STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

MELLITA A. LANE; JACQUELINE M. LANE; ZACHARY P. LANE; SARAH M. LANE; PETER A. LANE; FRIENDS OF PERDIDO BAY, INC.; AND JAMES LANE,	OGC CASE NOS. 04-1202 05-0738 05-0740 05-0741 05-0742 05-0767 05-0770
Petitioners,	
vs.	
DEPARTMENT OF ENVIRONMENTAL PROTECTION and INTERNATIONAL PAPER COMPANY,	DOAH CASE NOS. 05-1609 05-1610 05-1611 05-1612 05-1613 05-1981
Respondents.	

FINAL ORDER

On May 11, 2007, the Division of Administrative Hearings ("DOAH") submitted a Recommended Order ("RO") to the Department of Environmental Protection ("DEP") in these consolidated proceedings. Copies of the RO were served upon the Petitioners, Mellita A. Lane, Jacqueline M. Lane, Peter A. Lane, ("Lane Petitioners"); Friends of Perdido Bay, Inc., and James A. Lane ("FOPB"); and the Co-Respondent, International Paper Company ("IP"). On May 29, 2007, all Petitioners and Respondent IP filed Exceptions to the RO. Respondent DEP filed Exceptions to the RO and Motion for Remand.

On June 8, 2007, the FOPB filed a Reply to IP's Exceptions and a Response to DEP's Motion for Remand and Exceptions. The Lane Petitioners filed their Response to IP's and DEP's Exceptions. Respondent DEP filed Responses to the Exceptions filed

by the FOPB, the Lane Petitioners and IP. Respondent IP filed Responses to the Exceptions of FOPB, the Lane Petitioners and DEP. This matter is now before me for final agency action.

BACKGROUND

Florida Pulp and Paper Company first began operating the Cantonment paper mill in 1941. St. Regis Paper Company ("St. Regis") acquired the mill in 1946. In 1984, Champion International Corporation ("Champion") acquired the mill. Champion changed the product mix in 1986 from unbleached packaging paper to bleached products such as printing and writing grades of paper. In 2001, Champion merged with IP, and IP took over operation of the mill. The primary product of the mill continues to be printing and writing paper.

The mill's wastewater effluent is discharged into Elevenmile Creek, which is a tributary of Perdido Bay. The creek flows southwest into the northeastern portion of Perdido Bay. Elevenmile Creek is a freshwater stream for most of its length but is sometimes tidally affected one to two miles from its mouth. Elevenmile Creek is designated as a Class III water. Perdido Bay is approximately 28 square miles in area and is bordered by Escambia County on the east and Baldwin County, Alabama, on the west. The dividing line between the states runs north and south in the approximate middle of Perdido Bay. U.S. Highway 98 crosses the Bay, going east and west, and forms the boundary between what is often referred to as the "Upper Bay" and "Lower Bay." The Bay is relatively shallow, especially in the Upper Bay, ranging in depth between five and ten feet. Perdido Bay is designated as a Class III water. Sometime around 1900, a manmade navigation channel was cut through the narrow strip of land

separating Perdido Bay from the Gulf of Mexico. The channel, called Perdido Pass, allowed the salt waters of the Gulf to move with the tides up into Perdido Bay. Depending on tides and freshwater inflows, the tidal waters can move into the most northern portions of Perdido Bay and even further, into its tributaries and wetlands.

The Perdido River flows into the northwest portion of Perdido Bay. It is primarily a freshwater river but it is sometimes tidally influenced at and near its mouth. The Perdido River was designated an Outstanding Florida Water ("OFW") in 1979. At the north end of Perdido Bay, between Elevenmile Creek and the Perdido River, is a large tract of land owned by IP called the Rainwater Tract. The northern part of the tract is primarily freshwater wetlands. The southern part is a tidal marsh. Tee and Wicker Lakes are small (approximately 50 acres in total surface area) tidal ponds within the tidal marsh. Depending on the tides, the lakes can be as shallow as one foot, or several feet deep. A channel through the marsh allows boaters to gain access to Tee and Wicker Lakes from Perdido Bay.

Before 1995, the mill had to have both state and federal permits. The former Florida Department of Environmental Regulation ("DER") issued St. Regis an industrial wastewater operating permit in 1982 pursuant to Chapter 403, Florida Statutes. The United States Environmental Protection Agency ("EPA") issued St. Regis a National Pollutant Discharge Elimination System ("NPDES") permit in 1983 pursuant to the Clean Water Act. When it acquired the facility in 1984, Champion continued to operate the mill under these two permits. In 1986, Champion obtained a construction permit from DER to install the oxygen delignification technology and other improvements to its wastewater treatment plant ("WWTP") in conjunction with the conversion of the

production process from an unbleached to a modified bleached kraft production process. In 1987, Champion applied to DER for an operating permit for its modified WWTP and also petitioned for a variance from the Class III water quality standards in Elevenmile Creek for iron, specific conductance, zinc, and transparency. DER's subsequent proposal to issue the operating permit and variance was formally challenged. In 1988, while the challenges to the DER permit and variance were still pending, Champion dropped its application for the operating permit and requested a temporary operating permit ("TOP"), instead.

