, replenishing, and maintaining the water level in any such agricultural closed system.*** This subsection shall not be construed to eliminate the necessity to meet generally accepted engineering practices for construction, operation, and maintenance of dams, dikes, or levees.

§ 373.406(3), Fla. Stat. (2011). The Board interprets the legislature's references to "discharging" and "water level" in this exemption in the context of the definitions of "closed system" and "works" in subsections 373.403(5) and (6). A farmer must obtain a consumptive use permit to take water from outside the system and "discharge" sufficient quantities of water into the system for it to operate. But "the water level" to be replenished or maintained must mean the level (or amount of water) needed for the whole system to operate properly, and if the system contains

varying parts with disparate needs for water, the Board interprets "the water level" as intended to include the level needed in each ***part*** of the closed system for that part to operate properly.

For example, a farmer's system may contain numerous and various kinds of "works" in addition to one or more reservoirs, and the water levels needed in those various artificial structures may vary from one to another, for various reasons. The system may serve a large area of land with varying elevations, so that some parts of the system may likewise have to maintain water levels that differ from those of other parts of the system. Thus, a farmer sometimes may have to move (i.e., discharge) water from one or more parts of the system internally to one or more other parts of the system—for example, to maintain appropriate water levels for the root zones of different kinds of row crops in different fields. Crop rotation, weather, and the topography, soil types, and even hydrogeology of the site of an agricultural closed system may result in having to maintain varying levels within the system—not a single overall level.

The Board therefore modifies the portion of the ALJ's conclusion of law stating that a system "requires that ***a*** water level be maintained in the reservoir or works" (emphasis added). In accordance with section 120.57(1)(*l*), the Board is substituting its own conclusion of law interpreting the legislature's use of "the water level" in the exemption statute as meaning the level needed in each ***part*** of the closed system for that part (and thus the overall system) to operate properly, rather than a single uniform level throughout the system. The Board's clarified statement of the water level requirement is as reasonable as or more reasonable than the ALJ's statement of it, because the Board's statement avoids the possible implication that a particular water level must be maintained throughout a system for it to be a "closed system" under section 373.406(3). Such an implication would unreasonably limit the scope of this exemption, which applies to environmental resources permit requirements for the artificial structures (works or reservoirs) of the system, not to the system's internal water level or levels per se. A consumptive

use permit would address water quantities needed for each part of the system's operation, and the "closed system" exemption does not depend on what the water level is in any part of the system—so long as the system does not discharge offsite.

Despite this modification of part of one conclusion of law made by the ALJ, the Board agrees with the ALJ's summary conclusion in paragraph 11 of the SRO that Respondents' dredging and filling did not qualify for the permitting exemption for closed agricultural systems, based on the ALJ's findings of fact and the other conclusions of law in the SRO. The Board therefore rejects Respondents' Exception 3 to the SRO.

Exception 4: Distinguishing the *Latter-Day Saints* Case

Respondents attempt in this exception to distinguish the *Latter-Day Saints* case cited above that the ALJ also cites as support for his conclusion in paragraph 9 of the SRO that a closed (agricultural) system cannot discharge water offsite. *See Latter-Day Saints*, 489 So. 2d at 60 (concluding in pertinent part that a closed system cannot exist if there is a discharge off the property, since section 373.403(6) defines such a system as being "located entirely within agricultural lands owned or controlled by the user"). Respondents' basis for the distinction is an allegation that they "do not discharge water from their property." But two of Respondents' own witnesses (Kern and Humphreys) admitted that there is nothing on Respondents' property to prevent a discharge of stormwater runoff (T. 578, 742-43). Paragraph 10 (ostensibly a conclusion of law) of the SRO then paraphrases that admission (implicitly as a finding of fact supported by the competent substantial evidence given by Respondents' own witnesses), stating that "there is nothing on the property that prevents stormwater from discharging off-site." Based in part on that implicit finding, the ALJ then concludes that there cannot be a closed system on the property and that the closed system exemption does not apply to Respondents' activities (the dredging and filling in wetlands). *See* Supp. Rec. Order ¶¶ 10-11.

The ALJ also bases these conclusions on a finding that there is no reservoir or works on the property requiring water or maintenance of a water level. Competent substantial evidence supports that finding, too (T. 577, 711-14, 729, 733, 741). Under the standard for reviewing an ALJ's findings of fact, the Board has no authority to disturb any finding supported by any competent substantial evidence. Given these findings, the Board concurs with the ALJ's conclusion that there is no closed system on Respondents' property and rejects Exception 4.

Exceptions 5-7: ALJ's Recommendation on the Closed System Exemption

In these three exceptions Respondents object to the ALJ's overall recommendation in the SRO as unsupported by the evidence in the record and contrary to the Board's statutory authority under chapter 373. At the end of the SRO, the ALJ reached a recommendation based on all the findings and conclusions in both the recommended order and the SRO, as follows:

> RECOMMENDED that a final order be entered sustaining the charges in the Complaint, requiring Respondents to take the corrective actions described in District Exhibit 73, and determining that Respondents are not entitled to any agricultural exemption under Section 373.406, Florida Statutes.

Supp. Rec. Order at 5. These exceptions are all conclusory statements without a shred of specificity or cited support. They add nothing to Respondents' other exceptions to the recommended or the supplemental recommended order. The Board has already addressed all those exceptions, and the Board rejects these three exceptions as redundant and failing to comply with the requirements of section 120.57(1)(k) that each exception "identify the legal basis for the exception, or . . . include appropriate and specific citations to the record."

THE LEGISLATIVE AMENDMENT OF THE AGRICULTURAL EXEMPTION, AND THE BINDING DETERMINATION BY DACS

The Agricultural Exemption Statute. As discussed above at pages 5-6, in 2011 the Florida Legislature amended both the agricultural exemption in section 373.406(2) and the provision in section 373.407 for an opinion from the Department of Agriculture and Consumer Services

(DACS) on whether the exemption applies in a particular case. (The latter amendment now makes the DACS opinion "a binding determination.") Under the new language in the agricultural exemption, the topographical alterations that a person engaged in agriculture makes to his property "may impede or divert the flow of surface waters or adversely impact wetlands" and still qualify for the exemption, if the alterations are made for purposes consistent with the normal and customary practice of agriculture. However, the amended language excludes from the exemption any alteration that is "for the sole or predominant purpose of impeding or diverting the flow of surface waters or adversely impacting wetlands." (Previously, the exemption language had not referred anywhere to wetlands.) Although the amended exemption does not apply to activities previously covered by a permit under part IV of chapter 373, it applies retroactively to July 1, 1984—implicitly, to unpermitted activities such as those at issue here.

The "Binding Determination" Statute. Following the amendments made in 2011, section 373.407 now reads:

> **373.407 Determination of qualification for an agricultural-related exemption.**—In the event of a dispute as to the applicability of an exemption, a water management district or landowner may request the [DACS] to make a binding determination as to whether an **existing or proposed** activity qualifies for an agricultural-related exemption under s. 373.406(2). The [DACS] and each water management district shall enter into a memorandum of agreement or amend an existing memorandum of agreement which sets forth processes and procedures by which the [DACS] shall undertake its review, make a determination effectively and efficiently, and provide notice of its determination to the applicable water management district or landowner. The [DACS] has exclusive authority to make the determination under this section and may adopt rules to implement this section and s. 373.406(2).

§ 403.407, Fla. Stat. (2011) (emphasis added). This statute provides a simple procedure for initiating the process leading to DACS's binding determination of a dispute over the agricultural exemption. The statute requires only a request by either a district or a landowner to start the binding determination process by DACS. But the statute does not provide any guidance to DACS

or the parties for how DACS should proceed to make that determination. Instead, the statute leaves to DACS and the districts the task of developing most of the necessary procedures through a memorandum of agreement (MOA). DACS and the District have not yet amended their MOA to add such procedures, and DACS has not yet adopted rules on how it will implement the "binding determination" statute. Moreover, the statute is completely silent on what procedures apply when a respondent in an enforcement action asks for a determination after an ALJ has held a formal trial-like hearing and submitted a recommended order containing findings of fact supported by competent substantial evidence.

The DACS Determination in This Case. In the absence of procedures established by statute, rule, or MOA, and despite having a copy of the ALJ's recommended order in this proceeding under chapter 120, DACS conducted its own investigation. DACS inspected Respondents' property to determine the presence and location of wetlands and resolve the question whether the topographical alterations (the dredging and filling) by Respondents were for purposes consistent with the normal and customary practice of agriculture. DACS also reviewed documentary evidence submitted by Respondents and by the District. Based on that independent investigation and the review of portions of the record before the Board, DACS made its own findings of fact (and mixed findings of fact and conclusions of law) and reached its overall binding determination. *See* Ex. C *infra*. Although DACS acknowledged the existence of jurisdictional wetlands on Respondents' site, it concluded that the Molicas were engaged in the occupation of agriculture on the site and that their alterations of the topography were for purposes consistent with the normal and customary practice of that occupation on part of the site. Specifically, DACS determined that the agricultural exemption (under section 373.406(2)) did apply in the western and central portions of Respondents' property (outlined in green and including the labels A, C, and D on the aerial photographic exhibit attached to the DACS binding

determination). However, DACS determined that the exemption did not apply to the eastern portion of the property (outlined in red and containing the label B on the exhibit attached to the determination), *see id.* (aerial photograph attached as exhibit to the binding determination), because the filling of the jurisdictional wetland located there was not a normal and customary agricultural practice.[7]

The Governing Board cannot change or otherwise rule on the DACS findings, because another agency made them, and they (and some of the evidence supporting them) are outside the record here. In addition, those findings are final; neither the District nor the respondents chose to file a petition to undergo another hearing to challenge those findings. The Board must take into account the binding effect of the unchallenged determination by DACS, to comply with the legislative intent of the 2011 amendments to section 373.406(2). Thus, the corrective action ordered by this final order of the Board must be consistent with the findings of fact and conclusions of law necessary to support the DACS binding determination.

IT IS THEREFORE ORDERED: The Board adopts the findings, conclusions, and recommendations of both the recommended order dated June 12, 2009, and the supplemental recommended order dated September 21, 2009, in their entirety, except for the modification of one sentence in the findings of paragraph 20 of the initial recommended order, as explained above in the ruling on Exception 11. Moreover, to the extent that the DACS determination modifies the areal extent of the non-exempt topographical alterations, the revised corrective action as set forth in Exhibit D (originally, the District's Exhibit 73 at hearing) admitted into

[7] DACS also found that Respondents had recently placed a berm in jurisdictional wetlands along the northern, eastern, and southern boundaries of the property, to qualify for the closed system exemption under section 373.406(3). DACS acknowledged that it had no authority to rule on the closed system exemption and concluded that the filling of wetlands to construct the berm was not exempt under the agricultural exemption of section 373.406(2). Since there is no evidence about the berm in the record in this proceeding, the Board cannot consider it in this final order except to note that the presence of such a berm may affect future decisions by the District and Respondents, including the implementation of the corrective action at issue here.

evidence by the ALJ are modified to conform to the binding determination by DACS. Specifically,

(1) the phrase "hardwood wetland swamp" in the first two lines of "paragraph 13" on the first page of the exhibit is replaced by the following: "jurisdictional wetland within the boundary of the nonexempt area shown on Exhibit 2 to the DACS binding determination"; and

(2) the phrase "within the Respondent's property" in line 2 of subparagraph 15.a on the second page of Exhibit D" is replaced with the following: "within the boundary of the nonexempt area shown on Exhibit 2 of the DACS binding determination."

In all other respects, the allegations of the Complaint are sustained.

DONE AND ORDERED this 26th day of July 2012 in Palatka, Florida.

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT

BY: _____
Lad Daniels
Chairman

RENDERED this 26TH day of July 2012.

BY: Sandy Bertram
SANDY BERTRAM
DISTRICT CLERK

Copies to:

Vance Kidder, Assistant General Counsel
St. Johns River Water Management District
4049 Reid Street
Palatka, Florida 32177

Frank Henry Molica, Esq.
Frank Henry Molica, P.A.
231 North Courtenay Parkway
Merritt Island, Florida 32953-3407

Benjamin Y. Saxon II, Esq.
Saxon & Chakhtoura, P.A.
111 South Scott Street
Melbourne, Florida 32901-1262

Notice of Rights

1. Any substantially affected person who claims that final action of the District constitutes an unconstitutional taking of property without just compensation may seek review of the action in circuit court under section 373.617 of the Florida Statutes and the Florida Rules of Civil Procedure, by filing an action within 90 days of the rendering of the final District action.

2. Under section 120.68 of the 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 of the Florida Rules of Appellate Procedure within 30 days of the rendering of the final District action.

3. A District action or order is considered "rendered" after it is signed by the Chairman of the Governing Board, or his delegate, on behalf of the District and is filed by the District Clerk.

4. Failure to observe the relevant time frames for filing a petition for judicial review as described in paragraphs 1 or 2 will result in waiver of that right to review.

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing NOTICE OF RIGHTS has been furnished on this 27th day of July 2012, to each of the following:

Via U. S. Mail:

Frank Henry Molica, Esq.
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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, Petitioner, vs. FRANK H. AND LINDA M. MOLICA, Respondents.	)	Case No. 08-4359EF

RECOMMENDED ORDER

Pursuant to notice, this matter was heard before the Division of Administrative Hearings by its assigned Administrative Law Judge, Donald R. Alexander, on March 11, 12, and 13, 2009, in Merritt Island and Rockledge, Florida.

APPEARANCES

For Petitioner: Vance W. Kidder, Esquire
St. Johns River Water Management District
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Palatka, Florida 32178-1429

For Respondents: Frank Henry Molica, Esquire
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Melbourne, Florida 32901-1262

STATEMENT OF THE ISSUES

The issues are (1) whether Respondents, Frank H. and Linda M. Molica, dredged and filled wetlands on their property in

Merritt Island, Brevard County (County), Florida, without a permit and should take certain corrective actions, and (2) whether Respondents' activities are exempt from permitting under Section 373.406(2), Florida Statutes.[1]

PRELIMINARY STATEMENT

On August 8, 2008, Petitioner, St. Johns River Water Management District (District), filed an Administrative Complaint and Proposed Order (Complaint) alleging that "[b]eginning in 2004," Respondents "undertook land clearing, dredging, and filling in the wetland on [their] property without having a current, valid permit from the District"; and that these activities constituted "the construction and operation of a surface water management system and are prohibited unless authorized by a permit issued by the District." The Complaint further described a series of corrective actions that must be undertaken by Respondents, including the option of applying for an after-the-fact permit or restoring the subject property to a condition commensurate with the adjacent wetland system. By an ore tenus motion at final hearing, on which a ruling was reserved, the proposed corrective actions were slightly revised and are reflected in District Exhibit 73. The motion is hereby granted.

On August 25, 2008, Respondents filed their Petition for the purpose of contesting the charges in the Complaint. The Petition generally contended that Respondents were not required to obtain

a permit since their activities qualify for an agricultural exemption under Section 373.406(2), Florida Statutes. The matter was referred by the District to the Division of Administrative Hearings on September 3, 2008, with a request that an administrative law judge be assigned to conduct a hearing. On September 25, 2008, Respondents filed an Amended Petition, which sets out in greater detail the bases for their asserting that they were entitled to an agricultural exemption.

By Notice of Hearing dated September 11, 2008, a final hearing was scheduled on December 16 and 17, 2008, in Cocoa, Florida. On December 1, 2008, Respondents filed an unopposed Motion to Continue Hearing. The final hearing was then rescheduled to March 11 and 12, 2009, in Merritt Island and Rockledge, Florida, respectively. A continued hearing was conducted on March 13, 2009, in Merritt Island, Florida.

Numerous procedural and discovery disputes arose during the course of this proceeding and the rulings on those matters are found in various orders issued in this case.

The parties filed separate Pre-Hearing Statements, as revised, on March 4, 2009. In their filing, Respondents specifically asserted for the first time that "there has been no hardwood swamp or wetland on [the property] in the area where Petitioner claims there to be." At the final hearing, the District presented the testimony of Rita Strickland, who resides near Respondents' property; Frank Henry Molica; Mark E. Crosby,

an Engineer III in the Department of Water Resources and accepted as an expert; Elois S. Lindsey, a Regulatory Scientist II and accepted as an expert; Travis C. Richardson, a Soil Scientist with the Division of Environmental Resource Management and accepted as an expert; Bryan West, an Environmental Specialist II with the Department of Environmental Protection (DEP) and accepted as an expert; Mykal Kwami Pinnick, a former Brevard County biologist and accepted as an expert; and Lance D. Hart, Manager of Technical Programs and accepted as an expert. Also, it offered District Exhibits 1-6, 8-10, 12-15, 22, 45, 47-50, 52, 57, 62-67, and 73, which were received in evidence. Respondents presented the testimony of Philip Molica, a professional land surveyor and accepted as an expert; Richard Kern, a professional engineer and accepted as an expert; Gregory J. Sawka, a soil consultant and accepted as an expert; and Brooks Humphreys, an agronomist and accepted as an expert. Also, they offered Respondents' Exhibits 1, 2A and B, 3A-F, 4, 5A-K, 6, 7, 9, 10, 12A-C, 14, 16A-D, and 17-22. All were received except Exhibit 7, the deposition of Richard Szpyrka, County Land Development Engineer, upon which a ruling was reserved. The objection is overruled and the exhibit is received. Finally, the undersigned granted Motions for Official Recognition by both parties.[2]

The Transcript of the hearing (five volumes) was filed on April 24, 2009. At hearing, the parties agreed that proposed recommended orders would be due within thirty days after the

filing of the transcript. Proposed Orders were timely filed, and they have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based upon all of the evidence, the following findings of fact are determined:

A. Background

1. In 1990, Respondents purchased a 3.47-acre, rectangular-shaped parcel at 2050 North Tropical Trail, Merritt Island, Florida, which is located within the regulatory jurisdiction of the District. See § 373.069, Fla. Stat. The parcel identification number is 24-36-15-00-00764-00000.00. The property is less than a mile south of State Road 528 (A1A), approximately one-half mile west of State Road 3 (North Courtney Parkway), and around one-half mile east of the Indian River.

2. The property is bounded on its western side by a roadway known as North Tropical Trail, on the south side by a drainage ditch, and on the east side by another drainage ditch. Further to the east of the drainage ditch on the eastern side of the property are a holding pond and a subdivision known as Copperfield Subdivision developed in 1993, while a nursery is located just south of the drainage ditch on the southern side. The northern boundary of the parcel is five hundred twenty feet long and is adjoined by a vacant parcel of land similar in size to the Molica parcel and which is owned by the Lacanos. The

Lacano property is largely a wetland. To the north of the Lacano property is a parcel owned by the Stricklands. Historically, the natural flow of water in the area was north to south, that is, from the Stricklands to the Lacanos to the Molica's property, and then to the drainage ditch on the south side of the Molica's property.

3. When Respondents purchased the property in 1990, citrus trees were located "mostly in the front half," or western side of the property, "but they were also located in the rear scattered throughout." There was also "weed grass" or "mini grass" throughout the entire parcel.

4. In 2002 or 2003, the citrus industry was economically hurt by a drop in prices due to various problems, and it became difficult to find fruit pickers or purchasers for the fruit. Because of these conditions, and pursuant to a recommendation by another citrus grower, Respondents state that they began to "transform their property to palm tree production."

5. In late 2003, Respondents began removing orange trees and clearing the land; this continued throughout 2004. At the same time, they began to remove vegetation from the eastern half of the property, which included the excavation of the vegetation, soil, and roots. This was accomplished by the use of heavy equipment, including a tracked cab with hoe, a bobcat with front end loader bucket and root rake, and a wheeled tractor with front end root rake. This is confirmed by photographs taken of the

property in April and December 2004. See District Exhibits 8 through 10. Also, a few cabbage palms were removed that were damaged during the clearing process, as well as trees damaged by hurricanes that struck the east coast of Florida in 2004. The vegetation and soil were trucked off-site for disposal, and new soil or fill was placed throughout the eastern half of the property in which vegetation and soil had been excavated. In some cases, the fill measured as high as thirty-three inches but averaged around one foot in height. There is no dispute that dredging (or excavation) and filling on the property occurred. Respondents did not obtain an Environmental Resource Permit (ERP) before performing this work.

6. On December 13, 2004, the County received a complaint (generated by Mrs. Strickland, the neighbor to the north) about "heavy machinery operating in a wetland" on the Molica property. Mr. Pinnick, who was charged with enforcement of County environmental ordinances, visited the subject property to determine whether a violation of an ordinance had occurred. He observed heavy machinery operating on the central and eastern sides of the property and took several photographs of the site. See District Exhibit 12. He also observed vegetation and muck soil in the disturbed area and standing water in the ditch to the south and concluded that wetlands were being impacted. It is fair to infer that he then notified the DEP about the incident.

7. On December 15, 2004, Mr. Pinnick, accompanied by two DEP employees, Mr. West and his supervisor, Ms. Booker, visited the site and met Mr. Molica and his consultant. At that time, "clearing and [dredging and filling] of wetland at rear [or east end] of Molica's property [was observed]." See District Exhibit 49. The DEP requested that Respondents' consultant "flag a [wetland] line and then Molica have all fill within wetland area removed." The DEP also advised Mr. Molica that "[a]rea then needs to be restored to natural grade." Id. Notes taken by Mr. Pinnick confirm that Mr. Molica agreed to remove the fill "to restore the natural grade and the wetland boundary would be delineated [by Mr. Molica's consultant.]" See District Exhibit 52. The conclusion of both the County and DEP was that wetlands were present in the central part of the property. No formal delineation of wetlands was performed by them since the parties reached an understanding that Mr. Molica's consultant would perform this task. Because Mr. Molica thereafter denied access to the property, this would be the last time regulatory personnel were able to make an on-site inspection of the property until October 2008, when the District obtained an Order authorizing them to inspect the property.