In December 1989, DER and Champion entered into Consent Order No. 87-1398 ("the 1989 Consent Order"). The 1989 Consent Order included an allegation by DER that the mill's wastewater discharge was causing violations of state water quality standards in Elevenmile Creek for dissolved oxygen ("DO"), un-ionized ammonia, and biological integrity. The 1989 Consent Order authorized the continued operation of the mill, but established a process for addressing the water quality problems in Elevenmile Creek and Perdido Bay and bringing the mill into compliance in the future. Champion was required to install equipment to increase the DO in its effluent within a year. Champion was also required to submit a plan of study and, 30 months after DER's approval of the plan of study, to submit a study report on the impacts of the mill's effluent on DO in Elevenmile Creek and Perdido Bay and recommend measures for reducing or eliminating adverse impacts. The study report was also supposed to address the other water quality violations caused by Champion. A comprehensive study of the Perdido Bay system was undertaken by a team of 24 scientists lead by Dr. Robert Livingston, an aquatic ecologist and professor at Florida State University. The

initial three-year study by Dr. Livingston's team of scientists was followed by a series of related scientific studies, which are referred to collectively in the RO as "the Livingston studies."

The 1989 Consent Order had no expiration date, but it was tied to the TOP, which had an expiration date of December 1, 1994. Champion was to be in compliance with all applicable water quality standards by that date. The mill was not in compliance with all water quality standards in December 1994. No enforcement action was taken by the Department and no modification of the 1989 Consent Order or TOP was formally proposed that would have provided a point of entry to any members of the public who might have objected. Instead, the Department agreed through correspondence with Champion to allow Champion to pursue additional water quality studies and to investigate alternatives to its discharge to Elevenmile Creek.

In 1994 and 1995, Champion applied to renew its state and federal wastewater permits, which were about to expire. The Department and EPA notified Champion that its existing permits were administratively extended during the review of the new permit applications. Today, the Cantonment mill is still operating under the 1989 TOP which, due to the administrative extension, did not terminate in December 1994, as stated on its face. In November 1995, following EPA's delegation of NPDES permitting authority to the Department, the Department issued an order combining the state and federal operating permits into a single permit identified as Wastewater Permit Number FL0002526-002-IWF/MT.

During the period from 1992 to 2001, more water quality studies were conducted and Champion investigated alternatives to discharging into upper Elevenmile Creek,

including land application of the effluent and relocation of the discharge to lower Elevenmile Creek or the Escambia River.

In September 2002, while Champion's 1994 permit renewal application was still pending at DEP, IP submitted a revised permit renewal application to upgrade the WWTP and relocate its discharge. The WWTP upgrades consist of converting to a modified activated sludge treatment process, increasing aeration, constructing storm surge ponds, and adding a process for pH adjustment. The new WWTP would have an average daily effluent discharge of 23.8 million gallons per day ("MGD"). IP proposes to convey the treated effluent by pipeline 10.7 miles to the 1,464-acre wetland tract owned by IP (contained within the larger Rainwater Tract), where the effluent would be distributed over the wetlands as it flows to lower Elevenmile Creek and Upper Perdido Bay. IP revised its permit application again in October 2005, to obtain authorization to reconfigure the mill to produce unbleached brown paper for various grades of boxes. If the mill is reconfigured, only softwood (pine) would be used in the new process.

On April 12, 2005, the Department published notice of its intent to issue a proposed permit, consent order, experimental wetland exemption, and waiver. The Department authorizations would allow IP to change its industrial wastewater treatment system at the mill, construct an effluent distribution system within the wetland tract, construct the 10.7-mile pipeline to transport its treated wastewater to the wetlands, and discharge the treated wastewater into the wetlands.

In April 2005, Mellita A. Lane, Jacqueline M. Lane, Zachary P. Lane, Peter A. Lane, and Sarah M. Lane ("Lane Petitioners") filed identical petitions challenging the Department authorizations on numerous grounds. The Department forwarded the

petitions to DOAH for assignment of an Administrative Law Judge ("ALJ") and to conduct an evidentiary hearing. The Lane Petitioners subsequently amended their petitions. In May 2005, Friends of Perdido Bay, Inc., and James Lane filed a petition for hearing to challenge the Department authorizations. The FOPB petition was forwarded to DOAH and the pending cases were consolidated for the final hearing. The FOPB petition was subsequently amended.

In October 2005, while the cases were pending, IP applied for a revision to its NPDES permit renewal application. The cases were abated so that the DEP could review and act on the permit revision. In January 2006, DEP issued a proposed revised NPDES permit and a corresponding First Amendment to Consent Order. On July 26, 2006, the Department filed without objection a revision to the Consent Order. On July 31, 2006, the Department filed Joint Trial Exhibit 18 that integrated the Consent Order dated April 12, 2005, the First Amendment to Consent Order dated January 11, 2006, and the Department's Notice of Minor Revision to Consent Order filed on July 26, 2006.