8. The County later charged Respondents with violating the County Code ("prohibitions in functional wetlands"), and the matter was considered by a Special Magistrate. An Order of Dismissal was entered by the Special Magistrate on February 1,

2006, on the grounds the property was zoned agriculture and enjoyed an agricultural exemption, and Respondents agreed to use Best Management Practices, as prescribed by the Department of Agriculture and Consumer Affairs. See Respondents' Exhibit 4. However, neither the DEP nor the District was involved in that action, and the matter concerned an alleged violation of a local ordinance, and not a provision in Chapters 373 or 403, Florida Statutes.

9. At some point in time, but presumably after the site visit in December 2004, Mr. Molica asserted to the DEP that he was conducting an agricultural operation. In early 2005, the DEP referred the matter to the District since the two agencies have an operating agreement concerning which agency will handle certain types of permitting and enforcement matters. By letter dated August 15, 2005, Mr. Molica advised the local District office in Palm Bay, Florida, that the owners of the property were engaging in agricultural activities and denied that any unauthorized fill and excavation activities had occurred. He also requested copies of any statutes, rules, or case law that supported the District's position. See Respondents' Exhibit 2A. On August 3, 2007, the District advised Mr. Molica by letter that it had received a complaint from DEP, that the matter had not yet been resolved, and that it wished to inspect his property to determine if unauthorized fill and excavation activities had occurred. See Respondents' Exhibit 2B. According to a District

witness, the delay in responding to Mr. Molica's letter was caused by the building boom occurring in 2005 and 2006, which required action on numerous pending permits, and in-house confusion over whether the DEP or District had jurisdiction to handle the complaint. There is no evidence to suggest that at any time the District agreed that the activities were lawful, or that the delay in responding to Mr. Molica's letter prejudiced Respondents in any manner.

10. After conducting a preliminary investigation, which included a review of aerial photographs of the area, wetland maps, and soil maps, a visual inspection taken from the Copperfield Subdivision to the east and North Tropical Trail from the west, and a flyover of the property, the District issued its Complaint on August 8, 2008.

B. Are there wetlands on the property?

11. To determine whether wetlands were present on the Molica property, the District made a site inspection on October 22, 28, 29, and 30, 2008. Besides making a visual inspection of the property, the staff took photographs, performed twenty-nine soil borings on both the Molica and Lacano properties, reviewed soil surveys for the area, completed one west-to-east transect and five north-to-south transects to determine locations of hydric soils and any fill materials, and observed lichen and water stain lines on trees. The locations of the various soil borings are depicted on District Exhibit 22.

Finally, the staff examined a series of aerial photographs of the property.

12. Under the wetland delineation rule, three different indicators are used to make that determination: vegetation; soils; and signs of hydrology. See Fla. Admin. Code R. 62-340.300(2)(a)-(d). In addition, where the vegetation and soil have been altered by man-induced factors so that the boundary between the uplands and wetlands cannot be delineated by use of Rule 62-340.300(2), such a determination shall be made by using the most reliable information and "reasonable scientific judgment." See Fla. Admin. Code R. 62-340.300(3)(a). The parties presented conflicting evidence on the wetland issue; the District's evidence has been accepted as being the more persuasive and credible and supports a finding that the areas where dredging and filling occurred in the eastern and central parts of the property meet the test for a wetland.

a. Wetland Soils

13. Muck presence is a hydric soil indicator and also a wetland indicator. The District's expert, Mr. Richardson, established that the soil on the property where the dredging and filling occurred was hydric in nature, and therefore indicative of a wetland. Although Respondent's soil expert disagreed with this conclusion, he generally agreed with Mr. Richardson's methodology, and he agreed that muck was present below the fill material.

b. Wetland Vegetation

14. The presence or absence of wetland vegetation is another factor to consider in deciding whether an area is or was a wetland. Wetland hardwood trees, and not grass planted on top of the fill, are more appropriate for evaluating whether the area in which the trees are located was a wetland. Large trees, estimated to be fifty to sixty years old, remain on the property in the vicinity of certain District soil borings. They include boring 20 (swamp tupelo); borings 3, 4, and 5 (red maple, American elm, and holly); and borings 9 and 10 (maple and American elm). These are all wetland canopy species and provide further support for the District's position.

c. Hydrologic Indicators

15. Algal matting is found on the surface of the property in the vicinity of borings 3, 4, 5, 8, and 9. Algal matting occurs because water has inundated the surface of the ground sufficiently long for algae to grow in the water and then remains on the ground surface after the water no longer covers the ground. Rainfall alone does not produce algal mats.

16. Trees on the property provided evidence of being in saturated or inundated soil conditions through the morphological adaptation of buttressing and adventitious roots, particularly in the vicinity of District borings 20, 8, 9, and 10. Also, the trees had lichen lines on them, which are indicators of seasonal high water inundation elevations in wetlands.

17. The presence of muck soils is a hydrologic indicator. As noted above, the District determined through soil borings that muck was under the fill that had been placed on the property.

d. Reasonable Scientific Judgment

18. The evidence established that there was significant alteration to the soils and vegetation across the central and eastern parts of the subject property due to man-induced factors of vegetation removal, dredging, and filling. Through consideration of the most reliable information available, including aerial photographs, the remaining trees on the site, hydrologic indicators, the presence of hydric soils, coupled with reasonable scientific judgment, the evidence established that the areas where the recent dredging and filling occurred met the wetland delineation test in Florida Administrative Code Rule 62-340.300(3).

C. Agricultural Exemption

19. Mr. Molica is a full-time practicing attorney. His wife is his legal secretary. Respondents contend that since they purchased the property in 1990, they have been continuously engaged first in the occupation of citrus farming, and then beginning sometime in 2004 in the production of palm trees. Therefore, they assert they are entitled to the exemption provided under Section 373.406(2), Florida Statutes. That provision states in relevant part that "[n]othing herein . . . shall be construed to affect the right of any person engaged in

the occupation of . . . horticulture . . . to alter the topography of any tract of land consistent with the practice of such occupation. However, such alteration may not be for the sole or predominant purpose of impounding or obstructing surface waters." The parties agree that the burden of proving entitlement to this exemption rests on Respondents.

20. When the property was purchased in 1990, there were citrus trees on the land, mainly in the western half. A few navel oranges were later added, and some citrus trees were removed at that time. Beginning at the end of 2003, and continuing in 2004, the citrus trees were removed. At the time of the DEP inspection in December 2004, no potted palm trees were observed on the property. The precise date when they were first placed on the property is not clear. Photographs taken in January 2006, more than a year after the dredging and filling and just before the County code violation charge was resolved, reflect around fifty or so small trees in pots located in a small, cleared section of the property. See Respondents' Exhibit 18. Photographs taken three years later (January 2009), long after the dredging and filling occurred, show a comparable number of small palm trees in pots placed on what appears to be the same part of the property. See Respondents' Exhibit 21. Mr. Molica also submitted numerous documents (dated 2005 and later) downloaded from the internet by his wife which pertain to palm trees, see Respondents' Exhibit 20; and he stated that a

marketing plan for the sale of palm trees has been developed, which was simply a goal of selling the trees after they were ten years old. He further stated that he intends to work the "farm" as a business full-time after retiring from his law practice. Finally, he presented the testimony of an agronomist who stated that clearing property, filling holes, smoothing land, and building an access road are normal agriculture activities.

21. It is fair to infer from the record that Respondents' activities can be characterized as an avocation, not an occupation. Notably, there is no evidence that since they purchased the property in 1990, Respondents have sold any citrus fruit or a single palm tree.

22. There is no evidence that dredging and filling in wetlands is a normal agriculture practice, or that it is consistent with the practice of horticulture, including the growing of exotic palm trees. Mr. Molica's agronomist acknowledged that he has never been associated with an application to conduct agricultural or horticultural activities that involve the filling of wetlands. Moreover, extensive dredging, filling, and removal of vegetation were not necessary to accommodate the small area on which the potted plants sit. The more persuasive evidence supports a finding that the topographic alterations on the property are not consistent with the practice of agriculture.

23. The evidence shows that the filling on the property has obstructed the natural flow of surface water. More than likely, the filling of the wetlands was for the predominant purpose of obstructing and diverting surface water that flowed south from the Lacano property, and not for the purpose of enhancing horticultural productivity.

D. Corrective Actions

24. At hearing, the District submitted certain revisions to the proposed corrective action, which are described in District Exhibit 73. The revisions provide greater specificity regarding the formulation of a restoration plan and who must be involved in formulating that plan. In general terms, the corrective action offers Respondents the option of seeking an after-the-fact permit or restoring the wetlands. Respondents offered no proof at hearing that the original or revised corrective action is unreasonable. The revised corrective action is found to be reasonable and designed to address the restoration needs of the property and is hereby approved.

CONCLUSIONS OF LAW

25. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

26. Section 373.119(1), Florida Statutes, authorizes the District to issue a complaint when it has reason to believe that

a violation of any provision of Chapter 373, Florida Statutes, or a District rule has occurred.

27. Florida Administrative Code Rule 40C-4.041(2)(b)8. requires that an ERP be obtained "prior to the construction . . . [or] operation of a surface water management system which . . . is wholly or partially located in, on, or over any wetland." The term "construction" is defined in Florida Administrative Code Rule 40C-4.021(7) to mean "any activity including land clearing [or] earth moving . . . which will result in the creation of a system." The term "operation" means "to cause or to allow a system to function." See § 2.0(11), Applicant's Handbook. Florida Administrative Code Rule 40C-4.021(27) defines the terms "surface water management system" or "system" to include areas of dredging and filling wetlands. Therefore, if the area in which Respondents dredged and filled was a wetland, this activity constituted the construction and operation of a surface water management system requiring an ERP.

28. For the reasons previously found, the more credible and persuasive evidence supports a conclusion that Respondents dredged and filled wetlands on their property without first obtaining an ERP. Therefore, the charge in the Complaint has been sustained.

29. Respondents claim they are entitled to an agricultural exemption under Section 373.406(2), Florida Statutes. An exemption is strictly and narrowly construed against the person

claiming the exemption. See, e.g., Pal-Mar Water Management District v. Board of County Commissioners of Martin County, et al., 384 So. 2d 232, 233 (Fla. 4th DCA 1980). Under the statute, three issues must be evaluated in order to determine if an activity qualifies for an exemption. First, Respondents must be engaged in the occupation of agriculture or horticulture. Second, the topographic alteration must be consistent with the practice of agriculture. Finally, the alteration must not be for the sole or predominant purpose of impounding or obstructing surface waters.

30. The more persuasive evidence supports a conclusion that Respondents are not engaged in the occupation of palm tree production; that the topographic alterations are not consistent with the practice of agriculture; and that the alterations on the property were for the sole or predominant purpose of impounding or obstructing surface waters. Therefore, they are not entitled to an exemption.

31. Finally, Respondents cite the recent case of A. Duda and Sons, Inc. v. St. Johns River Water Management District, 34 Fla. L. Weekly D972 (5th DCA, May 15, 2009), for the proposition that if the predominant effect of their agricultural activity has a purpose consistent with the practice of agriculture, then the activity is exempt from the District's permitting requirements even if that activity has more than an incidental effect of impounding or obstructing surface waters. As previously found,

however, the predominant purpose of the dredging and filling was not to enhance agricultural or horticultural productivity, but rather to obstruct the surface water runoff from the upgradient properties. Given this factual record, the Duda case does not mandate a different result.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a final order be entered sustaining the charges in the Complaint, requiring Respondents to take the corrective actions described in District Exhibit 73, and determining that Respondents are not entitled to an agricultural exemption under Section 373.406(2), Florida Statutes.

DONE AND RECOMMENDED this 12th day of June, 2009, in Tallahassee, Leon County, Florida.

DONALD R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of June, 2009.

ENDNOTES

1/ All statutory references are to the 2008 version of the Florida Statutes.

2/ The officially recognized matters include Chapters 373 and 403, Florida Statutes (2007); Florida Administrative Code Rule Chapters 40C-4, 62-345, and 62-340; St Johns River Water Management District Applicant's Handbook for Management and Storage of Surface Waters (May 13, 2008), Sections 1-1 through 3-15, 7-1 through 7.6, 8.1 through 10.8, and 12.1 through 12.58; Delegation of Authority from the Florida Department of Environmental Protection; Conference Committee Report on CS/CS/HB 1187, Journal of the Florida House of Representatives, May 29, 1984, page 734 and Journal of the Florida Senate, May 28, 1984, page 475; Model Water Code Commentary for Chapter 4 and Sections 4.01 through 4.04; Chapter 93-213, Laws of Florida, pages 2129-33, 2137, 2143-54, and 2157; Part VIII, Chapter 403, Florida Statutes (1991), pages 1718-1724; Florida Administrative Code Rule 5E-1.023; the fact that Part IV, Chapter 373, Florida Statutes, is based on the Model Water Code; the Applicant's Handbook: Agricultural Surface Water Management Systems, December 3, 2006; and "the official seal of the Brevard County Property Appraiser, a governmental agency, together with the photographs upon which such seal is embossed."

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NOTICE OF RIGHT TO FILE EXCEPTIONS

All parties have the right to submit written exceptions within 15 days of the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will render a final order in this matter.

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, Petitioner, vs. FRANK H. AND LINDA M. MOLICA, Respondents.	)	Case No. 08-4359EF

SUPPLEMENTAL RECOMMENDED ORDER

After conducting an evidentiary hearing in this matter, on June 12, 2009, the undersigned issued his Recommended Order determining that the charges in an Administrative Complaint should be sustained, that Respondents should take the corrective actions described in District Exhibit 73, and that Respondents were not entitled to an agricultural exemption under Section 373.406(2), Florida Statutes.

On August 11, 2009, an Order of Remand (Order) was issued by the Governing Board of the St. Johns River Water Management District (District). The Order was filed with the Division of Administrative Hearings on August 14, 2009, together with the record of the underlying proceeding. That Order requested that the undersigned "make all necessary findings of fact and conclusions of law (along with an overall recommendation) on the issue whether the exemption in section 373.406(3) of the Florida

Statutes for closed agricultural systems exempts the activities at issue in this enforcement proceeding." On August 17, 2009, Respondents filed an Objection to Proceedings and Motion to Abate (Motion) on the ground they have secured a final declaratory judgment from the circuit court determining that the District "lacks authority to take administrative action under Chapter 373, Part IV, Florida Statutes, or ever has since its ownership by Plaintiffs." See Molica v. St. Johns River Water Management District, Case No. 05-2008-CA-051774 (Fla. 18th Cir. Ct., June 8, 2009). The parties do not expressly indicate whether that final judgment has been appealed, and if so, the status of the appeal. In any event, the Motion was denied by Order dated August 26, 2009, and this administrative proceeding reopened for the very limited purpose of complying with the Order of Remand.

Based on the evidence presented by the parties, the following additional findings of fact are determined:

SUPPLEMENTAL FINDINGS OF FACT

1. As previously found in the Recommended Order dated June 12, 2009, Respondents do not qualify for an exemption under Section 373.406(2), Florida Statutes. This is because they are not "engaged in the occupation of agriculture, silviculture, floriculture, or horticulture" on their property within the meaning of the law. In the parties' Prehearing Statement, however, they identified as an additional issue to be tried whether the closed agricultural system exemption in Section

373.406(3), Florida Statutes, exempted the activities at issue, even if the agricultural exemption in Section 373.406(2), Florida Statutes, did not apply.

2. A "closed system" is defined in Section 373.403(6), Florida Statutes, as "any reservoir or works located entirely within agricultural lands or controlled by the user and which requires water only for the filling, replenishing, and maintaining the water level thereof." The exemption generally provides that nothing in Chapter 373, Florida Statutes, or any rule adopted thereto, shall be construed to be applicable to the construction, operation, or maintenance of an agricultural closed system.

3. There is no evidence that Respondents capture, discharge, or use water for domestic use on their property. There is no residence on the property.

4. Although Respondents' witness Kern stated that he observed a closed system on the property, he indicated there was nothing on the property to keep stormwater from running off.

5. Respondents' witness Humphrey testified that there was no stormwater system or works on Respondents' property. He further indicated that if there was a system on the property, it was a closed system based on the District's definition. Like Mr. Kern, he acknowledged that there was nothing on the property to keep stormwater from running off. He also conceded there was

nothing on the property to take water into, to replenish water, or maintain water levels.

CONCLUSIONS OF LAW

6. Respondents have the burden to prove that their activities are exempt from District regulation. Compare, e.g., Key v. Trattman, 959 So. 2d 339, 345 (Fla. 1st DCA 2007). An exemption is strictly and narrowly construed against the person claiming the exemption. Pal-Mar Water Management District v. Board of County Commissioners of Martin County, et al., 384 So. 2d 232, 233 (Fla. 4th DCA 1980).

7. Section 373.406(3), Florida Statutes, provides in pertinent part:

> (3) Nothing herein, or in any rule, regulation, or order adopted pursuant hereto, shall be construed to be applicable to construction, operation, or maintenance of any agriculture closed system. However, part II of this chapter shall be applicable as to the taking and discharging of water for filling, replenishing, and maintaining the water level in any such agricultural closed system . . . .

8. Section 373.403(6), Florida Statutes, defines the term "closed system" to mean "any reservoir or works located entirely within agricultural lands owned or controlled by the user and which requires water only for the filling, replenishing, and maintaining the water level thereof."

9. A closed system "requires water," requires a "reservoir or works," and requires that a water level be maintained in the

reservoir or works. Also, by its very nature, a closed system cannot discharge water off-site. See St. Johns River Water Management District v. Corporation of the President of the Church of Jesus Christ of Latter Day Saints, 489 So. 2d 59, 60 (Fla. 5th DCA 1986); Suggs, et al. v. Southwest Florida Water Management District, DOAH Case No. 08-3530 (DOAH Feb. 19, 2009, SWFWMD April 3, 2009).

10. The more persuasive evidence supports a conclusion that Respondents' property does not have a reservoir or works on it that require water or maintenance of a water level in it. Further, there is nothing on the property that prevents stormwater from discharging off-site. Therefore, there cannot be a closed system on the property.

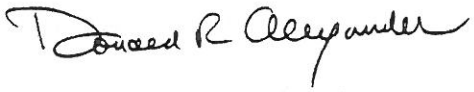
11. Respondents' activities are not exempted from District regulation by virtue of Section 373.406(3), Florida Statutes.

RECOMMENDATION

Based on the foregoing Supplemental Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a final order be entered sustaining the charges in the Complaint, requiring Respondents to take the corrective actions described in District Exhibit 73, and determining that Respondents are not entitled to any agricultural exemption under Section 373.406, Florida Statutes.

DONE AND RECOMMENDED this 21st day of September, 2009, in Tallahassee, Leon County, Florida.



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NOTICE OF RIGHT TO FILE EXCEPTIONS

All parties have the right to submit written exceptions within 15 days of the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will render a final order in this matter.

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GOVERNING BOARD OF
THE ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT,

Petitioner,

Case No.: 08-4359

vs.

FRANK H. MOLICA and
LINDA M. MOLICA his wife,

Respondents.
_____/

RESPONDENTS' EXCEPTIONS TO THE RECOMMENDED ORDER

Respondents, pursuant to Section 120.57 *Florida Statutes*, hereby file exceptions to the Recommended Order entered by the Administrative Law Judge on June 12, 2009.

1. **Exception No. 1**

That part of the Preliminary Statement which grants an ore tenus motion of the Petitioner, made at the final hearing, which amended the proposed corrective actions portion of its Administrative Complaint. (Ord. p. 2). This procedure did not give reasonable notice to Respondents or allow them a sufficient opportunity to even fully read the amendments, nor allow them an opportunity to have the proposed amendments reviewed by an expert which is needed because of the technical nature of same. Although the order states that the corrective actions were "slightly revised" even a cursory look at the amendments discloses that description of the revision to be totally inaccurate. This procedure was a deviation from the essential requirements of the law.

The following exceptions (2-20) are made on the basis of a lack of competent

substantial evidence, or clear and convincing evidence, or a preponderance of the evidence, as well as any other grounds asserted following each exception.

2. **Exception No. 2**

That part of paragraph 2 which states:

> "Historically, the natural flow of water in the area was north to south, that is, from Stricklands to the Lacanos to the Molica's property, and then to the drainage ditch on the south side of the Molica's property."

This finding is not based upon evidence in the record. Respondents' exhibit, the topographical survey map, (Exhibit 10), shows that water from Lacano's property cannot flow onto Respondents' property. The flow form Strickland's property to Lacano's property is due to Strickland's failure to provide water retention for their property as required by Brevard County Ordinance, referred to in the deposition of Richard Szpyrka, P.E., Brevard County engineer. (Resp. Ex. 7).

3. **Exception No. 3**

That part of paragraph 5 which states:

> "Which included the excavation of .. soil.. The vegetation and soil were trucked off-site for disposal, and new soil or fill was placed throughout the eastern half of the property in which the vegetation and soil had been excavated".. "There is no dispute that dredging (or excavation) and filling on the property occurred."

The record does not contain evidence of this; the record shows the removal of Brazilian pepper trees along with the roots and incidental soil with the roots of these pepper trees. The entire case concerns a dispute over the issue of dredging and filling. Respondents' expert Humphrys, testified that it was necessary to remove Brazilian pepper

tree roots because they emit a chemical which destroys other vegetation and without removal the peppers trees would just grow back. (T-712-713). The roots of these nuisance trees had entwined Respondents citrus trees. (T-692-693).

4. **Exception No. 4**

That part of paragraph 6 which states:

> "He also observed vegetation and muck soil in the disturbed area and standing water in the ditch to the south and concluded that wetlands were being impacted."

The "disturbed area" is not identified by this witness; the "ditch to the south" is not located on Respondents property. (T -323-333). This witness was called by Petitioner. The witness was on the property on two occasions in 2004, he admitted on cross examination that he saw no hardwood swamp, standing water or wetlands on Respondents' property, and that if he had, seen such things, he would have taken photographs of them. (T-332-336). This testimony from the Petitioner's own witness is contrary to the very allegations of the Petitioner's Administrative Complaint. In addition, Respondents' witness testified that there was no hardwood swamp on the property (T-703) and he was familiar with the property for many years before it was purchased by the Respondents. (T-680).