The DOAH Administrative Law Judge ("ALJ") held a lengthy final hearing in these consolidated cases on May 31, June 1, 2, and 26 through 30, and July 17, 27, and 28, 2006. Prior to the hearing, the parties filed their Joint Pre-Hearing Stipulation on May 24, 2006. The ALJ subsequently submitted his RO on May 11, 2007.

RECOMMENDED ORDER

The RO contains numerous factual findings and legal conclusions. In his "Summary," the ALJ concluded that the "more persuasive evidence . . . strongly indicates that" the proposed authorizations "would likely effectuate a significant improvement to the Perdido Bay system over the current discharge to Elevenmile

Creek," and that "[i]mproving overall environmental conditions is in the public interest." (RO Conclusion of Law 221).

However, the ALJ noted three reasons for his recommended denial of the proposed authorizations to IP. First, he concluded that IP did not make a sufficient showing that the discharge "would not significantly degrade the Perdido River OFW." (RO Conclusions of Law 204 and 207). Second, he concluded that IP did not make a sufficient demonstration that the mill's effluent would be assimilated so as not to cause "significant adverse impact on the biological community within the wetland tract." (RO Conclusions of Law 205, 207 and 210). Thus, he concluded that without sufficient demonstrations on these two points "IP failed to prove compliance with Florida's antidegradation policy." (RO Finding of Fact 132).

Third, he concluded that "the proposed Consent Order should not be approved" because "IP did not comply with all the special conditions of Section 403.088[2](e),[1] Florida Statutes." (RO Conclusion of Law 216). These reasons form the bases for his conclusions that IP did not meet the statutory and rule requirements applicable to three out of the four proposed authorizations. (RO Conclusions of Law 204, 205, 206, 207, 210, 216, and 220). The ALJ determined that IP did meet the statutory requirements to qualify for a waiver from one of the rule criteria applicable to the request for the experimental wetlands exemption authorization. (RO Conclusion of Law 213). However, since the ALJ ultimately recommended denial of the experimental wetlands exemption, he recommended denial of the related waiver. (RO Conclusion of Law 214).

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[1] Throughout the RO, the ALJ cites to Section 403.088(1)(d), (e) and (f), Florida Statutes. The correct citation is Section 403.088(2)(d), (e) and (f), Florida Statutes.

Therefore, the ALJ ultimately recommended that DEP issue a Final Order denying the proposed authorizations based on his conclusion that IP's demonstration of "compliance with all applicable Department standards and rules" was "insufficient." (RO Conclusion of Law 221).

STANDARDS OF REVIEW OF DOAH RECOMMENDED ORDERS

Section 120.57(1)(l), Florida Statutes, prescribes that an agency reviewing a recommended order may not reject or modify the findings of fact of an ALJ, "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 on competent substantial evidence." The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value or weight of the evidence. Rather, "competent substantial evidence" refers to the existence of some evidence (quantity) as to each essential element and as to its admissibility under legal rules of evidence. *See e.g., Scholastic Book Fairs, Inc. v. Unemployment Appeals Commission*, 671 So.2d 287, 289 n.3 (Fla. 5th DCA 1996).

A reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See e.g., Belleau v. Dept. of Environmental Protection*, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands County School Board*, 652 So.2d 894 (Fla. 2d. DCA 1995). These evidentiary-related matters are within the province of the ALJ, as the "fact-finder" in these administrative proceedings. *See e.g., Heifetz v. Dept. of Business Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Also, the ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that

cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. *See e.g., Collier Medical Center v. State, Dept. of HRS*, 462 So.2d 83, 85 (Fla. 1st DCA 1985); *Florida Chapter of Sierra Club v. Orlando Utilities Commission*, 436 So.2d 383, 389 (Fla. 5th DCA 1983).

A reviewing agency thus has no authority to evaluate the quantity and quality of the evidence presented at a DOAH formal hearing, beyond making a determination that the evidence is competent and substantial. *See e.g., Brogan v. Carter*, 671 So.2d 822, 823 (Fla. 1st DCA 1996). Therefore, if the DOAH record discloses any competent substantial evidence supporting a challenged factual finding of the ALJ, I am bound by such factual finding in preparing this Final Order. *See e.g., Florida Dept. of Corrections v. Bradley*, 510 So.2d 1122, 1123 (Fla. 1st DCA 1987). In addition, an agency head has no authority to make independent or supplemental findings of fact in the course of reviewing a DOAH recommended order. *See, e.g., North Port, Fla. v. Consolidated Minerals*, 645 So.2d 485, 487 (Fla. 2d DCA 1994).

Section 120.57(1)(l), Florida Statutes (F.S.), also authorizes an agency to reject or modify an administrative law judge's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." If an administrative law judge improperly labels a conclusion of law as a finding of fact, the label should be disregarded and the item treated as though it were actually a conclusion of law. *See, e.g., Battaglia Properties v. Fla. Land and Adjudicatory Commission*, 629 So.2d 161, 168 (Fla. 5th DCA 1994). However, neither should the agency label what is essentially an ultimate factual determination as a "conclusion of law" in order to modify or overturn

what it may view as an unfavorable finding of fact. *See, e.g., Stokes v. State, Bd. of Professional Engineers*, 952 So.2d 1224 (Fla. 1st DCA 2007).

An agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction and expertise. *See, e.g., Public Employees Relations Commission v. Dade County Police Benevolent Association*, 467 So.2d 987, 989 (Fla. 1985); *Florida Public Employee Council, 79 v. Daniels*, 646 So.2d 813, 816 (Fla. 1st DCA 1994). Considerable deference should be accorded to these agency interpretations of statutes and rules within their regulatory jurisdiction, and such agency interpretations should not be overturned unless "clearly erroneous." *See, e.g., Falk v. Beard*, 614 So.2d 1086, 1089 (Fla. 1993); *Dept. of Environmental Regulation v. Goldring*, 477 So.2d 532, 534 (Fla. 1985). Furthermore, agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be the only reasonable interpretations. It is enough if such agency interpretations are "permissible" ones. *See, e.g., Suddath Van Lines, Inc. v. Dept. of Environmental Protection*, 668 So.2d 209, 212 (Fla. 1st DCA 1996).

Evidentiary rulings of the ALJ that deal with "factual issues susceptible to ordinary methods of proof that are not infused with [agency] policy considerations," are not matters over which the agency has "substantive jurisdiction." *See Martuccio v. Dept. of Professional Regulation*, 622 So.2d 607, 609 (Fla. 1st DCA 1993); *Heifetz v. Dept. of Business Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985); *Florida Power & Light Company v. Florida Siting Board*, 693 So.2d 1025, 1028 (Fla. 1st DCA 1997). Evidentiary rulings are matters within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. *See Martuccio, supra, at* 609.

RULING ON DEP'S MOTION FOR REMAND

In its Exceptions, DEP requests that I remand this case back to the ALJ to address the issues raised by the Exceptions. DEP identifies "three overriding issues" underlying the ALJ's recommendation and that "[a]ll three issues involve the proper interpretation and application of rules within the Department's substantive regulatory jurisdiction." DEP further points out that "[a]ll three issues involve questions of law and policy over which the Secretary has final authority and responsibility." (DEP Exceptions, page 3). As further explained in this order, I agree that the ALJ did not properly interpret and apply the Department's OFW rule in Rule 62-4.242(2), Florida Administrative Code (F.A.C.). I also address the ALJ's apparent misinterpretation of the requirements under Section 403.088(2)(e) and (f), F.S. However, I must first address whether, even with erroneous conclusions of law, this matter is appropriate for remand back to the ALJ.

It is well established by the controlling case law of Florida that an agency has the authority to remand an administrative case back to DOAH for further limited proceedings where additional findings of fact and related conclusions of law are critical to the issuance of a coherent final order. *See, e.g., Dept. of Environmental Protection v. Dept. of Management Services, Div. of Adm. Hearings*, 667 So.2d 369 (Fla. 1st DCA 1995); *Collier Development Corp. v. State, Dept. of Environmental Regulation*, 592 So.2d 1107 (Fla. 2d DCA 1991); *Dept. of Professional Regulation v. Wise*, 575 So.2d 713 (Fla. 1st DCA 1991); *Miller v. State, Dept. of Environmental Regulation*, 504 So.2d 1325 (Fla. 1st DCA 1987); *Cohn v. Dept. of Professional Regulation*, 477 So.2d 1039, 1047 (Fla. 3d DCA 1985). An agency head is prohibited from reopening the record,

receiving additional evidence, or making supplemental findings, and is required to remand the case to the ALJ in limited circumstances when further factual findings are needed. *See e.g, Intelligence Group, Inc. v. Dept. of State*, 610 So.2d 589 (Fla. 2d DCA 1992); *Lawnwood Medical Center, Inc. v. AHCA*, 678 So.2d 421 (Fla. 1st DCA 1996).

However, remand is only available in exceptional circumstances. *See, e.g., Henderson Signs v. Dept. of Transportation*, 397 So.2d 769, 772 (Fla. 1st DCA 1981); *Dept. of Professional Regulation v. Wise*, 575 So. 2d 713 (Fla. 1st DCA 1991). If the agency head concludes that the ALJ "failed to perform" his function as a fact finder, the appropriate remedy is to remand the case back to the ALJ because the agency head cannot make his own findings of fact. *See e.g., Cohn v. Dept. of Professional Regulation*, 477 So.2d 1039 (Fla. 3d DCA 1985). Remand may be authorized where the reviewing agency or a court properly modifies or rejects an important conclusion of law contained in the RO, thereby requiring that certain additional factual issues be resolved. *See, e.g., Putnam County Environmental Council v. Georgia Pacific Corp.*, 24 FALR 4674 (Fla. DEP 2002) *app. den.*, Case Nos. 1D02-3673 and 1D02-3674 (Fla. 1st DCA, Nov. 26, 2003).

In this case the ALJ conducted an evidentiary hearing that lasted for 11 days resulting in an over 3,000 page hearing transcript and numerous exhibits from all the parties. He submitted an RO of approximately 95 pages with 187 findings of fact. Although the ALJ misinterpreted certain DEP rules and statutes, I do not find that additional factual issues need to be resolved in order for me to enter a coherent final order. Therefore, the remand request is denied.