5. **Exception No. 5**

That part of Paragraph 7 which states:

> "The conclusion of both the County and DEP was that wetlands were present in the central part of the property.. "Because Mr. Molica thereafter denied access to the property, this would be the last time regulatory personnel were able to make an on-site inspection of the property until October 2008.."

This refers to an onsite inspection on December 4, 2004, by the County and DEP

at the invitation of the Respondents. The evidence shows that only the rear part of the property was alleged by the DEP and County to contain a wetland area, and the specific portion was never identified. Petitioner's exhibit (Exhibit 2) which is a letter from Booker with the DEP to Frank Molica, refers to "rear" of property. Respondents do agree that there is a wetland area in the southeast corner of the property, which would be the rear of the property. There is no record evidence that the "central" part of the property was ever considered or alleged by the county or DEP to contain a wetland. (T-294). No on-site inspection occurred thereafter because the District and its employee, Lindsey, failed to answer or respond to the letter request of the Respondents, for a period of two years. (T-167-169) (Resp. Ex. 2A and 2B).

6. **Exception No. 6**

That part of paragraph 8 which states:

> ".. and Respondents agreed to use Best Management Practices.." "However, neither the DEP nor the District was involved in that action"

The county and DEP were consulting with each other on the matter; the letter from Booker shows a copy to Pennick, and Pennick was emailing District employee, Lindsey. The complained-of pile of top soil was removed by Respondents out of deference to the two agencies, and the complaint filed by Pennick, with the backing of the DEP and District, was dismissed. (Resp. Ex 4). The Magistrate also found that the Respondents were engaged in agricultural pursuits on this property.

7. **Exception No. 7**

That part of paragraph 9 which states:

> "At some point in time, but presumably after the site visit in December 2004, Mr. Molica asserted to the DEP that he was

conducting an agricultural operation."

Contrary to the record evidence, this incorrectly insinuates that the Respondents did not advise the DEP and County of their agricultural use of the property until after the site visit. This is incorrect and contrary to undisputed and unrebutted evidence. At the December 15, 2004, meeting at Respondents' property, witness Pennick stated that he recalls Frank Molica stating to Booker that Respondents were changing the use of the property from citrus to palm growing. (T-304, 326).

And that portion which states that the two year delay in responding to a written letter request by Respondents was:

> "caused by the building boom occurring in 2005 and 2006, which required action on numerous pending permits, and in-house confusion over whether the DEP or District had, jurisdiction to handle the complaint. There is no evidence to support that at any time the District agreed that the activities were lawful, or that the delay in responding to Mr. Molica's letter prejudiced Respondents in any manner."

The file in this matter was returned by the District to the DEP (T-170-171) and the obvious reason was because the District confirmed Respondents agricultural activity on the property. There is no evidence in the record that the "building boom" caused the two year delay for the District's employee to respond. The prejudice cause by the delay is obvious wherein Respondents continued to add more palm trees and clear areas to grow them as shown by the photographs admitted into evidence by Respondents. Should Petitioner succeed in this case, all the Respondents' work and trees will be lost.

8. **Exception No. 8**

That part of paragraph 12 which states:

"The parties presented conflicting evidence on the wetlands

> issue the District's evidence has been accepted as being the more persuasive and credible and supports a finding that the areas where dredging and filling occurred in the eastern and central parts of the property meet the test for a wetland."

The order fails to indicate what evidence is conflicting and which evidence it is more persuasive and credible than other evidence and why. In actuality, the testimony of Petitioner's and Respondents' soil experts was consistent. However as set forth in the following exception, Respondent's expert, Sawka, testified to the length of time that the fill had been on Respondents' property and Petitioner's expert did not.

That part of paragraph 13 which states:

> "The District's expert, Mr. Richardson, established that the soil on the property where the dredging and filling occurred was hydric in nature, and therefore indicative of a wetland."

The evidence from both experts was that this hydric soil was beneath one or two layers of fill and Respondent's expert Sawka testified that the fill had been covering the hydric soil there for as much as 50 years. (T-626-658). This was not controverted or disputed by Petitioner's Expert, Richardson. In fact, Petitioner elicited no testimony whatsoever from any of its experts, as to when the fill was put on the property. The photographic evidence and expert testimony of Sawka show the fill to have been placed on Respondents' property many years before they purchased it. (T-623). This prior impact of fill before the property was purchased by the Respondents was admitted to by Petitioner's witness, Hart, and he noticed a prior impact of fill in the central portion of Respondents' property. (T- 772-773). This evidence was not controverted or rebutted. The hydric soil by which the Petitioner seeks to prove its case is in reality relic soil and no testimony showed it to be at the surface level when Respondents purchased this property

other than at a few places at the rear of the property, the southeast corner as aforesaid. Petitioner did not call its soil expert, Richardson, to give any contrary evidence or rebuttal evidence to that given by Respondents' expert Sawka. This absence of evidence from the Petitioner's expert on this fact is a tacit admission of that fact.

9. **Exception No. 9**

That part of paragraph 14 which states:

> "These are all wetland canopy species and provide further support for the District's position."

Petitioner attempted to show current wetland hydrology by identifying wetland vegetation, on Respondents' property. These were stated by the witness Hart, to be several trees 50 to 60 years old (T-431); as such they too would be relics of a wetland which ceased its existence many years ago. The hydrology for a wetland is lacking on this property; it contains relic vegetation consisting of those trees identified by Hart. The absence of any younger age trees on the property indicates that a change took place 50 to 60 years ago. This would be consistent with the aerial photos taken in 1951 and 1975 showing that citrus was then growing on the property and the testimony of witness Humphrys. (T- 591-592). Hart also begrudgingly admitted that the predominant vegetation on Respondents' property was Brazilian pepper trees and they are not a wetland species. (T-462-466).

10. **Exception No. 10**

Part of C. Hydrologic Indicators as follows:

> "15. Algal matting is found on the surface of the property in the vicinity of borings 3,4,5,8, and 9... Rainfall alone does not produce algal mats."
> "16. ... Also, the trees had lichen lines on them, which are

indicators of seasonal high water inundation elevations in wetlands."

There was no testimony regarding the effect of the unusual rainfall, which was 20 inches above normal, on the lichens. This rainfall occurred immediately before the site visit. (T-619). It is reasonable to infer that some flooding may have occurred. Respondents' photograph (Exhibit 12A,B,C) of the measuring rod and tree lichens, captures the inaccurate manner in which the Petitioner's employee, Crosby, attempted to show a water line and the inaccuracy of the process. The photo reveals the rod being held well above the lowest lichens on the tree that he used and as a base line. There is no testimony in the record that rainfall alone cannot produce algal mats. The hydrologic conditions for a wetland are completely lacking on this property (except for the over flowing ditch on the neighbor's property located near the southeast corner of Respondents' property). The Administrative Law Judge failed to consider, or considered and ignored, the scientific evidence presented by Respondents through its experts, Philip Molica, (T-496-565) a licensed surveyor, who prepared a topographical map of survey, (exhibit 10) (T-561) and Richard Kern a licensed civil engineer. (T-566-584). There is no natural water flow from adjoining properties, in any direction, onto Respondents' property. (exhibit 10). In addition Gregory Sawka, a soil scientist and former employee of the Southwest Florida Water Management, testified that the water table on Respondents' property was measured by him to be fifty (50) inches below the surface. The Petitioner's experts did not give any testimony about the water table, inferentially that is because it would be unfavorable to its case. (T-617). The evidence from Respondents' witnesses was that, at least since 1993, the property lacked the hydrology to be a wetland. (T- 654). Wetlands can loose their

character as a wetland over time.

11. **Exception No. 11**

That part of paragraph 20 which states:

> "Photographs taken in January 2006, - - reflect around 50 or so small trees in pots.." "Photographs taken three years later .. show a comparable number of small palm trees in pots placed in what appears to be the same part of the property.." "Mr. Molica stated that a marketing plan for the sale of palm trees has been developed, which was simply a goal of selling trees after they were ten years old."

This is contrary to Respondents photo exhibits; (Resp. Ex. 21) the Administrative Law Judge either failed to review Respondents exhibits, or ignored the exhibits which were uncontroverted. The photos show hundreds of palms counted at two different locations. Even Petitioner's counsel suggested that there were many palms on Respondents' property (T-757) With respect to the marketing plan, the Order lacks any factual basis on the record for that finding regarding such a market plan.

12. **Exception No. 12**

All of paragraph 21 which states:

> "It is fair to infer from the record that Respondents' activities can be characterized as an advocation not an occupation. "Notably, there is no evidence that since they purchased this property in 1990, Respondents have sold any citrus fruit or a single palm tree."

The palm trees have not yet reached the desired size and so they have not been sold. The Molicas were being paid the unacceptable amount of one to two dollars for a ninety pound box of fruit by "bird doggers" who picked their fruit. (T-698). This paragraph is not based on record evidence.

13. **Exception No. 13**

That part of paragraph 22 which states:

> "There is no evidence that dredging and filling in wetlands is a normal agriculture practice." "The more persuasive evidence supports a finding that the topographic alterations on the property are not consistent with the practice of agriculture."

There was no dredging and filling of wetlands by Respondents. Brazilian pepper trees were cleared and holes filed; clearing is a normal agricultural practice. (T-705,714). The holes left from removal of the pepper trees and from fallen trees after the 2004 and 2005 hurricanes were filled in as shown by the areal photographs taken in 2008. (T-711). All of the other aerial photographs introduced by Petitioner reveal no change or disturbance to the property which would have to result, if an alleged dredge and fill operation occurred in 2004, or any other year. There could not have been a dredge and fill operation as alleged by Petitioner without disturbance to the land and it being revealed in aerial photographs. The other "Strickland" photos show the clearing of citrus and Brazilian pepper trees, and, certainly do not show any dredging.

14. **Exception No 14**

That part of paragraph 23 which states:

> "The evidence shows that the filling on the property has obstructed the natural flow of surface water. More than likely, the filling of the wetland was for the predominant purpose of obstructing and diverting surface water that flowed south from the Lacano property.."

The record does not contain any such evidence. In fact it shows the exact opposite furthermore the topographical survey map, (Exhibit 10,T-561) shows that the Lacano property is lower than Respondents' property, and there is no improvements or diversion

at all.

15. **Exception No. 15**

That part of paragraph 24 which states:

> "The revised corrective action is found to be reasonable and designed to address the restoration needs of the property and is hereby approved."

There was no evidence introduced or argument made by Petitioner, as to why a motion to amend could not have been made well before the hearing thus giving Respondents reasonable notice and an opportunity to have the revised corrective action document reviewed by them, and by an expert, so that evidence or objections could have been presented at the hearing. The modifications are extensive and to allow such an amendment without prior notice and a opportunity to present evidence as to the changes is a deviation from the essential requirements of the law. The Respondents were surprised and left without any means to defend.

16. **Exception No. 16**

That part of paragraph 27 which states:

> "Therefore, if the area in which Respondents dredged and filled was a wetland, this activity constituted the construction and operation of a surface water management system requiring an ERP."

The Petitioner offered no evidence of there being a system of any kind on this property. According to the definition of "construction" in Petitioner's Handbook, and its regulations, (40C-4.021(7), it must result in a system and there is no system on Respondents' property. (T-575).

17. **Exception No. 17**

All of paragraph 28.

18. **Exception No. 18**

All of paragraph 30.

The finding is contrary to the unrebutted and uncontroverted evidence of Respondents' witness, Humphrys. (T-676-758).

19. **Exception No. 19**

All of paragraph 31.

20. **Exception No. 20**

All of the recommendation.

21. **Exception No 21**

The hearing was held without there being a pre-trial order by the Administrative Law Judge which set forth the issues to be heard, resulting in a miscarriage of justice. On September 11, 2008, an Order Of Pre-Hearing Instructions was entered which required either the filing of a stipulation of the factual and legal issues or separate statements and it was assumed by Respondents counsel that, in the later case, there would subsequently be an Order entered which set forth the issues. In that respect, it was Respondents' understanding and belief that the Petitioner agreed that Respondents were engaging in agriculture/silviculture on their property and that there were only two issues, one being a legal issue as to whether Respondents were engaged in the "occupation" of agriculture or silviculture, the other being factual as to whether clearing a "wetland" was a farming activity. Respondents based this belief upon a letter from Petitioner's counsel to Respondents' counsel, (Resp. Ex.22, T-767,775), a copy of which is attached hereto, marked as (Exhibit 1), whereby counsel for the Petitioner states therein:

"The District does not perceive that you are not engaged in anything on the property but agriculture/silviculture."

The letter goes on to further state that the issue is whether there was filling or excavating in a wetland and if so whether that was considered a practice consistent with agriculture or silviculture. It was the Respondents' position in this matter that they did not excavate, dredge or fill a wetland, and merely cleared Brazilian pepper trees and fallen trees from the 2004 hurricanes from the property and then filled holes and leveled the land over, and this was consistent with the production of agriculture/silviculture. (T-714 - 715). Further, Respondents did not in anyway consider their property to be a wetland at that location.

Further, the Administrative Law Judge stated in his Order that there were only approximately 50 palm trees being grown on Respondents' property both in 2006 and 2009. In truth, there are hundreds of palms on the property in various stages of growth and were there in 2006 and 2008, 2009, and were readily visible to anyone going on the property not even Petitioner suggested such a thing. The photographs introduced into evidence illustrate this and by account of the trees in two different locations illustrated in the photograph it is evident that the Administrative Law Judge either failed to look at the evidence submitted by Respondents or ignored it. (Resp. Ex 21). This finding is even contrary to testimony elicited by Petitioner's counsel on cross examination of witness, Humphrys. (T-757 - l, 11).

In addition, Petitioner, through counsel, submitted a proposed order to the Administrative Law Judge stating that there was no evidence that Respondents had ever sold oranges from their grove prior to converting to a palm farm. Respondents did not believe this to be an issue or certainly would have introduced evidence regarding same.

Furthermore, pursuant to a request to produce, and prior to Petitioner's submittal of its proposed order, the Respondents provided Petitioner's counsel with evidence in the form of a receipt showing the sale of forty two boxes of citrus (approximately two tons) from their citrus grove on this property; a copy of the receipt is attached hereto, marked as EXHIBIT TWO. In addition; evidence of Respondents' sale of citrus was on the record. (T-699-700).

The foregoing matters have unduly prejudiced the Respondents, were misleading, and Administrative Law Judge failed to consider uncontested evidence and make clear what issues were to be tried.

22. **Exception No. 22**

At the conclusion of the hearing the Administration Law Judge did not allow the Respondents or the Petitioner to give closing argument. Section 120.57, *Fla. Stat.*, gives parties the right to argue all issues which infer the right to give final argument. The failure to permit argument was a deviation from the essential requirements of the law.

23. **Exception No. 23**

All of paragraph 23.

There is no evidence that Respondents filled their property or that it is at a greater height than it has always been since it was purchased by them. The testimony by Respondents' witnesses show that the earth is at the normal level at the trunks of the trees on Respondents' property. (T-725, 634). The topographical survey shows that the obstruction or diverting of surface water is non existent.

24. **Exception No. 24**

The Administrative Law Judge completely failed to consider or rule upon the exemption provided for in section 373.406 (3), *Florida Statutes*.

Respectfully submitted this 26th day of June, 2009.

Sent via Federal Express.

FRANK HENRY MOLICA, P.A.
Frank Henry Molica, Esquire
Florida Bar No. 120022
231 N. Courtenay Pkwy,
Merritt Island, FL 32953
Telephone No. 321/452-4455
Attorney for the Respondents

BENJAMIN Y. SAXON, II, ESQUIRE
Saxon & Chakhtoura, P.A.
Florida Bar No. 120850
111 South Scott Street
Melbourne, Florida 32901
Telephone No. 321/727-2545
Attorney for Respondents

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail this 26th, day of June, 2009, to *Vance Kidder, Esquire, and William H. Congdon, Esquire, St. Johns River Water Management District, 4049 Reid Street, Palatka, FL 32177.*

Attorney

St. Johns River
Water Management District

Kirby B. Green III, Executive Director • David W. Fisk, Assistant Executive Director • Mike Slayton, Deputy Executive Director
John Juilianna, Palm Bay Service Center Director, Regulatory

525 Community College Parkway S.E. • Palm Bay, FL 32909 • (321) 984-4940
On the Internet at *www.sjrwmd.com.*

December 5, 2007

CERTIFIED MAIL: 7007 0220 0001 1684 3588

Law Offices of Frank Henry Molica, P.A.
Attn: Frank Henry Molica, P.A.
231 N. Courtenay Parkway
Merritt Island, FL 32953

Re: Property located at 2050 N Tropical Trail, Merritt Island
Compliance Item: 009-488014
(Please reference compliance item number on all correspondence)

Dear Mr. Molica:

The District is in receipt of your letter dated August 16, 2007. The District has not pursued the matter in over two years, as you have stated, because the District returned the matter back to the Department of Environmental Protection (DEP), where it had originated, and DEP had not indicated that it would not pursue the matter. A recent inquiry found that the matter has never been resolved with either agency, therefore the District will continue to pursue this matter from a regulatory position.

You have referenced the "agricultural" exemption in section 373.406(2). F.S. The exemption, by its terms is not a blanket exemption for each and every activity done in the furtherance of agriculture. Indeed, case law wherein the defendant/respondent asserted the exemption as a defense is clear on that point: the exemption cannot be used to exclude activity from permitting if the alteration is for the sole or predominant purpose of impounding or obstructing surface water. Hence, certain things are exempt and others not. Copies of some cases are attached.

Subsection 373.406(2), F.S., states that "Nothing herein, or in any rule, regulation or order adopted pursuant hereto, shall be construed to affect the right of any person engaged in the occupation of agriculture, silviculture, floriculture, or horticulture to alter the topography of any tract of land for purposes consistent with the practice of such occupation. However, such alteration may not be for the sole or predominant purpose of impounding or obstructing surface waters." The District has adopted rules to implement part IV of chapter 373, F.S. as to agriculture. The rules include provisions that address the exemption. A copy of Chapter 40C-44, F.A.C is attached.

While chapter 40C-44, F.A.C., exists, it is the District's understanding, based on a site visit by the Department of Environmental Protection (DEP) in December 2004, that the issue at hand is whether a wetland area on your property was filled or excavated in 2004. Records obtained from the DEP seem to indicate that agreement had been reached that a Mr. Neal Thomas would flag where he believed the wetlands ended and if the DEP agreed to the line and no fill was in the wetlands, the matter was resolved. Conversely, if fill was in the wetlands, it would be removed and the filled area restored.

Subsequently, you thought the "agricultural" exemption in section 373.406(2), F.S. might apply. In determining whether an exemption is available to a person engaged in the occupation of agriculture, silviculture, floriculture or horticulture, the following questions must be addressed:

1. Is the person claiming the exemption actually engaged in the occupation of agriculture, silviculture, floriculture or horticulture;

2. Is the proposed topographic alteration consistent with the practice of agriculture, silviculture, floriculture or horticulture; and

3. Is the proposed topographic alteration for the sole or predominant purpose of impounding or obstructing surface waters.

If the first and second questions are answered affirmatively and the third is answered negatively, an exemption under subsection 373.406(2), F.S., is available.

The District does not perceive that you are not engaged in anything on the property but agriculture/silviculture . However, filling or excavating in a wetland is not considered consistent with the practice of agriculture/silviculture.

The District presumes that the following activities are consistent with the practice of silviculture when they are undertaken to place property into silvicultural use or to perpetuate the maintenance of property in silvicultural use and also are presumed not to be for the sole or predominant purpose of impounding or obstructing surface waters:

1. normal site preparation for planting of the tree crop;
2. planting; and
3. harvesting.

Activities which are considered to be for the sole or predominant purpose of impounding or obstructing surface waters have the effect of more than incidentally trapping, obstructing or diverting surface water. Examples of more than incidental effect of trapping, obstructing, or diverting are activities which create canals, ditches, culverts, impoundments, ponds, or fill roads. The purpose of excavating a wetland is to

impound water by making the area more suitable for the collection of water., i.e. trapping it. The purpose of filling a wetland is to keep water from readily collecting there, i.e., diverting or obstructing its flow path. Thus, if what you did was in a wetland, the "agricultural" exemption would not apply.

Additionally, in determining consistency with the practice of agriculture, the District refers to the following publication: "A Manual of Reference Management Practices for Agricultural Activities (November, 1978)" . The use of this publication in the manner it is used is by agreement with "agriculture" , IFAS, and the Florida Department of Agriculture and Consumer Services. The following practices described in the manual are considered as having impoundment or obstruction of surface waters as a primary purpose:

1. Diversion, when such practice would cause diverted water to flow directly onto the property of another landowner
2. Floodwater Retarding Structure
3. Irrigation Pit or Regulating Reservoir
4. Pond
5. Structure for Water Control
6. Regulating Water in Drainage Systems
7. Pumping Plant for Water Control, when used for controlling water levels on land

Other practices which are described in the manual and which are constructed and operated in compliance with Soil Conservation Service standards and approved by the local Soil and Water Conservation District are presumed to be consistent with agricultural activities. Practices which are not described in the manual are presumed to be inconsistent with the practice of agriculture and a permit is required for the construction, alteration, operation, maintenance, removal, or abandonment of a system, subject to the thresholds. A copy of the manual may be obtained by contacting the District headquarters.

The practice of filling wetlands is not considered a typical practice consistent with the occupation of agriculture and pursuant to section 40C-4.301 (2) (b) 8. F.A.C., a permit is required for any project which is wholly or partially located in, on, or over any wetland or other surface water. Based on aerial photography, past inspection and observation, and geographic database information, it appears that wetlands are located on your property and have been impacted by fill placed in them. However, the District would like to work with you to resolve the matter.

It is the District's preference to try and informally resolve whether an unpermitted activity is a violation of law. Section 373.119, F.S, gives the District authority to issue an administrative complaint. Once the administrative complaint is served inspection through discovery is available to the District. Similarly, section s 373.129 and 136, F.S. empower the District to file an action in circuit court and then have access through discovery. Observations of your property made by DEP while it was on your property, as well as observations by District employees from the property of others, indicate that

you filled or excavated a wetland without a permit. If those observations are incorrect granting the District access can disprove those observations.

The District again, requests permission to visit the property to determine if the activities performed there would have required an Environmental Resource Permit. Please contact Elois Lindsey at 321-676-6618 or Mark Crosby at 321-676-6631 **within 7 days of receipt of this letter** to schedule a site inspection of the property. Your cooperation is requested.

Sincerely,

Vance Kidder

Vance Kidder
Assistant General Counsel
Office of General Counsel

Cc: PDS-Palm Bay
PDS-Palatka
John Juilianna
Susan Moor
Fariborz Zanganeh
Janice Unger
Mark Crosby
Elois Lindsey

K.G. HULL CITRUS, INC.
P.O. BOX 541235
MERRITT ISLAND, FL. 32954

FRANK MOLICA

MARCH 30, 1993
STMT #1

PACKING CO. LOCATION SEASON 92/93

DATE	FRUIT TYPE	NO.BOXES	TICKET#	BOX PRICE	LOAD PRICE	COST OF BOX	HARVEST LOAD	BALANCE	ACCUMULATED BALANCE
MAR 2	E & M	42	52398	$1.00	$42.00			$42.00	$42.00
									$42.00
									$42.00

4/10/93

TOTAL	42	$42.00	$42.00

[redacted]

EXHIBIT TWO

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Petitioner,

v.

DOAH CASE NO:08-4359
SJR FOR No: 2008-44

FRANK H. MOLICA and LINDA M. MOLICA,

Respondents.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT'S EXCEPTION TO RECOMMENDED ORDER

Petitioner, St. Johns River Water Management District ("District"), files this exception to correct omissions in the Recommended Order entered by the Administrative Law Judge ("ALJ") in this matter.

One issue to be determined in this case is whether the Respondents' ("Molicas") wetland filling was exempt under the closed system exemption in section 373.406(3) of the Florida Statutes. Both parties identified this issue in their respective prehearing statements. See Molicas' prehearing statement at ¶6(b)(2) and District's prehearing statement at ¶8(b). Both parties addressed the closed system exemption in their respective proposed recommended orders ("PRO"). See Molicas' PRO at page 29 and District's PRO at ¶¶ 50, 51, 85, 86. However, The Recommended Order did not contain findings, conclusions, or a recommendation regarding the Molicas' closed system exemption defense under section 373.406(3) of the Florida Statutes.

"When the entity charged with finding facts upon the evidence presented, the hearing

officer, has, for whatever reason, failed to perform this function, the appropriate remedy is not for the agency (or the court of appeal) to reach its own conclusion, but rather to remand for the officer to do so." Cohn v. Department of Professional Regulation, 477 So.2d 1039, 1047 (Fla. 3rd DCA 1985); Inverness Convalescent Center v. Department of Health and Rehabilitative Services 512 So.2d 1011, 1015 (Fla. 1st DCA 1987) (same). District staff takes exception to the absence of findings of fact, conclusions of law, and a recommendation regarding the Molicas' closed system exemption defense, and requests that the Governing Board remand this matter to the ALJ for the limited purpose of making such findings, conclusions, and recommendation.

The requested remand is analogous to the one granted in The Sierra Club, et. al v. Hines Interests Limited Partnership and St. Johns River Water Management District, DOAH No. 99-1905 (SJRWMD February 9 2000). The final order in that case stated, in pertinent part:

> The Recommended Order contains no conclusions of law regarding the consumptive use permit application at issue in this proceeding. . . . In a section 120.57, Fla. Stat., proceeding the Administrative Law Judge finds the facts and applies the law to the facts, as would a court, and additionally serves the public interest role of exposing, informing, and challenging agency policy and discretion. State ex ref. Dep't of Gen. Serv. v. Willis, 344 So.2d 580 (Fla. 1st DCA 1977); McDonald v. Dep't of Banking and Finance, 346 So.2d 569 (Fla. 1st DCA 1977). This role is served in section 120.57(1)(k), Fla. Stat. (1999), which mandates, in pertinent part, "[t]he presiding officer shall complete and submit to the agency and all parties a recommended order consisting of findings of fact, conclusions of law, and recommended disposition or penalty, if applicable, and any other information required by law to be contained in a final order" (emphasis added). Further, section 120.57(1)(b), Fla. Stat. (1999), provides, in pertinent part, "[a]ll parties shall have the opportunity...to submit exceptions to the presiding officer's recommended order. . ." (emphasis added). See, Rule 28-106.217, Fla. Admin. Code. The opportunity of parties to submit exceptions is not only statutorily required, but is essential for a party to preserve matters for appellate review. Couch v. Comm'n on Ethics, 617 So.2d 1119 (Fla. 5th DCA 1993) (matters not properly excepted to or challenged before the agency head are not preserved for appeal); also, Envtl. Coalition of Florida v. Broward County, 586 So.2d 1212 (Fla. 15t DCA 1991); Kantor v. Sch. Bd. of Monroe County, 648 So.2d 1266 (Fla. 3d DCA 1995). Consequently, the essential requirements of the law direct the

> Administrative Law Judge to submit conclusions of law in the Recommended Order and that the parties be provided the opportunity to submit exceptions to those recommended conclusions before final action in this proceeding. See, Cohn v. Dep't of Professional Regulation, 477 So. 2d 1039 (Fla. 3rd DCA 1985); Beaumont v. Orlando Regional Healthcare System, Inc., 19 F.A.L.R. 1116 (November 30, 1995). . . . Thus, the Governing Board is statutorily obligated to remand this proceeding to the Administrative Law Judge to make those factual findings on the evidence presented at hearing regarding the consumptive use permit application and to provide appropriate conclusions of law on those findings.

Id. at 85-87. The final order then remanded the unaddressed matter to the ALJ. Id. at 91.

The provisions of Chapter 120 cited in Hines Interests Limited Partnership have not materially changed. The cases cited in that final order have not been over-ruled. Therefore, District staff respectfully requests that this case be remanded to the Division of Administrative Hearings for the limited purpose of the Administrative Law Judge submitting a supplemental recommended order that makes findings of fact, conclusions of law, and a recommendation regarding the Molicas' claim that their wetland filling is exempt under the closed system exemption in section 373.406(3) of the Florida Statutes.

Vance Kidder
Fla. Bar No. 142709
William H. Congdon
Fla. Bar No. 0283606
Attorneys for St. Johns River Water Management District
4049 Reid Street
Palatka, FL 32178-1429
(386) 329-4199

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing has been furnished to the District Clerk and that a true and correct copy of the foregoing, has been furnished to Frank H. Molica and Linda M. Molica, 231 N. Courtenay Parkway, Merrritt Island , FL 32953 and Benjamin Y. Saxon II, Esquire, Attorney for Plaintiffs, Saxon & Chakhtoura, P.A., 111 S. Scott Street, Melbourne, FL 32901 by U.S. Mail delivery, on this 29th day of June, 2009.

W.H. Congdon

William H. Congdon

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

GOVERNING BOARD OF
THE ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT,

Complainant,

SJRWMD F.O.R. NO. 2008-44
DOAH CASE NO. 08-4359

vs.

FRANK H. MOLICA AND
LINDA M. MOLICA

Respondents.

_____/

RESPONSE TO EXCEPTIONS TO RECOMMENDED ORDER

COMES NOW, Complainant, St. Johns River Water Management District ("District"), pursuant to Rule 28-106.217(3), Florida Administrative Code ("F.A.C."), by and through its undersigned attorneys, and files this Response to the Exceptions to the Recommended Order filed by Respondents ("Molica") and says serially to each exception filed by Molica[1]:

STANDARD OF REVIEW FOR EXCEPTIONS

On June 29, 2009 Molica filed twenty-four exceptions to the Recommended Order in this case. The majority of Molica's exceptions are to the Administrative Law Judge's (ALJ) Findings of Fact and allege a lack of competent substantial evidence and then seek to have the Governing Board reweigh the evidence presented to the ALJ at the final hearing. It is a basic principle of administrative law that if an ALJ's finding of fact is supported by competent

[1] Citations to page numbers in the transcript of the formal hearing are indicated by "T: ___." Citations to paragraphs of the Recommended Order will be by paragraph. Citations to exhibits will be made as follows; "P Ex __" for Complainant, the District, or "R Ex. __" for Respondents, Molica.

substantial evidence from which the finding could reasonably be inferred, then it cannot be disturbed. Berry v. Dept. of Envtl. Regulation, 530 So. 2d 1019 (Fla. 4th DCA 1988); Fla. Chapter of Sierra Club v. Orlando Utility Comm'n, 436 So. 2d 383, 389 (Fla. 5th DCA 1983). The issue is not whether the record contains evidence contrary to the ALJ's finding, but whether the finding is supported by competent substantial evidence. Florida Sugar Cane League v. State Siting Board, 580 So. 2d 846 (Fla. 1st DCA 1991). 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 n.3 (Fla. 5th DCA 1996).

The Florida Legislature has codified this principle at paragraph 120.57(1)(l), Fla. Stat., which reads in pertinent part:

> The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law.

Throughout the exceptions, but for numbers 11 and 24, Molica is re-arguing the case in an attempt to have the Governing Board reweigh evidence, judge the credibility of witnesses, and interpret evidence. It is the ALJ's duty, as the fact-finder, to weigh and interpret the evidence presented at final hearing. The Governing Board cannot interpret the evidence in a case to reach a desired result. Nor can it reweigh the evidence presented, or judge the credibility of witnesses; rather the Board is limited to determining whether any competent substantial evidence exists upon which the finding may reasonably be inferred, and/or whether the proceedings complied with the essential requirements of law. Goin v. Comm'n on Ethics, 658 So.2d 1131, 1139 (Fla. 1st DCA 1995); Heifetz v. Dept. of Business Regulation, 475 So. 2d 1277 (Fla. 1st DCA 1985); Bay County School Board v. Bryan, 679 So.2d 1246 (Fla. 1st DCA

1996), rehearing denied (October 16, 1996); Glover v. Sanford Child Care, Inc., 429 So.2d 91 (Fla. 5th DCA 1983).

It should also be noted that several of Petitioners' exceptions do not conform to the requirements of section 120.57(1)(k),Fla. Stat. Under section 120.57(1)(k), Fla. Stat., and section 28-106.217(1), F.A.C., a party may file written exceptions to the recommended order with the agency responsible for rendering final action. Section 120.57(1)(k), Fla. Stat., now provides, due to a statutory amendment in 2003, 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."

In some of Molica's exceptions, Molica either failed to identify the legal basis for the exception or failed to include appropriate and specific citations to the record or failed to do either. Thus, the Governing Board need not rule on these exceptions. To the extent a party fails to file written exceptions to a recommended order regarding specific issues, the party has waived such specific objections. Environmental Coalition of Florida, Inc. v. Broward County, 586 So.2d 1212, 1213 (Fla. 1st DCA 1991).

RESPONSE TO MOLICA'S EXCEPTIONS

EXCEPTION 1

Molica alleges that allowing the District to amend the proposed corrective action at the hearing was a deviation from the essential requirements of law on the basis of insufficient notice to allow Molica to read the proposed corrective action, lack of time to have an expert review the proposed corrective action, and the changes are more than slight changes. This exception alleges an erroneous evidentiary ruling. Section 120.57(1)(l), Fla. Stat., does not authorize the

Governing Board to reverse the Administrative Law Judge's evidentiary ruling. In any event, the facts of the case do not support the exception.

In the morning of the first day of the three day hearing, the District introduced testimony regarding the proposed corrective action in support of the corrective action portion of the administrative complaint. (T. Vol. I: 91-122) The District's evidence on the corrective action consisted of (1) the testimony of District employee Lindsey, who testified about all portions of the text of the corrective action, and (2) the amended proposed corrective action as its exhibit 73 . (T. Vol. I: 91-122, 135, 140)

The District moved, *ore tenus,* to admit the amended corrective action. (T. Vol. I: 138) Molica objected contending that the corrective action should not be amended and that the person who Molica might have testified about corrective action was out of the country, (T. Vol. I 124, 142) The ALJ heard argument on the motion and objection but reserved ruling and made it known to the parties that the motion and objection should be addressed by the parties in their proposed recommended orders. (T.Vol. I:139-40, 145) Additionally, the ALJ indicated that Molica could cross-examine the District's witness concerning differences between the two versions and, even though Molica had not intended to present a witness on corrective action, could have a witness testify later in the proceeding. (T. Vol I: 142-145) (T. Vol. I: 139-140)

Counsel for Molica noted that corrective action was an issue noticed for the hearing. (T. Vol. I: 130) The corrective action exhibit had been listed as an exhibit well in advance of the hearing. (T. Vol. I: 131 & District's Pre-hearing Statement) Indeed, per the ALJ's Order of Pre-hearing Instructions the Districts had provided its corrective action exhibit to Attorney Molica for inspection days in advance of the hearing. Molica stated Molica had someone who could have testified about corrective action but did not have the person attend the hearing. (T. Vol. I: 142) Even though two days of hearing remained, Molica did not call a witness later in the hearing, nor did Molica request a continuance. Furthermore, although the ALJ reserved ruling on admittance of District Exhibit 73, Molica did not make argument on the motion and objection in the Molica

Proposed Recommended Order. By not addressing the matter in the Proposed Recommended Order, Molica waived the issue.

The District's Proposed Recommended Order included an Exhibit A that was a comparison of the corrective action in the Administrative Complaint and the corrective action that was admitted into evidence as P. Ex. 73. The ALJ compared the two versions of corrective action and made the finding that the difference was slight.

EXCEPTION 2

Molica alleges a lack of competent substantial evidence to support a finding, in a portion of paragraph 2 of the Recommended Order, that water historically flowed from the north to the south from the Strickland property onto the Lacano property, across the Molica property, and thence to the ditch to the south of the Molica property. Molica offers Molica's interpretation of two of Molica's exhibits to substantiate the alleged lack of competent substantial evidence. There is ample competent substantial evidence in the record to support the finding and neither of the two exhibits which Molica sites contradict the finding. Competent substantial evidence to support the finding is found in the references to the record in paragraphs 4-6, 24-25, 27, most specifically paragraph 7 of the District's Proposed Recommended Order and T. Vol. I 82:20-83:6. Indeed, the topography depicted on Molica Exhibit 10, a topographic survey, leaves do doubt that water flowing from the north from the Strickland and other properties has to flow across the Molica property.

EXCEPTION 3

Molica alleges a lack of competent substantial evidence to support a finding, in a portion of paragraph 5 of the Recommended Order, that there was no dispute that Molica excavated soil and vegetation, trucked it off site, and brought in fill. This exception is due to Molica mis-interpreting the finding and, even was Molica correctly interpreting the finding, the finding is not a material finding due to other findings that found Molica excavated in a wetland, i.e., "dredged" per section 373.403(9), Fla. Stat, and filled in a wetland. Molica's citations to the transcript

merely point out that whether wetlands were excavated and filled was in dispute. Frank Molica testified that he had vegetation, soil and all, excavated and brought in fill. (T. Vol. I: 44:24-45:1, 46:1-17)

Molica argues that it was Brazilian Pepper that was removed but, because Brazilian Pepper grows in both uplands and wetlands, that fact proves nothing. (T. Vo. I 97:4-12) The issue tried at the hearing was whether or not Molica's excavating and filling was in a wetland. Thus, there is no difference between the parties whether Molica excavated and filled; the difference is about whether Molica did so in a wetland which made the excavating dredging by definition. Competent substantial evidence to support the findings in paragraph 5 is found in the references to the record in paragraphs 2-3, 8 and 9 of the District's Proposed Recommended Order.

EXCEPTION 4

Molica alleges a lack of competent substantial evidence to support a finding, in a portion of paragraph 6 of the Recommended Order, that, in December 2004, District witness Pennick observed vegetation and much soil in the disturbed area of the Molica property and water in the ditch to the south and concluded wetlands were being impacted by Molica. Molica alleges that the witness did not indentify where the "disturbed area" was, which the witness in fact did, and that the ditch is not on the Molica property. The balance of the exceptions alleges the witness' testimony contradicts the allegations of the administrative complaint, when in fact it does not. Molica's citation to the record about the Molica witness as to a hardwood swamp ignores other testimony by that witness. (T. Vol. V 703:19-21) Competent substantial evidence to support the findings in paragraph 6 is found in the references to the record in paragraph 30 of the District's Proposed Recommended Order, most specifically T. Vol. II 305: 17-31116 wherein the witness identified his location with reference to District boring locations.

EXCEPTION 5

Molica alleges a lack of competent substantial evidence to support the finding of paragraph 7 of the Recommended Order that as a result of a December 2004 inspection of the Molica property that DEP and Brevard County representatives concluded wetlands were present in the central portion of the Molica property and, because Molica denied access to the property thereafter, the next on-site inspection of the Molica occurred in October, 2008. Molica offers Molica's interpretation of selected portions of the record and Molica's excuse for not allowing inspection of the Molica property as an explanation of the time between inspections. Molica points to District Ex. 2 to support this exception but District Ex. 2 is the resume of one of its witnesses. Also, Molica Ex. 2A is a Molica letter of August 15, 2005 refusing inspection of the property claiming Molica had violated no law and Ex. 2 B is a August 3, 2007 letter from the District asking permission to inspect the Molica property. The testimony at T-294 that Molica cites is testimony wherein Molica quibbled with the witness whether the wetland was in the rear or the center of the Molica property when the center of the property is to the rear of the property when location is considered from the property's western boundary. If there was a letter authored by Booker at DEP it does not appear that it was admitted into evidence. Lastly, Molica Ex. 22 provided Molica the information requested in Molica Ex 2A but Molica yet did not allow the District to inspect the property. Access to the property occurred in 2008 through a request to enter made in discovery in the case. (T. Vol. I 94:13-21) Competent substantial evidence to support the findings in paragraph 7 is found in the references to the record in paragraph 30 of the District's Proposed Recommended Order, most specifically T. Vol. II 283:7-18, 285:1-8, 287:18-288:2, 296:9-15, 305:23-307:13, 303:1-5, 308:8-16, 310:17-311:21 and P Exs. 48-50, 22, 12 and 52.

EXCEPTION 6

Molica alleges a lack of competent substantial evidence to support a finding, in a portion of paragraph 8 of the Recommended Order, that DEP and the District were not a party to the legal proceeding brought by Brevard County. Moreover, Molica asserted as a defense that the

issues in the Administrative Complaint were previously resolved and contends that the District was a party to the Brevard Co. proceeding. Molica had to prove previous resolution and that the district was a party to the Brevard Co. case. Molica Exhibit 4 does not prove the issues in the Administrative Complaint were previously resolved. Molica's Exhibit 4 does not support the matters Molica asserts because the Exhibit does not establish that the District was a party to the Brevard County proceeding, nor that whether Molica dredged and filled in wetlands was litigated. Molica Ex. 4 has a caption identifying the parties and neither the District or DEP are parties to the proceeding, nor does the exhibit evidence that the DEP or the District were copied any portion of the composite exhibit. Competent substantial evidence to support the findings in paragraph 8 is found in Molica's Ex. 4.

EXCEPTION 7

Molica alleges a lack of competent substantial evidence to support a finding, in a portion of two parts of paragraph 9 of the Recommended Order, that (1) Molica asserted to DEP, presumably after the site visit in December 2004, that Molica was conducting an agricultural operations and (2) the District's delay in responding to Molica was due to numerous pending permits and in-house confusion, and (3) there is no evidence that the District agreed that Molica's activities were lawful or that the delay in responding prejudiced Molica in any way.

T 304 and 326 do not establish that Molica had asserted to DEP that Molica was conducting an agricultural operation. The citation to the record establishes that Molica told Ms. Booker that he was switching from citrus trees to palm trees but that does not constitute telling Ms. Booker the property was an agricultural operation. Moreover, P Exs. 48-50, which are memos of phone call conversations between DEP and Molica, one of which took place after the December 2004 inspection, do not mention any claim by Molica that Molica had an agricultural operation. District witness Lindsey explained the length of time it took between when the District became aware of the Molica violation and when the administrative complaint was served. (T. Vol. I: 161) Molica witness Humphreys testified that market conditions precluded

Molica marketing citrus and, after Molica began to replace citrus with palms, market conditions precluded Molica marketing the palms. (T. Vol. 697-11-16, 755:20-754:16) Competent substantial evidence to support the findings in paragraph 9 is found in the references to the record in paragraphs 58-61 of the District's Proposed Recommended Order.

EXCEPTION 8

Molica alleges a lack of competent substantial evidence to support a finding, in a portion of paragraph 12 of the Recommended Order, that the parties presented conflicting evidence on whether there were wetlands on the Molica property and the ALJ found the District's evidence more persuasive. Merely reading the Proposed Recommended Order of each party establishes the parties presented conflicting evidence on wetlands. Likewise, reading the transcript of the hearing supports the finding concerning conflicting evidence on wetlands. Competent substantial evidence to support the findings in paragraph 12 is found in the references to the record in paragraphs 8 - 48 of the District's Proposed Recommended Order, most specifically T. Vol. III 376:11-393:24, 425:12-428:19. Vol. II 223:22-249:21, Vol. I 97:24-104:21, Vol. IV 634:25-635:1.

The exception further alleges that the Recommended Order fails to indicate what evidence was conflicting, was more persuasive and credible and why. There is no requirement that the ALJ's Recommended Order explain any of the matters Molica states. A function of the ALJ is to adjudge the credibility of witnesses and determine which evidence is more persuasive and then prepare a recommended order with findings of fact and conclusions of law. The test for the validity of the findings of fact is whether there is competent substantial evidence in the record that supports a finding, not whether the Recommended Order explains why the ALJ found one witness more credible and persuasive than another.