RULINGS ON RESPONDENTS' EXCEPTIONS

I. ANTIDEGRADATION AND THE PERDIDO RIVER OFW

DEP and IP's Exceptions address portions of certain findings of fact (RO Findings of Fact 131, 132, 135, 136, and 137) and conclusions of law (RO Conclusions of Law 204 and 207) where the ALJ ultimately determined that IP did not prove compliance with Florida's antidegradation policy. The Exceptions urge me to reject the ALJ's two conclusions underlying his ultimate determination. The first conclusion is that IP did not provide reasonable assurance that its discharge would not significantly degrade the Perdido River OFW. As explained below this conclusion is rejected based on the ALJ's misinterpretation of the standards applying to OFW waters in the Department's antidegradation rule. *See* Rule 62-4.242(2), Fla. Admin. Code.

Rule 62-4.242(2) contains standards that apply to Outstanding Florida Waters. The rule provides, in pertinent part, that no Department permit shall be issued for a proposed discharge unless the applicant affirmatively demonstrates that: a) the proposed activity or discharge is clearly in the public interest, and b) the existing ambient water quality within the Outstanding Florida Water will not be lowered as a result of the proposed discharge. Paragraph (c) of the rule defines the term "existing ambient water quality."

> (c) For the purpose of this section the term "existing ambient water quality" shall mean (based on the best scientific information available) the better water quality of either (1) that which could reasonably be expected to have existed for the baseline year of an Outstanding Florida Water designation, or (2) that which existed during the year prior to the date of a permit application. It shall include daily, seasonal, and other cyclic fluctuations, taking into consideration the effects of allowable discharges for which Department permits were issued or applications for such

permits were filed and complete on the effective date of designation. (Emphasis added).

Rule 62-4.242(2)(c), Fla. Admin. Code.

At the formal administrative hearing, IP presented the testimony of Mr. Tom Gallagher, who was accepted without objection as an expert in the field of environmental engineering with a specialty in water quality modeling. (T. IV, pp. 438-439). The ALJ found that Mr. Gallagher performed water quality modeling to compare the DO levels in the Perdido River that would result from the mill's discharge of Biochemical Oxygen Demand (BOD) at the proposed permit limit of 4,500 ppd (pounds per day) with the predicted DO levels that would have existed in 1979 if St. Regis was discharging 5,100 ppd of BOD. The competent substantial evidence in the record shows that IP's expert testified that the proper analysis required a comparison of maximum permitted levels (T. IV pp. 483-484). Therefore, he performed his analysis utilizing allowable BOD loadings previously authorized for St. Regis in 1979. (Joint Trial Exhibit 9(b), IP's Second Response to the Department's Request for Additional Information submitted April 7, 2003, HydroQual Modeling Results, Appendix 4; T. IV pp. 483-484). The water quality modeling predicted improved water quality in the Perdido River for DO and several other criteria over the conditions that existed in 1979. (RO Finding of Fact 134).

In the first and third sentences of Finding of Fact 135, the ALJ interprets Rule 62-4.242(2)(c), to require IP to compare the DO levels resulting from the proposed permit with the DO levels that the model would have simulated using actual BOD loadings by St. Regis in 1979. These factual findings are actually a legal conclusion and the ALJ cites no legal authority to support his interpretation. On those occasions where a

finding of fact or a conclusion of law is improperly labeled in a recommended order, the label is to be disregarded and the matter treated as if it were properly labeled. *See, e.g., Battaglia Properties v. Land and Water Adj. Comm'n*, 629 So.2d 161, 168 (Fla. 5th DCA 1994). Based on his interpretation of Rule 62-4.242(2)(c), the ALJ ultimately concludes (RO Findings of Fact 131 through 137) that IP did not provide reasonable assurance that the proposed permit would not cause the Perdido River OFW to be significantly degraded (RO Conclusion of Law 204).

The ALJ misinterprets both the plain meaning of the word "allowable" and the common use of the term "allowable discharge" in NPDES permits and environmental rules. The ALJ appears to either add the word "actual" to the rule, or substitute it for the word "allowable" in the rule. Neither the ALJ nor I have the authority to rewrite the rule in this manner. *See St. Joe Paper Company v. Dept. of Revenue*, 460 So. 2d 399 (Fla. 1st DCA 1984) (holding that it is axiomatic that the court is not free to add words to steer a statute to a meaning which its plain wording does not supply); *Wallace Corporation v. City of Miami* Beach, 1999 WL 1483699 (Fla. Dept. Env. Prot. 1999) (concluding that it is an established rule of case law to disapprove the addition of words or phrases to a statute to steer it to a meaning and a limitation which its plain wording does not supply).