Molica's Exception 8 also alleges that the testimony of District witness Richardson and Molica witness Sawka was consistent and asserts an exception to that part of paragraph 13 of the findings of the Recommended Order that finds the District witness Richardson established

that the soil on the Molica property where the dredging and filling occurred was hydric in nature and therefore indicative of a wetland. Molica witness Sawka's subject matter testimony addressed the subject matter of District witnesses Richardson and Hart. Witnesses Richardson and Sawka gave opposing opinions about the presence of hydric soils on the Molica property. Competent substantial evidence for the presence of hydric soils is at T. Vol. II 210:10-12, 217:7-12, 224:3-249:21, 254:22-256:19 and P Ex. 67. Molica witness Sawka testified that two filling events took place on the Molica property and that the more recent second filling, that according to Sawka ranged between 6 and 28 inches in depth, could have taken place in 2003 or 2004. (T. Vol. IV 666-667) The ALJ found that Molica had dredged and filled in 2004. Molica's activity in 2004 is the only evidence of a second excavating and filling on the property. The balance of the exception is merely argument by Molica why the ALJ should have made different findings of fact based on limited portions of the testimony of Molica's witness Sawka and District witnessed Richardson and Hart. Competent substantial evidence to support the findings in paragraph 13 is found in the references to the record in paragraphs 8 - 48 of the District's Proposed Recommended Order.

EXCEPTION 9

Molica alleges a lack of competent substantial evidence to support a finding, in a portion of paragraph 14 of the Recommended Order, that wetland canopy species of vegetation that are on the Molica property support the District's position that Molica dredged and filled wetlands on the Molica property. The balance of the exception is merely argument by Molica why the ALJ should have made different findings of fact based on limited portions of the testimony of Molica's witness Humphreys and District witness Hart. Brazilian Pepper trees grow in wetlands, but also grow in uplands, so that species of trees is not an indicator whether an area is upland or wetland per Rule 62-340.450, F.A.C. (T. Vol. I 97:7-12) Competent substantial evidence to support the findings in paragraph 14 is found in the references to the record in paragraphs 15-

17, 22-27, 48 of the District's Proposed Recommended Order, most specifically T. Vol. III, 377:8-379:22, 431:4-17, Rule 62-340.450(1), F.A.C., T. Vol. IV 608:21-25.

EXCEPTION 10

Molica alleges a lack of competent substantial evidence to support the findings, in paragraphs 15 and 16 of the Recommended Order. Paragraph 15 is a finding that algal mats were found on the property in the vicinity of District soil borings 3-5 and 8 and 9 and algal matting occurs when water, not rainfall, inundates ground surface sufficiently long for algae to grow and remain when the water recedes. Paragraph 16 is a finding that trees on the Molica property provided evidence (buttressing, adventitious roots and lichen lines) of being saturated or inundated. The exception is merely argument by Molica why the ALJ should have made different findings of fact based on limited portions of the record, primarily the testimony of Molica's witnesses. Competent substantial evidence to support the findings in paragraphs 15 and 16 is found in the references to the record in paragraphs 15-20, 21-29, 34-48 of the District's Proposed Recommended Order, most specifically T. Vol. I 65:1-6, 74:6-22, 98:9-12, 103:8-10, 105:16-107:7, 108:12-18, Vol. III 368:9-369:16, 383:23-384:11, 390:7-393:11, 391:14-393:24, Vol. IV 631:24-632:3, Vol. V 739:1-13.

EXCEPTION 11

Molica alleges a lack of competent substantial evidence to support a finding, in a portion of paragraph 20 of the Recommended Order, concerning the number of palm trees (50 or so in 2006 and a comparable number in 2009) in pots on the Molica property and the marketing plan for them. Molica contends certain photographs taken in 2009 show hundreds of palm trees in pots on the property and there is no basis for the finding concerning the marketing plan. Molica references no testimony for the number of palms and the ALJ's finding indicates it is based on looking at photographs. The exhibit to which Molica refers may indeed depict more than 50 or so palms but the exhibit provides no exact count. The finding is the ALJ's estimate based on the evidence so the finding does not lack competent substantial evidence. The exception is merely

Molica's argument why the ALJ should made a finding of more than "50 or so". Molica witness Humphreys testified to the need for a marketing plan when horticulture is an occupation. (T. Vol. V 743:8-20) Despite reviewing the record, the District cannot find any competent substantial evidence to support the findings in paragraph 8 that Molica had a ten year marketing plan.

EXCEPTION 12

Molica alleges a lack of competent substantial evidence to support the findings of fact in paragraph 20 of the Recommended Order that Molica's activities on the property were an avocation, not an occupation, and that Molica sold no citrus. Molica's citation to T-698 does not establish that Molica sold any citrus; it established why Molica would not have sold citrus and why Molica looked for something other than citrus. (T. Vol. I 45:22-23, Vol. V 743:25-744:2) Molica witness Humphreys testified to the need for a marketing plan when horticulture is an occupation and there is no evidence of a marketing plan. (T. Vol. V 743:8-20) Competent substantial evidence to support the findings in paragraph 20 is found in the references to the record in paragraph 52 of the District's Proposed Recommended Order, most specifically T. Vol. I 45:22-23. Vol. V 743:8-744:4, 693:17-20.

EXCEPTION 13

Molica alleges a lack of competent substantial evidence to support the findings of fact, in part of paragraph 22 of the Recommended Order, that there is no evidence that dredging and filling in wetlands is a normal agricultural activity and that the topographic alterations on the Molica property, which were found to be dredging and filing in wetlands, are not consistent with the practice of agriculture. To prove qualification for the section 373.406(2), Fla. Stat., exemption Molica had the burden to prove that dredging and filling in a wetland was a normal agricultural practice. Molica's evidence about "normal agricultural practice" does not establish that dredging and filling in a wetland is a normal agricultural practice, but, as found by the ALJ, if anything the evidence proves the opposite, (T. Vol. V 714:24-715:4, 746:14-747:19) The balance of the exception is merely argument by Molica why the ALJ should have made different

findings based on limited portions of the testimony of Molica's witness Humphreys and Molica's denial that dredging and filling of a wetland occurred on the Molica property. Competent substantial evidence to support the findings in paragraph 22 is found in the references to the record in paragraphs 14-48 of the District's Proposed Recommended Order.

EXCEPTION 14

Molica alleges a lack of competent substantial evidence to support a finding, in a portion of paragraph 23 of the Recommended Order, that filling on the Molica property obstructed the natural flow of surface water and that, more than likely, the predominant purpose of filling the wetlands on the Molica property was to obstruct ands divert surface water from going onto the Molica property from the Lacano property. The balance of the exception is merely argument by Molica why the ALJ should have made different findings based on limited portions of the record. Competent substantial evidence to support the findings in paragraph 23 is found in the references to the record in paragraphs 24-25, 27, 35-46 of the District's Proposed Recommended Order, most specifically T. Vol. I 82:20-83:16, Vol. V 742:22-743:7.

EXCEPTION 15

Molica alleges a lack of competent substantial evidence to support a finding of fact, in a portion of paragraph 24 of the Recommended Order, that the revised corrective action is reasonable to address the restoration needs of the Molica property. The balance of the exception merely is the same argument made in Exception 1. The District's response to exception 1 is incorporated herein as well as paragraphs 87-89 of the PRO. Competent substantial evidence to support the findings in paragraph 24 is found in the references to the record in paragraph 54-57 of the District's Proposed Recommended Order, most specifically at T. Vol. I 138-140, 142-145.

EXCEPTION 16

Molica alleges a lack of competent substantial evidence to support the finding and conclusion, in a portion of paragraph 27 of the Recommended Order, that if Molica dredged and

filled in a wetland Molica constructed a surface water management system. Competent substantial evidence to support the findings in paragraph 27 is found in the references to the record in paragraph 8-48 of the District's Proposed Recommended Order. Paragraphs 64-75 of the District's Proposed Recommended Order establishes the legal correctness of the Conclusion of Law. Dredging and filling in a wetland is construction of a surface water management system. Rules 40C-4.021(7) and (27) and 40C-4.041(2)(a)8, F.A.C.

EXCEPTION 17

Molica alleges a lack of competent substantial evidence to support the finding and conclusion in paragraph 28 of the Recommended Order, that for the reasons stated previously in the ALJ's Recommended Order, the more credible and persuasive evidence is that Molica dredged and filled in wetlands without obtaining an Environmental Resource Permit. This exception does not comply with section 120.57(1((k). Fla. Stat., and should be treated as no exception at all. In any event, competent substantial evidence to support the findings in paragraph 28 is found in the references to the record in paragraphs 8-48 of the District's Proposed Recommended Order. Paragraphs 64-75 of the District's Proposed Recommended Order establishes the legal correctness of the Conclusion of Law.

EXCEPTION 18

Molica alleges a lack of competent substantial evidence to support the finding and conclusion in paragraph 30 of the Recommended Order, that (a) Molica is not engaged in the occupation of palm tree production, (b) the topographic alterations Molica did on the property are not consistent with the practice of agriculture, (c) the alterations of the property were for the sole or predominant purpose of obstructing or impounding surface water, and (d) Molica was not therefore entitled to the section 373.406(2), Fla. Stat., exemption. Part of the contention of this exception is also part of the contentions in exceptions 11-14. The District's response to those exceptions is incorporated herein. Competent substantial evidence to support the findings in paragraph 30 is found in the references to the record in paragraphs 49-53 of the District's

Proposed Recommended Order. Paragraphs 76-86 of the District's Proposed Recommended Order establishes the legal correctness of the Conclusion of Law.

EXCEPTION 19

Molica alleges a lack of competent substantial evidence to support the finding and conclusion in paragraph 31 of the Recommended Order that the recent case A. Duda & Sons, Inc. v. St. Johns River Water Management District was not dispositive of the section 373./406(2), Fla. Stat., exemption in favor of Molica. This exception does not comply with section 120.57(1)(k). Fla. Stat., and should be treated as no exception at all. In any event, competent substantial evidence to support the findings in paragraph 28 is found in the references to the record in paragraphs 21-53 of the District's Proposed Recommended Order. Paragraphs 76-86 of the District's Proposed Recommended Order establishes the legal correctness of the Conclusion of Law.

EXCEPTION 20

Molica alleges a lack of competent substantial evidence to support the recommendation in the Recommended Order that a final order be entered sustaining the charges in Administrative Complaint, requiring compliance with the corrective action in P Ex. 73, and that Molica was entitled to exemption pursuant to section 373.406(2), Fla. Stat. This exception does not comply with section 120.57( ). Fla. Stat., and should be treated as no exception at all. In any event, competent substantial evidence to support the findings in paragraph 28 is found in the references to the record in the District's Proposed Recommended Order.

EXCEPTION 21

Molica alleges that the hearing was held without a pre-hearing order setting forth the issue to be heard and that failure to have a pre-hearing order setting forth the issue to be tried resulted in a miscarriage of justice. Molica knew full well the issues to be tried in this case, including the District's position on each aspect of the exemption in subsection 373.406(2), Fla. Stat., in advance of the hearing. Molica's exception is an attempt to make Molica's failure to

prove entitlement to the exemption into a procedural issue. There was a Prehearing Order that states the issue to be tried, generally, but not having a pre-hearing order that restated each party's statement of the issues to be tried in not a miscarriage of justice.

Molica states as support for the contention of a miscarriage of justice that Molica believed that there only were two issues to be tried at the administrative hearing as to the exemption in subsection 373.406(2), Fla. Stat.: (1) whether Molica was engaged in the "occupation" of agriculture or silviculture as a matter of law and (2) whether clearing a wetland was farming. The balance of the exception is argument by Molica about Molica's belief about a sentence in Molica Exhibit 21 and why the ALJ should have made different findings of fact based on portions of the evidence that were rejected by the ALJ.

Molica's Prehearing Statements, the District's Prehearing Statement, and Molica's questioning of Molica's witnesses on direct exam conclusively establish the lack of merit in this exception. These things establish a lack of any basis for Molica's statement in the exception about what Molica's belief was prior to the hearing. Indeed, it is ludicrous to argue that the ALJ had to frame the issues that Molica wanted to try. It is Molica's task to determine what Molica had to prove in order to establish entitlement to any exemption.

The ALJ Judge entered an Order of Pre-hearing Instructions that required the parties to meet to stipulate to facts and issues and examinee documents and then file Prehearing Statements that included a statement of the issues of law and fact to be tried and stipulate to issues of fact and law to which there was agreement. Molica and the District met in accord with the Order of Pre-hearing Instructions. Both parties filed Prehearing Statements and served the pleading on the other party. Thus, each party knew in advance of the hearing the other party's position as to issues to be tried and agreed upon facts. Molica's Pre-hearing Statement is full of references to the claimed exemptions.

Molica's Prehearing Statement listed the issues Molica wanted tried. One issue was whether the exemptions in section 373.407, F.S., are applicable to Respondents' activities.

Molica admitted in the Proposed Recommended Order that it was Molica's burden to prove entitlement to the exemptions. Molica's Prehearing Statement contains nothing that indicates that the District agreed to what Molica contends.

The District's Prehearing Statement conclusively and irrefutably belies Molica's contention. The District's Prehearing Statement listed the issues that the District wanted tried:

Issues of Fact Which Remain to be Litigated

a) Whether the Molicas dredged and filled in wetlands on their property and the extent of wetlands dredged and filled,
b) What value the wetlands dredged and filled have under UMAM,
c) Whether what the Molicas did on their property captures, discharges and uses water for the domestic use of water ,
d) Whether the Molicas engage in the occupation of agriculture, silviculture, floriculture or horticulture on their property,
e) Whether what they did on their property altered the topography of their property for a purpose consistent with the practice of agriculture, silviculture, floriculture or horticulture,
f) Whether what the Molicas did on their property was done for the sole or predominant purpose of impounding or obstructing surface water,
g) Whether what the Molicas did on their property was a reservoir or work located entirely within agricultural land owned or controlled by them and requires water only for the filling, replenishing and maintaining the water level thereof and has no surface water runoff from it,
h) Whether what the Molicas did on their property meets generally accepted engineering practices for construction, operation and maintenance of a dam, dike or levee.

Statement of Issues of Law Remaining for Determination by the ALJ

a) Whether Sections 373.413, 373.414, and 373.416, Florida Statutes, and implementing rule chapters 40C-4, including the Applicant's Handbooks, require the Molicas to obtain a permit from the District in order to dredge and fill in the wetland on the Molicas' property,
b) Whether what was done on the Molica property is exempt from having to obtain a permit from the District in order to do what was done on their property pursuant to Subsections 373.406(1)-(3), Florida Statutes, and implementing rule chapter 40C-4, including the Applicant's Handbooks.

The Prehearing Statements establish that Molica knew in advance the issues to be tried. Molica presented witnesses Humphreys and Kern to provide testimony concerning Molica's contention that Molica was exempted by subsections 373.406(1) - (3), Fla. Stat, from regulation

by chapter 373, Fla. Stat., Part IV. (See record citations in paragraphs 49-53 of the District's PRO) In line with the issues to be tried as stated in the each party's Prehearing Statement, Molicas' direct examination of Kern and Humphreys is questioning them about whether Molica qualifies for the exemptions. (See record citations in paragraphs 49-53 of the District's PRO) Moreover, the text of the District's December 5, 2007 letter to Molica also belies Molica's statement about what Molica could have believed based on the letter. Molica notes the third paragraph on page 2 of the letter but totally disregards the preceding paragraph wherein the District informs Molica that it is the occupation of agriculture/silviculture that is the one of the pre-requisites for qualifying for the exemption. To note that the District was unaware of Molica doing any thing on the property that was not agriculture/silviculture is not an admission that Molica had agriculture/silviculture as an occupation.

Molica offers three additional matters to support the contention that failure to have a pre-hearing order setting forth the issue to be tried resulted in a miscarriage of justice. Molica states that Molica disagreed with the District's contention in the letter that Molica had dredged and filled in a wetland on the Molica property. Molica states, as in Exception 11, that the ALJ mis-counted the palm trees on the Molica property that are shown on Molica's exhibits showing palm trees. Lastly, Molica states that Molica did not believe that whether Molica sold citrus was an issue or Molica could have introduced evidence into the record on that matter.

Molica's disagreement with a statement in the District's December 5, 2007 letter that Molica had dredged and filled in a wetland is not a basis for arguing for a more detailed pre-hearing order in face of the issues both parties stated in the Prehearing Statements. Molica's statement that the ALJ under-counted palm trees pictured in certain of Molica's exhibits is not a basis for arguing for a more detailed pre-hearing order in face of the issues both parties stated in the Prehearing Statements. Molica's statement that Molica could have put additional evidence about citrus sales into the record had Molica better understood the issues is not a basis for arguing for a more detailed pre-hearing order in face of the issues both parties stated

in the Prehearing Statements. Issue statements do not detail for parties what to put into evidence.

The parties to this proceeding framed the issues to be tried. It is the responsibility of the parties to frame the issues, not the ALJ. Moreover, any prehearing order by the ALJ can only frames the issue as presented to the judge by the parties. Molica failed to prove entitlement to the exemption because Molica's evidence did not prove entitlement. Molica's failure to prove entitlement to the exemption is not in any way due to a lack of a prehearing order setting forth issue to be tried in greater detail. The Prehearing Statements of the parties clearly state what Molica wanted tried. Not prior to the hearing or in Molica's proposed Recommended Order, but only after the Recommended Order found against Molica, did Molica maintain that there was any deficiency with the Prehearing Order that was entered by the ALJ. Molica failed to prove entitlement to the exemption and lack of procedure is not a issue.

EXCEPTION 22

Molica alleges that the ALJ did not allow closing argument and that not allowing closing argument was a departure from the essential requirements of law. Molica and the District each submitted a Proposed Recommended Order to the ALJ. Due to the fact that Molica submitted a Proposed Recommended Order to the ALJ, Molica must contend that additional, or other type, argument was needed in order to avoid a departure from the essential requirements of law. In that a Proposed Recommended Order to the ALJ is written argument, Molica must be contending that oral argument was required in order to avoid a departure from the essential requirements of law. There is no support in statute, case law, or fact for this exception.

Molica's exception states that section 120.57, Fla. Stat., "infers the right to make final argument". Section 120.57, Fla. Stat, is very clear and straight forward about the procedure to be followed in a 120.57 hearing concerning closing/final argument to the ALJ. Section 120.57(1)(b), Fla. Stat., states in relevant part that:

"[a]ll parties shall have an opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence, to submit proposed findings of fact and orders, to file exceptions to the presiding officer's recommended order, and to be represented by counsel or other qualified representative."

Molica was afforded closing/final argument to the ALJ in the form of proposed findings and an order and Molica did in fact submit a Proposed Recommended Order that contained Findings of Fact, Conclusions of Law and a Recommended Order. The statute does not list oral "closing argument" as procedure to be followed in addition to submitting proposed findings and an order so the exception is without basis in statute. Molica cited no case law to support the exception. Molica, through written closing/final argument to the ALJ, was given due process and there was no departure from the essential requirements of law.

EXCEPTION 23

Molica alleges a lack of competent substantial evidence to support the finding of fact in paragraph 23 of the Recommended Order. Molica contends a lack of evidence that Molica filled the Molica property or that it was filled to a greater height than when it was purchased. As evidence supporting this exception, Molica offers testimony of Molica witnesses Sawka and Humphreys about ground levels around tree trunks and Molica's belief about what Molica Exhibit 10, the topographic survey, establishes. Molica took exception to this paragraph in Molica Exceptions 8 and 14. The District incorporates its response to Exceptions 8 and 14 herein in this response to Exception 23. Molica witness Sawka testified that two filling events took place on the Molica property and that the more recent second filling, that according to Sawka ranged between 6 and 28 inches in depth, could have taken place in 2003 or 2004. (T. Vol. IV 666-667) The only evidence of a second filling was Molica's activity in 2004 and after.

EXCEPTION 24

Molica alleges that the Administrative law Judge failed to address the exemption in section 373.406(3), Fla. Stat. The District concurs with this exception and filed its own exception on this very point.

WHEREFORE, Molica's exceptions, but for 24 and that portion of 12 pertaining to a marketing plan, should be rejected because each and every one is unfounded.

Vance Kidder
Florida Bar No. 142709
William H. Congdon
Florida Bar No. 283606
Attorneys for SJRWMD
4049 Reid Street
Palatka, FL 32178-1429
(386) 329-4199

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing, has been furnished to the Attorneys for Respondents, Frank H. Molica, 231 N. Courtenay Parkway, Merritt Island , FL 32953, and Benjamin Y. Saxon II, Esquire, Saxon & Chakhtoura, P.A., 111 S. Scott Street, Melbourne, FL 32901 by U.S. Mail on this 8th day of July, 2009.

William H. Congdon
Vance Kidder

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GOVERNING BOARD OF
THE ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT,

Petitioner,

Case No.: 08-4359
SJR No.: 2008-44

vs.

FRANK H. MOLICA and
LINDA M. MOLICA his wife,

Respondents.
_____/

RESPONDENTS' EXCEPTIONS TO THE SUPPLEMENTAL RECOMMENDED ORDER

Respondents, pursuant to section 120.57 *Florida Statutes*, hereby file exceptions to the Supplemental Recommended Order entered by the Administrative Law Judge on September 21, 2009.

Exceptions

1. The denial of the Respondents' Motion To Abate. The Administrative Law Judge lacks authority to proceed in this matter in that the final declaratory decree dated June 8, 2009, is the law of this case unless overturned on appeal.

2. The Supplemental Order refers to the supplemental findings of fact in the Recommended Order dated June 12, 2009. That Recommended Order contains gross factual errors which are set forth in Respondents Motion For New Trial/Rehearing, a copy of which is attached hereto and made a part hereof. The Motion is hereby reiterated as an exception to the Supplemental Order.

3. The conclusions of law in the Supplemental Order misconstrue sections 373.403 (6) and 373.406 (3), *Florida Statutes*, with respect to the matters of requiring water and discharging water.

4. The case of St. Johns River Water Management District v. Corporation of the President of the Church of Jesus Christ of Latter Day Saints, 489 So. 2d 59 (Fla. 5 DCA 1986), is clearly factually distinguishable from the instant case. The uncontroverted evidence shows that Respondents do not discharge water from their property.

5. The Recommendation in the Supplemental Order is not supported by the uncontroverted evidence in the record relevant to a closed system; the allegations made in the Administrative Complaint with respect to the alleged requirement that Respondents obtain permits under Chapter 373, Part IV, *Florida Statutes*, have not been proven.

6. Based upon the uncontroverted evidence in the record, the Recommendation in the Supplemental Order is not in accordance in Petitioner's statutory authority under Chapter 373, Part IV, *Florida Statutes*.

7. Based upon the findings of fact in the Supplemental Order, which are inconsistent with the allegations of the Administrative Complaint, the Recommendation in the Supplemental Order is not in accordance with Petitioner's statutory authority under Chapter 373, Part IV, *Florida Statutes*.

Respectfully submitted this 1st day of October, 2009.

FRANK HENRY MOLICA, P.A.
Frank Henry Molica, Esquire
Florida Bar No. 120022
231 N. Courtenay Pkwy,
Merritt Island, FL 32953
Telephone No. 321/452-4455
Co-counsel for the Respondents

BENJAMIN Y. SAXON, II, ESQUIRE
Saxon & Chakhtoura, P.A.
Florida Bar No. 120850
111 South Scott Street
Melbourne, Florida 32901
Telephone No. 321/727-2545
Co-counsel for Respondents

I HEREBY CERTIFY that the original hereof was deposited with the US Postal Service for delivery to the *Clerk of the St. Johns River Water Management District, 4049 Reid Street, Palatka, FL 32178-1429*, and that a copy of same has been furnished by mail, to *Vance Kidder, Esquire, and William H. Congdon, Esquire, St. Johns River Water Management District, 4049 Reid Street, Palatka, FL 32178-1429*, this 1st day of October, 2009.

Attorney

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT,

Petitioner,

vs.

CASE No.: 08-4359

FRANK H. MOLICA and
LINDA M. MOLICA his wife

Respondents.
_____/

RESPONDENTS' MOTION FOR NEW TRIAL / REHEARING AS TO PART OF THE ISSUES

Respondents, by and through their undersigned attorney, pursuant to Rule 1.530, Fla.R.Civ.P., and Rule 28 -106.303, F.A.C., move the Administrative Law Judge for a new trial/rehearing as to a part of the issues in this matter and would show:

1. A Supplemental Recommended Order was entered on September 21, 2009, to which this Motion is directed.

2. That Florida law, section 373.403 (2), *Florida Statutes*, grants a exemption from the permitting requirements of Chapter 373, Part IV, *Florida Statutes*, for agriculture and silviculture.

3. In said Supplemental Order the ALJ recites "As previously found in the Recommended Order dated June 12, 2009, Respondents do not qualify for an exemption under section 373.406 (2) *Florida Statutes*." That previous finding was based upon certain erroneous facts that should not, in the interest of justice and fairness, serve as a basis for any order in this administrative matter.

4. Specifically, the conclusion by the ALJ that the Respondents were not engaged in the occupation of agriculture or silviculture on their property, was stated to be based upon a finding that the Respondents never sold any oranges from their grove on that property, and, after converting it to grow and produce palm trees, that there were only fifty palm trees on the property; these factual matters are grossly inaccurate.

5. That attached hereto is an affidavit of Respondent, Frank H. Molica, with respect to the gross inaccuracy of such findings.

6. The Respondents did not specifically introduce evidence as to these matters at the hearing because counsel did not understand those things to be in issue. That contributing to this misunderstanding was the absence of a pre-trial order setting forth the factual issues to be tried, and, that the Respondents believed that the Petitioner, SJRWMD, was not controverting such matters because its counsel had sent a letter to Respondents wherein it stated:

> "The District does not perceive that you are not engaged in anything on the property but agriculture/silviculture."

A copy of said letter is attached hereto as EXHIBIT ONE.

7. In addition, Respondents did not foresee that SJRWMD would make an argument that there were only fifty palm trees on the property, after having inspected the property several months before the hearing, and it very well knowing thereby, that there were, and are, hundreds of palm trees on Respondents' property.

8. That with respect to the sale of oranges, if Respondents had known that there was an issue regarding the prior citrus activity, they would have produced evidence of the sale of fruit, before conversion to palm production, not withstanding that the administrative

complaint was directed to the years 2004-2008, which was during the years of palm production and not citrus production.

9. The Respondents were of the belief that the issue with regard to agriculture and silviculture was whether the Respondents' activities of removing fallen trees from the 2004 hurricanes and clearing out Brazilian pepper trees, was consistent with farming practices, and perhaps the legal meaning of the word "occupation" in the exemption.

10. That with regard to the portion of the Order which adopts Petitioner's argument as to a requirement of water, although Respondents respectfully disagree with that determination, Respondents would point out that it is this very administrative action which has hindered the Respondents from any further activity on their property, including use of a reservoir, until the issues are resolved.

11. That attached hereto is an affidavit of Respondent in support of this Motion.

WHEREFORE Respondents respectfully request a retrial/rehearing on the issues of exemption under section 373.406, *Florida Statutes*.

I HEREBY CERTIFY a true copy of the foregoing has been furnished by mail this 24th day of September, 2009, to *Vance Kidder, Esq., and William H. Congdon, Esq., St. Johns River Water Management District, 4049 Reid Street, Palatka, Florida 32177.*

FRANK HENRY MOLICA, P.A.
Frank Henry Molica, Esquire
Florida Bar No. 120022
231 N. Courtenay Pkwy,
Merritt Island, FL 32953
Telephone No. 321/452-4455
Co-Counsel for the Respondent

St. Johns River
Water Management District

Kirby B. Green III, Executive Director • David W. Fisk, Assistant Executive Director • Mike Slayton, Deputy Executive Director
John Juilianna, Palm Bay Service Center Director, Regulatory

525 Community College Parkway S.E. • Palm Bay, FL 32909 • (321) 984-4940
On the Internet at *www.sjrwmd.com*.

December 5, 2007

CERTIFIED MAIL: 7007 0220 0001 1684 3588

Law Offices of Frank Henry Molica, P.A.
Attn: Frank Henry Molica, P.A.
231 N. Courtenay Parkway
Merritt Island, FL 32953

Re: Property located at 2050 N Tropical Trail, Merritt Island
Compliance Item: 009-488014
(Please reference compliance item number on all correspondence)

Dear Mr. Molica:

The District is in receipt of your letter dated August 16, 2007. The District has not pursued the matter in over two years, as you have stated, because the District returned the matter back to the Department of Environmental Protection (DEP), where it had originated, and DEP had not indicated that it would not pursue the matter. A recent inquiry found that the matter has never been resolved with either agency, therefore the District will continue to pursue this matter from a regulatory position.

You have referenced the "agricultural" exemption in section 373.406(2). F.S. The exemption, by its terms is not a blanket exemption for each and every activity done in the furtherance of agriculture. Indeed, case law wherein the defendant/respondent asserted the exemption as a defense is clear on that point: the exemption cannot be used to exclude activity from permitting if the alteration is for the sole or predominant purpose of impounding or obstructing surface water. Hence, certain things are exempt and others not. Copies of some cases are attached.

Subsection 373.406(2), F.S., states that "Nothing herein, or in any rule, regulation or order adopted pursuant hereto, shall be construed to affect the right of any person engaged in the occupation of agriculture, silviculture, floriculture, or horticulture to alter the topography of any tract of land for purposes consistent with the practice of such occupation. However, such alteration may not be for the sole or predominant purpose of impounding or obstructing surface waters." The District has adopted rules to implement part IV of chapter 373, F.S. as to agriculture. The rules include provisions that address the exemption. A copy of Chapter 40C-44, F.A.C is attached.

– EXHIBIT ONE –

While chapter 40C-44, F.A.C., exists, it is the District's understanding, based on a site visit by the Department of Environmental Protection (DEP) in December 2004, that the issue at hand is whether a wetland area on your property was filled or excavated in 2004. Records obtained from the DEP seem to indicate that agreement had been reached that a Mr. Neal Thomas would flag where he believed the wetlands ended and if the DEP agreed to the line and no fill was in the wetlands, the matter was resolved. Conversely, if fill was in the wetlands, it would be removed and the filled area restored.

Subsequently, you thought the "agricultural" exemption in section 373.406(2), F.S. might apply. In determining whether an exemption is available to a person engaged in the occupation of agriculture, silviculture, floriculture or horticulture, the following questions must be addressed:

1. Is the person claiming the exemption actually engaged in the occupation of agriculture, silviculture, floriculture or horticulture;

2. Is the proposed topographic alteration consistent with the practice of agriculture, silviculture, floriculture or horticulture; and

3. Is the proposed topographic alteration for the sole or predominant purpose of impounding or obstructing surface waters.

If the first and second questions are answered affirmatively and the third is answered negatively, an exemption under subsection 373.406(2), F.S., is available.

The District does not perceive that you are not engaged in anything on the property but agriculture/silviculture . However, filling or excavating in a wetland is not considered consistent with the practice of agriculture/silviculture.

The District presumes that the following activities are consistent with the practice of silviculture when they are undertaken to place property into silvicultural use or to perpetuate the maintenance of property in silvicultural use and also are presumed not to be for the sole or predominant purpose of impounding or obstructing surface waters:

1. normal site preparation for planting of the tree crop;
2. planting; and
3. harvesting.

Activities which are considered to be for the sole or predominant purpose of impounding or obstructing surface waters have the effect of more than incidentally trapping, obstructing or diverting surface water. Examples of more than incidental effect of trapping, obstructing, or diverting are activities which create canals, ditches, culverts, impoundments, ponds, or fill roads. The purpose of excavating a wetland is to

impound water by making the area more suitable for the collection of water., i.e. trapping it. The purpose of filling a wetland is to keep water from readily collecting there, i.e., diverting or obstructing its flow path. Thus, if what you did was in a wetland, the "agricultural" exemption would not apply.

Additionally, in determining consistency with the practice of agriculture, the District refers to the following publication: "A Manual of Reference Management Practices for Agricultural Activities (November, 1978)" . The use of this publication in the manner it is used is by agreement with "agriculture" , IFAS, and the Florida Department of Agriculture and Consumer Services. The following practices described in the manual are considered as having impoundment or obstruction of surface waters as a primary purpose:

1. Diversion, when such practice would cause diverted water to flow directly onto the property of another landowner
2. Floodwater Retarding Structure
3. Irrigation Pit or Regulating Reservoir
4. Pond
5. Structure for Water Control
6. Regulating Water in Drainage Systems
7. Pumping Plant for Water Control, when used for controlling water levels on land

Other practices which are described in the manual and which are constructed and operated in compliance with Soil Conservation Service standards and approved by the local Soil and Water Conservation District are presumed to be consistent with agricultural activities. Practices which are not described in the manual are presumed to be inconsistent with the practice of agriculture and a permit is required for the construction, alteration, operation, maintenance, removal, or abandonment of a system, subject to the thresholds. A copy of the manual may be obtained by contacting the District headquarters.

The practice of filling wetlands is not considered a typical practice consistent with the occupation of agriculture and pursuant to sectio[redacted] permit is required for any project which is wholly or partially located in, on, or over any wetland or other surface water. Based on aerial photography, past inspection and observation, and geographic database information, it appears that wetlands are located on your property and have been impacted by fill placed in them. However, the District would like to work with you to resolve the matter.

It is the District's preference to try and informally resolve whether an unpermitted activity is a violation of law. Section 373.119, F.S, gives the District authority to issue an administrative complaint. Once the administrative complaint is served inspection through discovery is available to the District. Similarly, section s 373.129 and 136, F.S. empower the District to file an action in circuit court and then have access through discovery. Observations of your property made by DEP while it was on your property, as well as observations by District employees from the property of others, indicate that

you filled or excavated a wetland without a permit. If those observations are incorrect granting the District access can disprove those observations.

The District again, requests permission to visit the property to determine if the activities performed there would have required an Environmental Resource Permit. Please contact Elois Lindsey at 321-676-6618 or Mark Crosby at 321-676-6631 **within 7 days of receipt of this letter** to schedule a site inspection of the property. Your cooperation is requested.

Sincerely,

Vance Kidder

Vance Kidder
Assistant General Counsel
Office of General Counsel

Cc: PDS-Palm Bay
PDS-Palatka
John Juilianna
Susan Moor
Fariborz Zanganeh
Janice Unger
Mark Crosby
Elois Lindsey

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GOVERNING BOARD OF
THE ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT,

Petitioner,

Case No.: 08-4359

vs.

FRANK H. MOLICA and
LINDA M. MOLICA his wife

Respondents.
_____/

AFFIDAVIT

STATE OF FLORIDA
COUNTY OF BREVARD

Before me, the undersigned authority, personally appeared, Frank H. Molica, who being duly sworn upon oath deposes and says:

1. That he is a co-owner of the property which is the subject of this action and has owned said property since 1990.

2. That since approximately 2005 up to the present time, there have been approximately five hundred palm trees growing and being raised on the property. The majority of these palm trees vary in size ranging from four to five feet and are in large fifteen, twenty, and thirty gallon containers.

4. That Respondents have expended many thousands of dollars to convert thier farm from citrus to palm production and many receipts evidencing this were furnished through pre-hearing production requests to Petitioner.

5. That when this farm was in citrus, it produced many boxes of fruit annually, a pick slip from 1993 has been located and is attached hereto showing that forty two, ninety pound boxes, were sold that year.

Frank Henry Molica, Affiant

Sworn To And Subscribed before me this 24 day of September, 2009 by Frank Henry Molica, who

✓ is personally known to me.

____ produced _____ as identification.

NOTARY PUBLIC

Linda S. Hare

Printed Name

(SEAL)

LINDA S. HARE
Notary Public - State of Florida
My Commission Expires Dec 28, 2010
Commission # DD 611055
Bonded Through National Notary Assn.

My Commission Expires: 12/28/2010

K.G. HULL CITRUS, INC.
P.O. BOX 541235
MERRITT ISLAND, FL. 32954

FRANK MOLICA

MARCH 30, 1993
STMT #1

PACKING CO. LOCATION SEASON 92/93

DATE	FRUIT TYPE	NO.BOXES	TICKET#	BOX PRICE	LOAD PRICE	COST OF BOX	HARVEST LOAD	BALANCE	ACCUMULATED BALANCE
MAR 2	E & M	42	52398	$1.00	$42.00			$42.00	$42.00
									$42.00
									$42.00

4/10/93

42 $42.00 $42.00

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

GOVERNING BOARD OF
THE ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT,

Complainant,

vs.

SJRWMD F.O.R. NO. 2008-44
DOAH CASE NO. 08-4359

FRANK H. MOLICA AND
LINDA M. MOLICA

Respondents.

_____/

RESPONSE TO EXCEPTIONS TO SUPPLEMENTAL RECOMMENDED ORDER

COMES NOW, Complainant, St. Johns River Water Management District ("District"), pursuant to Rule 28-106.217(3), Florida Administrative Code ("F.A.C."), by and through its undersigned attorneys, and files this Response to the Exceptions to the Supplemental Recommended Order filed by Respondents ("Molica") and says serially to each exception filed by Molica[1]:

STANDARD OF REVIEW FOR EXCEPTIONS

On October 5, 2009 Molica filed seven numbered paragraphs titled "Respondents' Exceptions to the Supplemental Recommended Order". Molica's Exceptions to the Supplemental Recommended Order do not state any grounds for rejecting a finding or conclusion of law made by the Administrative Law Judge (ALJ)and none of the Exceptions are proper exceptions to the

[1] Citations to page numbers in the transcript of the formal hearing are indicated by "T: ___." Citations to paragraphs of the Recommended Order will be by paragraph. Citations to exhibits will be made as follows; "P Ex __" for Complainant, the District, or "R Ex. __" for Respondents, Molica.

Supplemental Recommended Order. In conclusionary statements, i.e., statements without specific argument or explanation, without citations to the record or the Recommended/Supplemental Recommended Order, or to specific statute or rule provisions, Molica's exceptions allege (1) that the ALJ lacked authority to render a supplemental order, (2) a new hearing or partial hearing should be granted, (3) the conclusions of law are incorrect, (4) - (6) the facts are uncontraverted and applicable law is misapplied to the facts, (7) the findings in the Supplemental Recommended Order are inconsistent with the allegations of the administrative complaint. The Exceptions do not allege that the Findings of Fact of the Supplemental Recommended Order are not supported by competent substantial evidence. The Exceptions seek to have the Governing Board reinterpret the evidence and to reject the Conclusions of Law.

It is a basic principle of administrative law that if an ALJ's finding of fact is supported by competent substantial evidence from which the finding could reasonably be inferred, then it cannot be disturbed. Berry v. Dept. of Envtl. Regulation, 530 So. 2d 1019 (Fla. 4th DCA 1988); Fla. Chapter of Sierra Club v. Orlando Utility Comm'n, 436 So. 2d 383, 389 (Fla. 5th DCA 1983). The issue is not whether the record contains evidence contrary to the ALJ's finding, but whether the finding is supported by competent substantial evidence. Florida Sugar Cane League v. State Siting Board, 580 So. 2d 846 (Fla. 1st DCA 1991). 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 n.3 (Fla. 5th DCA 1996).

The Florida Legislature has codified this principle at paragraph 120.57(1)(l), Fla. Stat., which reads in pertinent part:

> The agency may adopt the recommended order as the final order of the agency. 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 rule .... Rejection of modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law.

Throughout the Exceptions to the Supplemental Recommended Order Molica is re-arguing lack of authority and asks the Governing Board to reinterpret the evidence. It is the ALJ's duty, as the fact-finder, to weigh and interpret the evidence presented at final hearing. The Governing Board cannot interpret the evidence in a case to reach a desired result, nor can it reweigh the evidence presented, or judge the credibility of witnesses; rather the Governing Board is limited to determining whether any competent substantial evidence exists upon which the finding may reasonably be inferred, and/or whether the proceedings complied with the essential requirements of law. Goin v. Comm'n on Ethics, 658 So.2d 1131, 1139 (Fla. 1st DCA 1995); Heifetz v. Dept. of Business Regulation, 475 So. 2d 1277 (Fla. 1st DCA 1985); Bay County School Board v. Bryan, 679 So.2d 1246 (Fla. 1st DCA 1996), rehearing denied (October 16, 1996); Glover v. Sanford Child Care, Inc., 429 So.2d 91 (Fla. 5th DCA 1983). The Governing Board may also correct erroneous conclusions of law made by the ALJ as to statutes and rules within the Governing Board's substantive jurisdiction.

Under section 120.57(1)(k), Fla. Stat., and section 28-106.217(1), F.A.C., a party may file written exceptions to the recommended order with the agency responsible for rendering final

action. Section 120.57(1)(k), Fla. Stat., 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."

None of Molica's Exceptions to the Supplemental Recommended Order clearly identify the disputed portion of the recommended order, identify the legal basis for the exception, or include appropriate and specific citations to the record. Each and every Exception is a mere general conclusion without explanation or reasoning supplied as to whether the findings of fact were not supported by competent substantial evidence or how the law was improperly applied to the facts that were found. Thus, the Governing Board need not rule on any of the exceptions to the Supplemental Recommended Order. To the extent a party fails to file written exceptions to a recommended order regarding specific issues, the party has waived such specific objections. Environmental Coalition of Florida, Inc. v. Broward County, 586 So.2d 1212, 1213 (Fla. 1st DCA 1991).

RESPONSE TO MOLICA'S EXCEPTIONS

EXCEPTION 1

The Respondents take exception to the ALJ's denial of their Motion To Abate ("Motion"). Exception 1 is not in any way related to the correctness of findings of fact or conclusions of law in the recommended order. It is instead an objection to the ALJ's ruling on a purely procedural matter, whether to proceed with entry of a supplemental recommended order or to abate the proceeding pending the outcome of an appeal. The final order should reject Exception 1 for two reasons.

First, the ALJ's ruling on the Motion was correct because the Motion asserted no legal basis for holding the issuance of the supplemental recommended order in abeyance. The underlying factual predicate for the Motion is a circuit court Final Declaratory Judgment entered June 8, 2009, which concluded that the District lacked authority under Chapter 373 of the Florida Statutes over the Molicas' property. Motion at ¶4. As explicitly stated in the Motion, that Judgment has been appealed by the District. *Id.* The Motion provided no legal argument or authority for holding the ALJ's work in abeyance, other than the mere existence of the appealed Judgment. Since the Motion provided no legal authority mandating abatement of the proceeding, abatement was a discretionary decision on the part of the ALJ. *See Hatcher v. Miller* 479 So.2d 848 (Fla. 1st DCA 1985) (order abating the proceeding was not an abuse of discretion). The ALJ properly exercised his discretion by timely issuing his supplemental recommended order.

More importantly, the final order should reject Exception 1 because the ALJ's decision regarding abatement is not within the agency's substantive jurisdiction. Section 120.57(1)(*l*), of the Florida Statutes provides authority for an agency to reject a legal ruling only if the agency has substantive jurisdiction over the subject of the ruling. §120.57(1)(*l*), Fla. Stat. *See also Barfield v. Department of Health*, 805 So.2d 1008, 1010 (Fla. 1st DCA 2001) ("Board lacked the substantive jurisdiction to reject the evidentiary conclusion"); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So.2d 1140, 1142 (Fla. 2nd DCA 2001) (agency lacked authority to reverse ALJ's decision not to apply collateral estoppel).