According to Webster's New College Dictionary the word "allowable" means "permissible" or "that can be allowed." *Webster's New College Dictionary* (2005). Black's Law Dictionary offers the following definitions - "valid in law," and "entitled to enforcement." *Black's Law Dictionary* (5th ed.) The term "allowable discharge" is commonly used in NPDES permits and environmental rules to specify the discharge

level of a pollutant authorized by the permit or the rule. *See, e.g., Fisher v. Chestnut Mountain Resort, Inc.*, 54 ERC 1093, 32 Envtl. L. Rep. 20 (Mar. 19, 2002) ("The CWA bars the discharge of any pollutant except as the act otherwise provides. 33 U.S.C. § 1311. It provides that a permit may be obtained under certain circumstances allowing the discharge of pollutants as provided in the permit. *Id.* § 1342. For purposes relevant here, discharges pursuant to a permit are the only allowable discharges of a pollutant."); *Russian River Watershed Protection Committee v. City of Santa Rosa*, 142 F.3d 1136, 1139 (9th Cir. 1998) (concluding that the agency devised a method for measuring allowable discharge which has been used throughout the terms of the City's 1990 and 1995 NPDES permits); *City of Coral Gables v. Baljet*, 263 So.2d 273 (Fla. 3d DCA 1972) (finding that the operation of an incinerator was in violation of the Dade County Code by exceeding the maximum allowable discharge of particulate matter); *Kunnen v. Southwest Florida Water Management District*, 2001 WL 1638506 *5 (Fla. Div. Admin. Hrgs. 2001) (finding that under the Basis of Review the District considers a discharge at a point that has been permitted by the District to be a legally allowable discharge).

I thus reject the ALJ's interpretation that "allowable discharges" for which Department permits were issued means "actual" loadings to the water body in the year of OFW designation. It is inconsistent with the plain language of the rule and the established use of the term in the context of NPDES permits. Also, as pointed out by DEP in its Exceptions, if one accepts the ALJ's interpretation of the Department's rule, there could be no "actual discharge" associated with a permit application that was filed and complete on the effective date of designation. I find that the above interpretation of the plain language of the DEP's OFW rule is more reasonable than that of the ALJ. *See*

§ 120.57(1)(l), Fla. Stat. (2006). An agency has the primary responsibility of interpreting statutes within its regulatory jurisdiction and expertise. *See, e.g., Public Employees Relations Commission v. Dade County Police Benevolent Association*, 467 So.2d 987, 989 (Fla. 1985); *Florida Public Employees Council, 79 AFSCME v. Daniels*, 646 So.2d 813, 816 (Fla. 1st DCA 1994).

In view of the above rule interpretations, I reject the ALJ's conclusion that IP did not provide reasonable assurance that the proposed permit would not cause the Perdido River OFW to be significantly degraded. (RO Conclusions of Law 204 and 207). In Finding of Fact 134 the ALJ found that:

> 134. Mr. Gallagher's modeling analysis predicted improved water quality in the Perdido River for DO and several other criteria over the conditions that existed in 1979, the year the river was designated as an OFW. However, the modeling also predicted that the discharge would reduce the DO in the river (as it existed in 1979) by .01 mg/l under unusual conditions of effluent loading at the daily limit (based on a monthly average) during a drought. Mr. Gallagher's modeling indicated that a very small (less than 0.1 mg/l) reduction in DO in the surface water of the lower Perdido River would occur as a result of the proposed project. He considered that to be an "insignificant" effect and it was within the model's range of error.

Therefore, based on the factual findings to which no Exceptions were taken, I conclude that IP provided reasonable assurance that the proposed permit would not cause the Perdido River OFW to be significantly degraded. It is well established that the determination of whether the findings of fact constitute the necessary "reasonable assurance" under DEP Rule 62-4.070(1), F.A.C., for a permit applicant to be entitled to issuance of a permit from this agency is a regulatory decision that must ultimately be made by the agency, rather than the ALJ. *See, e.g., Putnam County Environmental*

Council v. Georgia Pacific Corp., 24 FALR 4674, 4685 (Fla. DEP 2002) *app. den.*, Case Nos. 1D02-3673 and 1D02-3674 (Fla. 1st DCA, Nov. 26, 2003); *Miccosukee Tribe of Indians v. South Florida Water Management District*, 20 FALR 4482, 4491 (Fla. DEP 1998), *aff'd*, 721 So.2d 389 (Fla. 3d DCA 1998); *Barringer v. Speer and Associates*, 14 FALR 3660, 3667 n.8 (Fla. DER 1992).

The second conclusion underlying the ALJ's determination that IP did not prove compliance with Florida's antidegradation policy is that IP did not provide reasonable assurance that its proposed discharge would not cause significant adverse impact to the biological community of the Wetland Tract. This conclusion is based on the ALJ's findings that IP failed to: (1) adequately address the impact of increased specific conductance levels on fish and other live organisms in the freshwater area of the Wetland Tract and (2) provide baseline data concerning the "ecological state" of Tee and Wicker Lakes. IP argues that it was not necessary to provide this evidence as a part of its prima facie case because the Petitioners did not raise these issues as disputed issues of fact in the petitions for administrative hearing or in the pre-hearing stipulation.[2]

All proceedings conducted pursuant to Section 120.57(1), F.S., are conducted *de novo*. *See Florida Dept. of Transportation v. J.W.C. Co. Inc.*, 396 So.2d 778, 785 (Fla.