Respondents' assertion in Exception 1, that the ALJ "lacks authority" to enter a supplemental recommended order, raises an issue that is very close to the issue addressed in *G.E.L. Corp. v. Department of Environmental Protection*, 875 So.2d 1257 (Fla. 5th DCA 2004). There, the ALJ concluded he lacked jurisdiction to address a claim for attorney's fees. *G.E.L.*

Corp. at 1263. DEP concluded that under section 120.57(1)(*l*), the agency was "powerless to correct that decision because it did not have substantive jurisdiction to do so." *Id.* The relevant issue on appeal was whether DEP erred in concluding it did not have substantive jurisdiction over the ALJ's jurisdictional determination. *Id.* The Fifth District upheld DEP's view of its substantive jurisdiction and concluded that DEP could not address "technical matters of law concerning jurisdictional issues . . . ." *Id.* The court went on to note that G.E.L. Corp. should have challenged the ALJ's ruling through appeal to the district court of appeal. *Id.* at 1264-65.

In this case, the ALJ's decision not to abate the proceeding before the Division of Administrative Hearings is a procedural matter within his discretion. That procedural matter is outside the scope of the District's substantive jurisdiction. The District therefore has no authority to change the ALJ's procedural decision and must reject this exception. As noted in *G.E.L. Corp.*, Respondents' avenue for review of the ALJ's ruling on the Motion is through appeal to the district court.

EXCEPTION 2

Molica's takes exception to the Supplemental Recommended Order because it notes that certain matters were addressed in the Recommended Order and alleges that the Recommended Order contains findings of fact that are erroneous and a new hearing or partial hearing should be granted for reasons stated in the Respondents Motion for New Trial/Rehearing. The case was remanded to the ALJ to make a recommendation on section 373.406(3), Fla. Stat, the "Closed System" exemption. The Exception does not state (1) how any facts found in the Recommended Order pertain to the issue of whether Molica proved entitlement to the "Closed System" exemption in section 373.406(3), Fla. Stat., and (2) how any facts relevant to the Motion, which pertains to the section 373.406(2), Fla Stat. exemption, pertain to the "Closed System"

exemption. Indeed, the Motion addresses alleged deficiencies as to findings of fact as to section 373.406(2), Fla. Stat., not section 373.406(3), Fla. Stat., and the Supplemental Recommended Order makes no additional findings as to section 373.406(2), Fla. Stat., and only addresses section 373.406(3), Fla. Stat. Although paragraph 10 of the Motion mentions the use of water as a requirement, use of water pertains to section 373.406(3), Fla. Stat., and not section 373.406(2), Fla. Stat., and as such has nothing to do with the rest of the motion and provides no basis for a new hearing or rehearing.

The matters set forth in the Motion for NewTrial/Rehearing ("Motion") were argued by Molica in exceptions 11, 12, 18 and 21 to the Recommended Order. The Motion is not based on a new finding of fact in the Supplemental Recommended Order but a statement in the Supplemental Recommended Order that the exemption in section 373.406(2), Fla. Stat., was addressed in the Recommended Order. Nothing in the Motion establishes grounds for a new trial or rehearing. The District's response to the Exceptions 11, 12, 18 and 21 of the Respondents' Exceptions to the Recommended Order are incorporated herein.

Paragraph 4 of the Motion states what Molica contends was the basis for finding that Molica was not engaged in the occupation of agriculture or silviculture. The finding that Molica was not engaged in the occupation of agriculture was based on the evidence presented at hearing and paragraph 4 of the Motion is not an accurate representation of the findings and conclusions in the Recommended Order. See paragraphs 19 through 21 of the Recommended Order..

Molica's statement in the Exception/Motion that he did not understand what the issues were that were to be tried is totally and completely belied by the record in the case. Molica asserts as grounds for a new trial or rehearing as to section 373.406(2), Fla. Stat., that the hearing was held without a pre-hearing order setting forth the issue to be heard and that failure to have a

pre-hearing order setting forth the issue to be tried resulted in a miscarriage of justice. Molica knew full well the issues to be tried in this case, including the District's position on each aspect of the exemption in subsection 373.406(2), Fla. Stat., in advance of the hearing. Molica's exception is an attempt to make Molica's failure to prove entitlement to the exemption into a procedural issue. There was a Prehearing Order that states the issue to be tried, generally, but not having a pre-hearing order that restated each party's statement of the issues to be tried or advising each party with specificity what evidence to put into the record is not a miscarriage of justice or grounds for new or rehearing.

In the Exception to the Recommended Order and Motion Molica states as support for the contention of a miscarriage of justice and for a new or rehearing that Molica believed that there only were two issues to be tried at the administrative hearing as to the exemption in subsection 373.406(2), Fla. Stat.: (1) whether Molica was engaged in the "occupation" of agriculture or silviculture as a matter of law and (2) whether clearing a wetland was farming. Molica's Prehearing Statements, the District's Prehearing Statement, and Molica's questioning of Molica's witnesses on direct exam conclusively establish the lack of merit in this exception/motion and establish a lack of any basis for Molica's statement in the exception/motion about what Molica's belief was prior to the hearing. Indeed, it is ludicrous to argue that the ALJ had to frame the issues that Molica wanted to try and even more so to contend that the ALJ had to tell Molica in advance of the hearing what was relevant to issues Molica had to prove. It is Molica's task to determine what Molica had to prove in order to establish entitlement to an exemption.

The ALJ Judge entered an Order of Pre-hearing Instructions that required the parties to meet to stipulate to facts and issues and examine documents and then file Prehearing Statements

that included a statement of the issues of law and fact to be tried and a stipulation of issues of fact and law to which there was agreement. Molica and the District met in accord with the Order of Pre-hearing Instructions. Each party filed a Prehearing Statement and served the pleading on the other party. Thus, with a written statement of a party's position on facts and law as to every issue, each party knew in advance of the hearing the other party's position as to issues to be tried and agreed upon facts.

Molica's Pre-hearing Statement is full of references to the claimed exemptions. Molica's Prehearing Statement listed the issues Molica wanted tried. One issue was whether the exemptions in section 373.406, F.S., are applicable to Respondents' activities. Molica admitted in the Proposed Recommended Order that it was Molica's burden to prove entitlement to the exemptions. Molica's Prehearing Statement contains nothing that indicates that the District agreed or stipulated to what Molica contends.

The District's Prehearing Statement conclusively and irrefutably belies Molica's contention. The District's Prehearing Statement listed the issues that the District wanted tried:

Issues of Fact Which Remain to be Litigated

a) Whether the Molicas dredged and filled in wetlands on their property and the extent of wetlands dredged and filled,
b) What value the wetlands dredged and filled have under UMAM,
c) Whether what the Molicas did on their property captures, discharges and uses water for the domestic use of water ,
d) Whether the Molicas engage in the occupation of agriculture, silviculture, floriculture or horticulture on their property,
e) Whether what they did on their property altered the topography of their property for a purpose consistent with the practice of agriculture, silviculture, floriculture or horticulture,
f) Whether what the Molicas did on their property was done for the sole or predominant purpose of impounding or obstructing surface water,
g) Whether what the Molicas did on their property was a reservoir or work located entirely within agricultural land owned or controlled by them and requires water only for the filling, replenishing and maintaining the water level thereof and has no surface water runoff from it,

h) Whether what the Molicas did on their property meets generally accepted engineering practices for construction, operation and maintenance of a dam, dike or levee.

Statement of Issues of Law Remaining for Determination by the ALJ

a) Whether Sections 373.413, 373.414, and 373.416, Florida Statutes, and implementing rule chapters 40C-4, including the Applicant's Handbooks, require the Molicas to obtain a permit from the District in order to dredge and fill in the wetland on the Molicas' property,
b) Whether what was done on the Molica property is exempt from having to obtain a permit from the District in order to do what was done on their property pursuant to Subsections 373.406(1)-(3), Florida Statutes, and implementing rule chapter 40C-4, including the Applicant's Handbooks.

The Prehearing Statements establish that Molica knew in advance of the hearing the issues to be tried and whether Molica was engaged in the occupation of agriculture, silviculture, floriculture or horticulture is clearly stated as an issue of fact as well as law that was at issue.

Molica presented witnesses Humphreys and Kern to provide testimony concerning Molica's contention that Molica was exempted by subsections 373.406(1) - (3), Fla. Stat, from regulation by chapter 373, Fla. Stat., Part IV. (See T. Vol. V 746:8-10, Vol. IV 577:24-578:2, 578:14-15, Vol. V 729:17-21, 730:2-7, 742:2-13, 690:7-12, 700:2-24, 701:3-18, &44:25-745:2, 743:18-20, 745:22-25, 743:22-744"5, 793:17-20, 751:16-18, 714:24-715:4, 747:17-19, 735:16-736:3, 742:25-743:7 and Vol. I 82:20-83:6 which were citations to the record in paragraphs 49-53 of the District's PRO) In line with the issues to be tried as stated in the each party's Prehearing Statement, Molicas' direct examination of Kern and Humphreys includes questioning them about whether Molica qualifies for the exemptions. (See previous provided record citations from paragraphs 49-53 of the District's PRO)

The text of the District's December 5, 2007 letter to Molica also belies Molica's statement about what Molica could have believed based on the letter. Molica notes the third paragraph on page 2 of the letter but totally disregards the preceding paragraph wherein the

District informs Molica that it is the occupation of agriculture/silviculture that is the one of the pre-requisites for qualifying for the exemption. To note that the District was unaware of Molica doing any thing on the property that was not agriculture/silviculture is not an admission that Molica had agriculture/silviculture as an occupation.

Molica additionally asserts as support for a new trial or rehearing that Molica did not know the District would argue that there were only 50 palm trees on the Molica property. The District never made that argument at any time in the proceeding; the ALJ made such a finding based on the evidence in the case. However, even if the District had made such an argument it would not be grounds for a new trial or rehearing. Molica's statement that the ALJ under-counted palm trees pictured in certain of Molica's exhibits is not a basis for arguing for a new trial or rehearing order in face of the issues both parties stated in the Prehearing Statements.

Molica had to decide what evidence might be relevant to establishing entitlement to an exemption. In the case of section 373.406(2), Fla. Stat., in addition to other matters, Molica had to prove that Molica was engaged in the occupation of agriculture, silviculture, floriculture or horticulture on the Molica property. The ALJ decided that the facts introduced into evidence established that what Molica was doing on the Molica property was an avocation, not an occupation. Apparently, in advance of the hearing Molica did not see any relevance of sales of product from the land as to whether Molica was engaged in an occupation on the property. However, the sale of crops while Molica owned the property was part of cross-examination of Molica witness Humphreys, who Molica called as an expert witness concerning the section 373.06(2), Fla Stat., exemption and Molica's use of the Molica property, and nothing was elicited from the witness on re-direct as to sales. (T, Vol. V 676-756)

It is not the ALJ's responsibility, or the District's, to tell Molica in advance of the hearing what facts are relevant to proving issues Molica had to prove at the hearing. That Molica failed to understand that evidence concerning whether Molica sold citrus could be relevant to whether he was engaged in an occupation or avocation on the property is not a basis for a new hearing or rehearing.

Molica's statement that Molica could have put additional evidence about citrus sales into the record had Molica better understood the issues is not a basis for arguing for a more detailed pre-hearing order in face of the issues both parties stated in the Prehearing Statements. Issue statements do not detail for parties what to put into evidence. The parties to this proceeding framed the issues to be tried and, indeed, it is the responsibility of the parties to frame the issues, not the ALJ. Moreover, any prehearing order by the ALJ can only frames the issue as presented to the judge by the parties. Molica failed to prove entitlement to the exemption because Molica's evidence did not prove entitlement. Molica's failure to prove entitlement to the exemption is not in any way due to a lack of a prehearing order setting forth issue to be tried in greater detail. The Prehearing Statements of the parties clearly state what Molica wanted tried. Not prior to the hearing or in Molica's proposed Recommended Order, but only after the Recommended Order found against Molica, did Molica maintain that there was any deficiency with the Prehearing Order that was entered by the ALJ. Molica failed to prove entitlement to the exemption and lack of procedure is not a issue. The Exception should be rejected and the Motion denied.

EXCEPTION 3

Molica alleges that the ALJ misconstrued sections 373.403(6) and 373.406(3), Fla. Stat., as requiring and discharging water. Molica's Exception provides no reasoning or explanation of how the ALJ's conclusion of law are counter to sections 373.403(6) and 373.406(3), Fla. Stat. In

point of fact and law, paragraphs 7 through 11 of the Supplemental Recommended Order are supported by the statute's provisions as written and interpreted by case law.

Subsection 373.406(3), F. S., states:

> "[N]othing herein [in part IV chapter 373] or in any rule...adopted pursuant to hereto, shall be construed to be applicable to construction, operation, or maintenance of any agricultural closed system. However, part II of this chapter [chapter 373] shall be applicable as to the taking and discharging of water for filling, replenishing, and maintaining the water level in any such agricultural closed system...

"Closed system" is defined to mean "any reservoir or works located entirely within agricultural lands owned or controlled by the user and which requires water only for the filling, replenishing, and maintaining the water level thereof." Section 373.403(6), F. S.

A closed system, by the aforementioned statutory provisions, "requires water," requires a "reservoir or works," and requires that a water level be maintained in the reservoir or works. Additionally, a "closed" system cannot discharge water off-site. Sec. 373.406(3) and 373.403(6), F. S.; St. Johns River Water Management District v Corp. of the President of the Church of Jesus Christ of Latter Day Saints, 489 So.2d 59, 60 (Fla. 5th DCA 1986), rev.den. 496 So.2d 142 (Fla. 1986) (A closed system must not discharge surface water offsite). Suggs v. Southwest Florida Water Management District, (DOAH Case No 08-3530). (Final Order dated April 3, 2009, adopting in toto Recommended Order dated Feb. 19, 2009, 2009 WL 452534. A system that discharges surface water or ground water is not a closed system.) The evidence is without contradiction that Molica's property does not have a reservoir or works on it that requires water or maintenance of a water level in it. Indeed, the evidence is without contradiction that there is nothing on Molica's property that Molica constructed that prevents stormwater from running off the property. Molica placed fill throughout a large portion of the Molica property, which was a

wetland. In other words, because stormwater discharges off the filled property it cannot be a closed system. The ALJ's conclusions are correct. The Exception should be rejected.

EXCEPTION 4

Molica alleges that St. Johns River Water Management District v. Corporation of the President of the Church of Jesus Christ of Latter Day Saints, 489 So. 2d 59, (Fla 5th DCA 1986) is distinguishable on the facts from the Molica case and that it is uncontraverted fact that Molica does not discharge water from the Molica property. The testimony of both Molica witnesses Kern and Humphreys was that stormwater ran off the Molica property, not that it did not, and the uncontraverted testimony is not what Molica states in the Exception. Besides misrepresenting the facts, the Exception does not state how the facts of the Molica case are distinguishable from the facts of the court case. The findings of the ALJ, in paragraphs 3 through 5 of the Supplemental Recommended Order, are that Molica witnesses Kern and Humphreys stated that there was a closed system on the Molica property but stormwater discharged from the property. What Molica did on the Molica property was dredge and fill in a wetland. Hence, both of Molica's witnesses testified that stormwater ran off the dredged and filled property, which means what Molica constructed is not a closed system. The ALJ's findings are supported by competent substantial evidence. The Exception should be rejected.

EXCEPTION 5

Molica alleges the evidence does not support the Recommendation in the Supplemental Recommended Order and that the allegations of the administrative complaint concerning the need for Molica to have to obtain a permit from the District were not proven. The Exception provides no explanation how the Recommendation is not supported by the facts found, or alleged uncontraverted facts, and the conclusions of law. Similarly, the exception does not explain how

the Supplemental Recommended Order does not support the Recommendation that the allegations of the administrative complaint were proven. The Recommended Order as supplemented by the Supplemental Recommended Order contain findings of fact supported by competent substantial evidence and the conclusions of law are correct as to the facts found. Therefore, the Recommendation is correct. The Exception should be rejected. (The Response to Exception 2 contains relevant citations to the record.)

EXCEPTION 6

Molica alleges that evidence in the record is uncontraverted and the Recommendation in the Supplemental Order is not in accord with Part IV, chapter 373, Fla. Stat. The Exception does not state what is the alleged uncontraverted evidence that is relevant to a closed system, nor how the Recommendation is not in accord with statutory authority. This Exception is essentially Exceptions 3, 4 and 5. The District reiterates and incorporates its response to Exceptions 3, 4 and 5 herein. The Exception should be rejected.

EXCEPTION 7

Molica alleges the Recommendation in the Supplemental Order is not in accord with Part IV, chapter 373, Fla. Stat., because of the findings of fact in the Supplemental Order, and the findings of fact in the Supplemental Order are inconsistent with the allegations of the complaint. The Exception does not state with specificity what findings in the Supplemental Order to which it pertains and provides no explanation how the allegations of the administrative complaint are inconsistent with findings in the Supplemental Order. Furthermore, the Exception provided no explanation how the findings are not in accord with statutory authority. This Exception seems to be embodied in previous Exceptions. The District reiterates and incorporates its response to the previous Exceptions. The Exception should be rejected.

WHEREFORE, Molica's exceptions should be rejected because each and every one is unfounded.

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4049 Reid Street
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(386) 329-4199

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing, has been furnished to the Attorneys for Respondents, Frank H. Molica, 231 N. Courtenay Parkway, Merritt Island , FL 32953, and Benjamin Y. Saxon II, Esquire, Saxon & Chakhtoura, P.A., 111 S. Scott Street, Melbourne, FL 32901 by U.S. Mail on this 8th day of October, 2009.

William H. Congdon
Vance Kidder

OFFICE OF AGRICULTURAL
WATER POLICY
(850) 617-1700

MAGNOLIA CENTER, SUITE 200
1203 GOVERNOR'S SQUARE BOULEVARD
TALLAHASSEE, FLORIDA 32301

FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES

COMMISSIONER ADAM H. PUTNAM

May 9, 2012

Mr. Frank Molica
231 N. Courtenay Parkway
Merritt Island, Florida 32953

SUBJECT: **373.407 CORRECTED ORDER - Binding Determination – Frank Molica**

Dear Mr. Molica:

Attached please find the corrected order on the subject referral. In short, the corrected order now includes a map depicting the exempt and non-exempt areas; and it corrects a typographical error (one word) that was in the conclusion. The overall conclusions contained in the original order did not change.

If you have any questions as you review the document, please feel free to contact me or Bill Bartnick at 850-617-1700.

Sincerely,

ADAM H. PUTNAM
COMMISSIONER

Richard J. Budell
Director

Enclosure

cc: Vince Singleton
Carol Forthman

Exhibit C

FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES
Office of Agricultural Water Policy
1203 Governors Square Blvd., Suite 200
Tallahassee, Florida 32301

Binding Recommendation and Opinion
Florida Statute 373.406(2) Exemption Claim
Frank Molica, Brevard County

FDACS Clerk No. A77197

CORRECTED ORDER – The original binding determination contained a clerical error designating an area as in the west of the property when it was in the east. In addition, a map detailing the exempt and non-exempt areas has been attached to clarify the areas in question.

Introduction:

Under s. 373.407, F.S., a water management district or landowner may request that the Florida Department of Agriculture and Consumer Services (FDACS) make a binding determination as to whether an existing or proposed agricultural activity qualifies for a permitting exemption under section 373.406(2), F.S. However, in order for FDACS to conduct a binding determination, all of the following conditions must exist:

a. There must be a dispute between the landowner and the water management district as to the applicability of the exemption.

b. The activities in question must be on lands classified as agricultural by the county property appraiser pursuant to s. 193.461, F.S.

c. The activities in question have not been previously authorized by an environmental resource permit (ERP) or a management and storage of surface water (MSSW) permit issued pursuant to Part IV, Chapter 373, F.S., or by a dredge and fill permit issued pursuant to Chapter 403, F.S.

Frank Molica has requested that FDACS conduct a binding determination on his operation, and the conditions described above are in place. Per this request, FDACS staff has performed a site inspection and evaluated St. Johns River Water Management District (District) provided documentation and additional information received from Molica, and has rendered a conclusion. The basis for that conclusion is provided below.

Background:

The site is a 3.5 acre parcel located in Section 15, Township 24 South, Range 36 East, in Brevard County, north of Courtney Parkway in Merritt Island. The parcel is classified as agriculture (vacant nursery) pursuant to 2011 Brevard County Property Appraiser information. Frank and Linda Molica hold title to the property, and acquired the parcel by warranty deed on February 1, 1990.

Prior Legal Proceedings

This particular parcel has a lengthy legal history. The relevant events are as follows:

December 5, 2007, the Molicas[1] received a letter from the District alleging wetland violations (filling) associated with earthwork activities that occurred in 2004.

August 8, 2008, the District issued an Administrative Complaint against Molica claiming that beginning in 2004, Molica had taken actions on the property that included dredging in a hardwood swamp wetland and placing fill in that wetland.

September 8, 2008, Molica requested an administrative hearing.

Molica also filed a declaratory judgment action in circuit court claiming the District lacked legal authority to regulate the activities on his property.

March 11, 2009, the administrative hearing was held.

June 12, 2009, the Administrative Law Judge (ALJ) issued a Recommended Order stating that Molica is not entitled to the exemption under ss. 373.406(2).

June, 2009, the Brevard County Circuit Court issued a Final Declaratory Judgment stating that the District lacked authority to take administrative action under ss. 373.406(3). [2]

August 14, 2009, the District Board remanded the case to the ALJ for findings on the applicability of an exemption under 373.406(3), F.S.

September 21, 2009, the ALJ issued a Supplemental Recommended Order.

August, 19, 2011[3], the District Court of Appeal, Fifth District, reversed the circuit court decision, finding that the District did have authority to regulate the activities on Molica's property.

As of the date of this determination, the District has not entered a Final Order. Molica waived the 90 day issuance date so that the Final Order will not be issued until after the Department's determination.

Binding Determination Request

The authority for the Department to issue a binding determination concerning whether an agricultural activity is exempt from Environmental Resource Permitting pursuant to Section 373.406(2), F.S., became effective on July 1, 2011. While previously permitted activities are specifically excluded from the determination process, the statute is silent as to activities subject to Administrative Orders, consent decrees or other non-permit orders. Therefore, without such exclusion, the activity on the Molica property has been considered to qualify for the binding determination process.

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[1] The previous legal actions named both Frank H. and Linda M. Molica.
[2] The exact date is not in the materials available to the Department.
[3] The exact date of the mandate from the Fifth District is not known.

OAWP received Mr. Molica's written request for binding determination on November 2, 2011. OAWP received additional information from the District on November 17, 2011; and additional information from Molica on November 22, 2011.

Site Inspection Findings:

On November 9, 2011, a site inspection was performed by Bill Bartnick with the OAWP, accompanied by Frank and Linda Molica, and Mr. Brooks Humphrys (retired UF-IFAS extension agent), all representing Molica. During this site inspection, all salient features were observed and digital photos were taken.

Most of the site is used to support a palm tree container nursery operation. The western half is comprised of approximately 120 Queen Palm trees grown in 15-gallon containers on weed cloth ground cover. No irrigation system was noted in this area, reportedly due to poor (saline) water from a now abandoned well. The eastern half is comprised of approximately 50 Sago Palm trees grown in 15-gallon containers on weed cloth ground cover. PVC irrigation risers were noted in this area, allowing for attachment to a standard garden hose which is used to irrigate by hand. A small excavated water supply pond with a 5.5 horsepower motor and pump was noted directly to the east, serving only the Sago Palm production area. Two, 300-gallon cisterns were also noted in this area, but lacked plumbing and served no functional purpose.

Molica stated that they started the nursery business in 2005, after back-to-back 2004 hurricanes destroyed and toppled much of their mature navel citrus grove. The citrus grove dated back to the 1950s and pre-existed their real estate purchase. Reportedly, the hurricanes also toppled many native trees, and Brazilian Peppers (non-native, exotic), in a forested wetland fringe, which is in the central part of the Molica property; and is contiguous to an undisturbed forested wetland that is on the adjacent property directly to the north. According to the District, the functional wetland loss in this area as a result of Molica's earthwork is estimated to be 0.87 acres. At present, much of this remnant forested wetland fringe area is now dominated by an overstory of mature Cabbage Palm trees, mixed with a Brazilian Pepper and Wax Myrtle shrub understory. The groundcover is mostly grass, and the area is not currently being used as a nursery production area.

Using a spade shovel, two holes were dug to a depth of 12-inches in the middle of the forested wetland fringe to determine the level of the water table. One hole was near a Cabbage Palm. Groundwater was encountered at the 12-inch depth. The second hole was in the grass area away from the trees and shrubs. In this hole, mottled soil primarily composed of sand and shell material, but no groundwater, was noted at the 12-inch depth. When asked about this, Molica replied that some fill was brought in to fill in the large holes that remained when the Brazilian Pepper trees were removed as a function of the hurricane clean-up operation.

No ditches were noted within the property, only existing perimeter ditches along the south and east property boundary lines. Standing water was observed in these ditches,

as were emergent aquatic plants. A small berm (approximately one-foot in height) was observed on Molica's property, adjacent to the south, east and north property boundary lines. Molica advised that the berm was recently installed in order to conform to the exemption under ss. 373.406(3), F.S., for a closed agricultural system. That particular exemption is outside the Department's authority to make a binding determination which extends only to the exemption pursuant to 373.406(2), F.S. The berm material was placed in jurisdictional wetlands.

Statutory Analysis:

(a) "*Is the person engaged in the occupation of agriculture, silviculture, floriculture, or horticulture on lands classified as agricultural pursuant to s. 193.461, F.S.?*"

YES. The OAWP finds that Molica is engaged in the practice of agriculture on the subject parcel. The county has found that the property qualifies for classification as a bona fide agricultural use pursuant to s. 193.461 F.S., continuously since the Molicas purchased the property in 1990.

Based on aerial photo-interpretation, the citrus trees that were on the property in the 1990s remained mostly intact until the year 2006. In 2006 photographs, the citrus trees on the western side of the property were gone and replaced with container nursery stock. During this same time period, stockpiled soil, but no nursery stock, existed on the eastern side of the property. At some point between the initial earthwork (April 15, 2004 photographs taken by adjacent property owner) and 2006, Molica began systematically replacing his citrus grove with container-grown palm trees. This change in agricultural land use was according to Molica due to hurricane damage and/or unproductive citrus trees in varying states of decline. This was corroborated by former Extension Agent Brooks Humphrys during the site visit.

Photos produced by Molica show that the nursery had an assortment of palm tree varieties; namely, Sago, Foxtail, Majesty, and Christmas palms. The Molicas reported that they suffered a near catastrophic loss to their nursery stock as a result of freeze events over the last few years. This was corroborated with data supplied by the National Weather Service Forecast Office in Melbourne, Florida. Based on data from their nearest station in Titusville (TITFI), there were no fewer than five (5) freeze events with minimum recorded temperatures at or below 32°F between January 2009 and January 2011. According to Dr. Tim Broschat with the UF-IFAS Ft. Lauderdale Research Center, the typical grow-out period for these varieties of palm trees (especially Foxtail and Queen) cultivated in 15-gallon pots is 4 to 5 years. The combination of Dr. Broschat's estimated grow-out period and the aforementioned documented freeze events leads the Department to conclude that the freeze destroyed most of their trees before they reached the typical market size for sale. Hence, no commercial sales records exist for the nursery to date. The Molica nursery is not currently registered with the Department's Division of Plant Industry per nursery inspection law requirements. It would need to do so before generating any commercial sales.

Based on these factors, OAWP has determined that the growing of the palm trees is agriculture and therefore Molica is engaged in the occupation of agriculture.

(b) "*Has the individual altered (or proposed to alter) the topography of the tract of land for the purposes consistent with the normal and customary practice of such occupation in the area?*"

YES (for that part of the property from North Tropical Trail to the easternmost extent of the forested wetland fringe). The OAWP finds that the filling of holes that were left by the removal of the Brazilian Pepper and/or citrus trees and residual leveling, after the hurricanes, would qualify as a normal and customary practice in this instance. Most of the dominant species which form the tree canopy within the forested wetland fringe have been left intact. (See map, Exhibit 1)

NO (for the remaining part of the property). The OAWP finds that the importation of fill material into a jurisdictional wetland, coupled with nursery production activities, is not a normal and customary practice.

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c) "*Are the alteration(s) (or proposed alterations) for the sole and predominant purpose of impeding or diverting surface waters or adversely impacting wetlands?*"

NO. As to the re-filling of holes for removed trees. All activities associated with tree removal, leveling and filling were not for the sole and predominant purpose of impeding or diverting surface waters or adversely impacting wetlands.

YES. As to the placement of fill for a berm. The installation of the berm along the northern property boundary is for the sole and predominant purpose of impeding surface waters; however, it can easily be corrected by removing the berm material in wetlands and placing it in a suitable upland site.

Conclusion:

OAWP has determined that the incidental earthwork in the forested wetland fringe within the central part of the Molica property is exempt under subsection 373.406(2), F.S. The earthwork and nursery production area east of the forested wetland fringe; and installation of the berm are not exempt under subsection 373.406(2), F.S.

Nothing herein relieves the landowner from applying for and obtaining any applicable federal, state, or local authorization.

A determination by the Department that an activity is not exempt from permitting does not preclude the landowner and the water management district from agreeing to modifications to the activity that would render it exempt.

Right to Administrative Hearing:

If you wish to contest OAWP's corrective action, you have the right to request an administrative hearing to be conducted in accordance with Sections 120.569 and 120.57, Florida Statutes, and to be represented by counsel or other qualified representative. Mediation is not available. Your request for hearing must contain:

1. Your name, address, and telephone number, and facsimile number (if any).
2. The name, address, telephone number, and facsimile number of your attorney or qualified representative (if any) upon whom service of pleadings and other papers shall be made.
3. A statement that you are requesting an administrative hearing and dispute the material facts alleged by OAWP, in which case you must identify the material facts that are in dispute (formal hearing), or that you request an administrative hearing and that you do not dispute the facts alleged by the OAWP (informal hearing).
4. A statement of when (date) you received this Notice and the file number of this Notice.

Your request for a hearing must be <u>received</u> at the address shown on this Notice within twenty-one (21) days of receipt of this Notice. If you fail to obtain a Release from this Notice or fail to request an administrative hearing within the twenty-one (21) day deadline you waive your right to a hearing and the binding determination will become final agency action upon filing with the agency clerk.

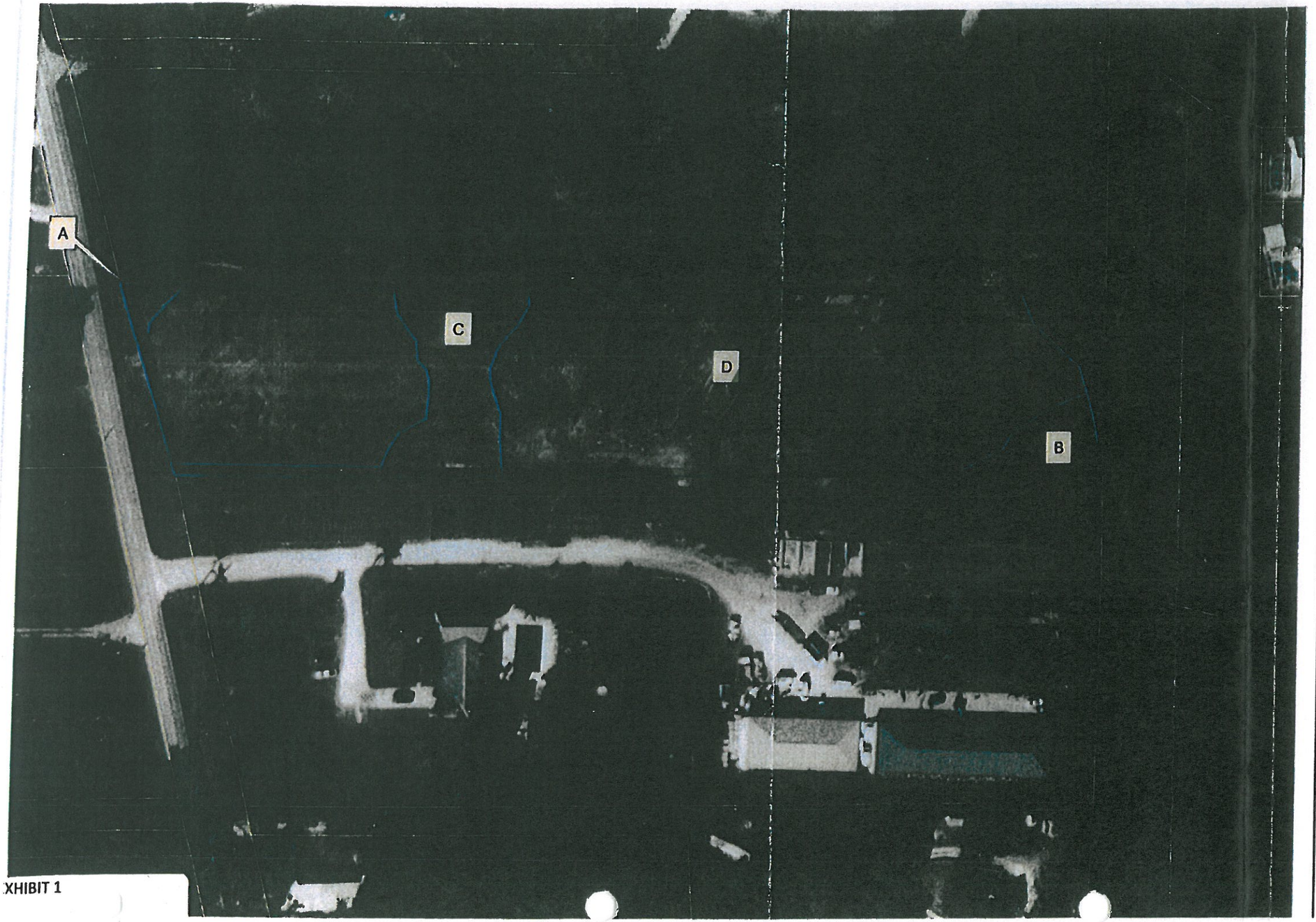
You may appeal the final agency action by filing: (1) a Notice of Appeal with the OAWP at the address shown in this Notice, and (2) a copy of the Notice of Appeal with the applicable district court along with the filing fee within 30 days of the action becoming final.

Supporting Documents:

1) 2011 Brevard County Property Appraiser Information
2) Site Visit Digital Photographs
3) Natural Resources Conservation Service, Field Office Technical Guide, Section IV, Conservation Practice Standard 314, Brush Management, September, 2009
4) Aerial, Soil, Wetland and Topographic maps
5) SJRWMD and Molica Additional Information received in November of 2011
6) National Weather Service Minimum Temperature Data (Titusville station)
7) UF-IFAS Telephone Conversation on December 2, 2011

Filed with the Agency Clerk and rendered this 8th day of May, 2012.

Paul Palmiotto, Agency Clerk



Wetland Area	Area
A	0.(
B	0.:
C	0.:
D	1.(

Exempt and Non-Exempt areas on Molica property noted on SJRWMD provided 2009 color aerial

Exempt

Non-Exemp

Bill Bartnick
2/12/12

100 50 0

EXHIBIT 1

District Ex 73

CORRECTIVE ACTION

13. Respondents shall implement measures to restore the hardwood wetland swamp, in which unpermitted construction took place, as a hardwood swamp or obtain an after-the-fact permit. Respondents shall notify the District which option they chose within 14 days of rendition of the Final Order in this matter. Within 45 days after notifying the District which option is chosen, the Respondents shall submit a restoration plan to the District that complies with paragraph 15 herein or submit a fee and a complete application for a permit to the District that provides reasonable assurance that the standards and criteria in Rules 40C-4.301 and 40C-4.302, F.A.C., are met.

14. Should the Respondents choose to file an application for an after-the-fact permit and should the District request additional information, the Respondents shall timely and fully respond to any requests for additional information within 120 days of the request for additional information or, if additional time is needed, within the 120 days submit a written request for an extension of time pursuant to Rule 40C-1.008, F.A.C. The written request for an extension shall demonstrate that the Respondents are diligently acquiring the requested information. The written request for an extension shall include, as a minimum, a copy of all work done at the time the extension is requested that partially responds to the request for additional information. Failure to timely respond to a request for additional information that results in a Final Order denying the application on an administrative basis for failing to respond to a request for additional information, will require the Respondents to restore the wetlands as specified in paragraph 15. Similarly, denial of the application on a substantive basis for not meeting applicable requirements will require restoration of the wetland as specified in paragraph

15. In either case, the restoration plan shall be submitted to the District for review within 14 days of rendition of the Final Order denying the application for a permit. The Respondents shall implement the restoration plan as provided in paragraph 15.

Paragraph 15 detailing the restoration plan – final version without markup

15. The restoration plan shall address and accomplish the following:

a. The Respondents shall establish the boundaries of the impacted wetland within the Respondent's property and shall provide written notification to the District of completion of the wetland restoration delineation. The impacted wetland boundary shall be staked or flagged by a qualified wetland biologist.

b. Upon District approval of the wetland restoration boundary, Respondents shall provide to the District a restoration plan that includes the following information:

i. A topographic survey, signed and sealed by a professional surveyor registered in the State of Florida. The survey shall include the District approved boundary of the wetland restoration area, current elevations within the wetland restoration area and extending 25-feet from the limits of the restoration area or to the limits of the property boundary, whichever occurs first. The survey shall include elevations every 5-feet and existing contours within the surveyed boundaries.

ii. The methodology for the removal of non-indigenous material within the wetland restoration area, including equipment to be utilized, the location for appropriate erosion control devices to be utilized during construction, and the location of an contained upland area or

appropriate offsite disposal site for the removed material. The contained upland area or offsite location must be approved by District staff.

iii. Details for the installation of a muck blanket or plan to reestablish a natural soil profile within the wetland restoration area as described in paragraph 15(d).

iv. A planting plan consistent with paragraph 15(e).

v. A plan to monitor and maintain the restoration area consistent with paragraphs 15(g) through 15(i).

c. Upon District approval of the restoration plan, Respondents shall re-grade the wetland restoration area, and provide a topographic survey of the restored wetland elevations that is consistent with the criteria of paragraph15(b)(i). Re-grading shall be accomplished through the removal of all non-indigenous soil and material from the restoration area. The elevations within the wetland restoration area shall be reestablished to prefilled elevations, so that upon installation of a muck blanket or supporting soil profile, the re-graded wetland elevation will be reestablished to the natural elevation existing prior to the filling and excavation activities. All spoil piles of earth and material taken from the restored wetland area shall be removed from the wetland and deposited on a contained upland area or transported offsite to an appropriate area approved by District staff. Should District staff determine that additional earth work is still necessary to reestablish the wetland restoration area to

appropriate elevations, as defined above, an additional survey meeting the criteria of paragraph 15(b)(i) will be required following the additional corrective work.

d. Upon District approval of the re-grading work, Respondents shall install a muck blanket or shall recreate a soil profile consistent with the natural soil profile existing within the wetland restoration area prior to excavation and filling activities. The material used to reestablish the soil profile or to establish a muck blanket shall be appropriate to support the targeted wetland community, shall originate from an acceptable donor site and shall be free from an exotic/nuisance species seed source. If a muck blanket will be utilized, the material shall be of an appropriate depth to support the target community. If a soil profile will be recreated, the profile shall consist of an appropriate hydric soil type and must include appropriate soil stratification similar in nature to the preexisting condition.

e. Upon District approval of the supporting soil installation, the wetland restoration area shall be replanted. The wetland restoration area shall be planted with a mix of native wetland herbaceous and forested species commensurate with the composition of the adjacent un-disturbed wetland area to the north. The native herbaceous species that are planted shall be 1 gallon in size spaced three (3) foot on center and the forested species that are planted shall be 5 gallon in size spaced fifteen (15) foot on center.

f. Respondents shall establish the boundary of the restoration area within 30 days of rendition of the Final Order and within 7 days of completion of the

restoration area delineation, must provide written notification to the District that the delineation is completed. Within 30 days of District written approval of the wetland restoration area boundary, Respondents shall submit to the District a restoration plan and topographic survey consistent with paragraph 15(b). Respondents shall commence re-grading within 14 days of District written approval of the restoration plan and, within 7 days of completion of the re-grading, Respondents shall provide written notification to the District of completion of the re-grading. Similarly, the Respondents shall commence installation of the supporting soil material within 14 days of District written approval of re-grading and, within 7 days of completion of the soil installation, Respondents shall provide written notification to the District of completion of the supporting soil installation. Similarly, Respondents shall commence replanting within 14 days of District written approval of the supporting soil installation and, within 7 days of completion of the replanting, Respondents shall provide written notification to the District of completion of replanting. At least 48 hours prior to commencement of re-grading, Respondents shall provide written notification to the District of commencement. At least 48 hours prior to commencement of installation of the supporting soil material, Respondents shall provide written notification to the District of commencement. Likewise, at least 48 hours prior to commencement of replanting, Respondents shall provide written notification to the District of commencement.

g. Respondents shall maintain the restoration area on a quarterly basis until the restoration area has met the success criteria set forth in paragraph 15(h). Maintenance shall consist of replacing dead plants and removing exotic or nuisance species as defined by the 2007 Florida Exotic Pest Plant Council's list of Florida's most invasive species.

h. Successful establishment of the restoration area will have occurred when:

- At least 80 percent of the planted individuals in each stratum have survived and are showing signs of normal growth, based upon standard growth parameters, such as height and base diameter, and canopy circumference; and,
- At least 80 percent cover by appropriate species has been obtained; and,
- The aerial coverage of nuisance species (including, but not limited to Brazilian pepper, cattail, primrose willow, etc.) is less than 5% aerial coverage of plants on the 2007 Florida Exotic Pest Plant Council's list of Florida's most invasive species; and,
- The above success criteria have been achieved for a continuous 5 year period of time.

i. Respondents shall monitor the restoration area until success is achieved as measured by the preceding paragraph. Respondents shall submit annual restoration and monitoring reports to the District, using District form EN-55, each August each year the Respondents monitor restoration. The reports shall be submitted for a period of 5 years or, if success is not achieved in 5 years, until success is achieved after the initial 5 years. The first annual monitoring report shall be submitted to the District no later than August 31 of the year following the year in which a Final Order is rendered. The reports shall contain the following information for the restoration area:

- Percent survival and diversity of species within each stratum;

- Recruitment density and composition within each stratum;
- Recorded growth via established parameters; and
- Percent cover of herbaceous species and forested species;
- Percent cover of nuisance and exotic species;
- The reports shall also include photo documentation of the restored area. Photo stations shall be established within the restored area. Photos shall be taken annually at the established stations during the monitoring events and submitted in the annual report.

j. If successful establishment, as stated in paragraph 15(h) above, has not occurred at the end of 5 years after replanting, Respondents shall submit a remediation plan no later than 30 days following the initial 5-year period or, during the monitoring period, in the event that 50 percent or greater mortality of the species in the restoration area occurs at any time. Respondents shall submit a remediation plan no later than 30 days following the Respondents detecting a 50 percent or greater mortality, or the District notifying the Respondents in writing of a 50 percent or greater mortality. The remediation plan shall propose measures for achieving successful replanting as measured by paragraph 15(h) above. The remediation plan shall include a narrative describing the type and cause(s) of failure and contain a complete set of plans for the redesign and/or replacement planting of the restoration area. Following written District approval of the remediation plan, Respondents shall implement the redesign and/or replacement planting within 30 days. Respondents shall monitor remediation as specified in paragraph 15(g) through 15(i) above. Remediation and monitoring shall continue until success is achieved.

k. Prior to and during construction, Respondents shall implement and maintain all erosion and sediment control measures (best management

practices) required to retain sediment on-site and to prevent violations of state water quality standards, in accordance with the guidelines and specifications in chapter 6 of the Florida Land Development Manual: A Guide to Sound Land and Water Management (Florida Department of Environmental Regulation 1988).