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[2] It appears the Petitioners did generally raise the issues whether IP provided reasonable assurance that the discharge would comply with Rules 62-4.242(1)(b), F.A.C., the antidegredation rule, and 62-660.300(1)(a), F.A.C., the wetlands exemption rule. *See e.g.* Joint Pre-hearing Stipulation at paragraph 20 on page 12. This issue of whether the Petitioners properly brought these objections and/or whether these objections were subsequently tried by consent of the parties, is solely an evidentiary matter and not within the substantive jurisdiction of the Department. Evidentiary-related matters, such as this, are within the province of the ALJ, as the "fact-finder" in these administrative proceedings. *See e.g., Heifetz v. Dept. of Business Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985).

1st DCA 1981). As such, these proceedings are intended to formulate final agency action, not to review action taken earlier and preliminarily. *See Id.* When these proceedings involve the issuance of a license or permit, the applicant carries the "ultimate burden of persuasion" of entitlement through all the proceedings, of whatever nature, until such time as final agency action has been taken by the agency. *See Id at* 787; *see also, Cordes v. Florida Dept. of Environmental Regulation*, 582 So.2d 652 (Fla. 1st DCA 1991); *Balino v. Dept. of Health & Rehabilitative Services*, 348 So.2d 349 (Fla. 1st DCA 1977). This burden is not subject to shifting by the ALJ (hearing officer), however it is possible that a shifting of the burden of going forward with the evidence may occur during the course of the permitting proceeding. *J.W.C.*, 396 So. 2d *at* 787. Thus, regardless of what issues were framed by the petition or pre-hearing stipulation, IP had the burden to make a showing, by a preponderance of the evidence, of "reasonable assurance" by providing "credible and credited evidence of [its] entitlement to the permit." *J.W.C., 396 So. 2d at* 789. In establishing such a prima facie case showing an entitlement to a permit, IP was required to address "reasonably foreseeable contingencies" (*see, e.g., Putnam County Environmental Council v. Georgia Pacific Corp.*, 24 FALR 4674, RO at 4714 (Fla. DEP 2002), *app. den.*, Case Nos. 1D02-3673 and 1D02-3674 (Fla. 1st DCA, Nov. 26, 2003)), and show its proposed discharge would not contravene Department standards or rules. *See* Rule 62-4.070(1), Fla. Admin. Code. The ALJ ultimately concluded that IP failed to show the discharge would not contravene two rules pertinent to its entitlement to the permit: Rule 62-4.242(1)(b), the "antidegradation rule" and Rule 62-660.300(1)(a), the "wetlands exemption rule." As explained below, I concur in these conclusions and they are adopted in this Final Order.

Section 403.088(2)(b), F.S., provides that a permit for a discharge that would reduce the quality of the receiving waters can only be issued if the Department determines such water quality degradation is "necessary or desirable under federal standards and under circumstances which are clearly in the public interest." In making this determination, the Department must consider whether the proposed discharge would: (1) benefit the public health, safety, or welfare; (2) adversely affect conservation of fish, wildlife and their habitats; (3) adversely affect the fishing, recreational values, or marine productivity in the vicinity of the proposed discharge; and (4) be consistent with any applicable approved Surface Water Improvement and Management Plan. *See* Rule 62-4.242(1)(b), Fla. Admin. Code and RO Finding of Fact 130. Without evidence of (1) the impact of increased conductance levels on the fish and organisms in the freshwater area of the Wetland Tract and (2) the ecological state of Tee and Wicker Lakes, the ALJ was not "reasonably assured" that IP's proposed water quality degradation was "necessary or desirable under federal standards and under circumstances which are clearly in the public interest." In other words, I cannot ultimately consider and balance the four factors in Rule 62-4.242(1)(b), F.A.C., because IP did not present evidence addressing factors (2) and (3). (RO Findings of Fact 130, 131, 132). In its Exceptions IP essentially admits that its demonstration in assessing the impact on the "biological community" was based on wetland functions, as opposed to "measur[ing] the whole bunch of things and then say[ing] what's significant and what isn't significant." (IP Exceptions, page 23, ¶ 52). IP points out that organisms "may or may not exist in those small water bodies." (IP Exceptions, page 24, ¶ 55). IP did not challenge the ALJ's finding of "sloughs" and "creeks" in the freshwater area of the wetland tract. (RO Finding

of Fact 153, first sentence). In addition, the ALJ's finding that baseline data for Tee and Wicker Lakes was not presented as part of the evidence in the hearing, was not challenged. (RO Finding of Fact 66). As such, IP failed to establish a prima facie case for compliance with the antidegradation rule.

Exceptions to Finding of Fact 131 – Based on the reasons outlined above, DEP and IP's Exceptions to the second and third sentences of Finding of Fact 131 are granted in part and denied in part.

Exceptions to Finding of Fact 132 – Based on the reasons outlined above, DEP and IP's Exceptions to the second sentence of Finding of Fact 132 are granted in part and denied in part.

Exceptions to Finding of Fact 135 – Based on the reasons outlined above, DEP and IP's Exceptions to the first and third sentences of Finding of Fact 135 are granted. Those sentences are not adopted in this Final Order.

Exceptions to Finding of Fact 136 – Based on the reasons outlined above, DEP and IP's Exceptions to Finding of Fact 136 are granted. That finding is not adopted in this Final Order.

Exceptions to Finding of Fact 137 – Based on the reasons outlined above, DEP and IP's Exceptions to the second sentence of Finding of Fact 137 are granted. That sentence is not adopted in this Final Order.

Exceptions to Conclusion of Law 204 – Based on the reasons outlined above, DEP and IP's Exceptions to Conclusion of Law 204 are granted. That conclusion is not adopted in this Final Order.

Exceptions to Conclusion of Law 207 – Based on the reasons outlined above, DEP and IP's Exceptions to that portion of Conclusion of Law 207 which finds that IP did not make a sufficient showing that the discharge would not significantly degrade the Perdido River OFW, are granted.

II. EXPERIMENTAL USE OF WETLANDS EXEMPTION

IP and DEP's Exceptions address portions of findings of fact (RO Findings of Fact 147, 149, 152, 153, 154, 155, 156, 157, 162, 163, 164, 171 and 174) and conclusions of law (RO Conclusions of Law 205, 207, and 210) where the ALJ ultimately determined that IP did not qualify for an exemption for the experimental use of wetlands under Rule 62-660.300(1)(a), F.A.C. The rule requires a discharger to satisfy seven criteria in order to qualify. The ALJ concluded that IP did not provide reasonable assurance that three of the criteria were met.

Regarding the first criterion the ALJ determined that IP did not affirmatively demonstrate that the wetlands ecosystem may reasonably be expected to assimilate the waste discharge without significant adverse impact on the biological community within the receiving waters. *See* Rule 62-660.300(1)(a)1, Fla. Admin. Code. The ALJ found that the freshwater area of the Wetland Tract contains "sloughs, creeks, and other surface water flow." (RO Finding of Fact 153, first sentence). No exception was taken to that finding. The ALJ also found that IP presented no evidence about "the biological community associated with the sloughs, creeks, and other waters in the wetland tract, other than general statements about the existing plants. . .." (RO Finding of Fact 153). As to Tee and Wicker Lakes, the ALJ basically determined that the baseline monitoring to determine the current "ecological state" of those tidal ponds are "data that must be

known before a determination is possible that the discharge would not have a significant adverse impact on the biological community associated with the lakes." (RO Finding of Fact 156). In other words, the data is required as part of IP's affirmative demonstration. I conclude that this interpretation is based on the plain language of the rule and is a reasonable interpretation of the rule criteria. *See e.g., Public Employees Relations Commission v. Dade County Police Benevolent Association*, 467 So.2d 987, 989 (Fla. 1985); *Florida Public Employee Council, 79 v. Daniels*, 646 So.2d 813, 816 (Fla. 1st DCA 1994).

Without evidence of (1) the impact of increased conductance levels on the fish and organisms in the freshwater area of the Wetland Tract and (2) the current ecological state of Tee and Wicker Lakes, IP's prima facie case lacked the required affirmative demonstration required by the rule's first criterion. (RO Conclusion of Law 210). Absent this affirmative demonstration of compliance with the rule criteria the ALJ could not find that IP had provided reasonable assurance. Contrary to IP and DEP's arguments in their Exceptions, the ALJ's reliance on the seminal case *Metropolitan Dade County v. Coscan, Fla., Inc.,* 609 So.2d 644 (Fla. 3d DCA 1992), is not misplaced. "Reasonable assurance," in this context means the upfront demonstration that there is a substantial likelihood of compliance with standards, or "a substantial likelihood that the project will be successfully implemented." *Id.* at 648.

The second criterion of the wetlands exemption rule which the ALJ found that IP did not meet is the requirement that "[g]ranting the exemption is in the public interest." *See* Rule 62-660.300(1)(a)2, Fla. Admin. Code. The ALJ found that some restoration of the wetlands would be accomplished (RO Finding of Fact 161) and concluded that it

should not be a rigorous challenge to satisfy this public interest criterion "if all the other exemption criteria are met." (RO Finding of Fact 164). I concur with this reasonable interpretation of the application of this public interest criterion. *See e.g., Public Employees Relations Commission v. Dade County Police Benevolent Association*, 467 So.2d 987, 989 (Fla. 1985); *Florida Public Employee Council, 79 v. Daniels*, 646 So.2d 813, 816 (Fla. 1st DCA 1994).

The third criterion of the wetlands exemption rule that the ALJ found IP did not meet is the requirement that the "exemption will not interfere with the designated use of contiguous waters." *See* Rule 62-660.300(1)(a)6, Fla. Admin. Code. The ALJ's conclusion is based on finding that "IP did not provide reasonable assurances that the proposed permit and related authorizations would not significantly degrade the Perdido River OFW." (RO Finding of Fact 171). I reject this determination for the same reasons set forth above in Section I. and in ruling on the Exceptions relating to interpretation and application of the OFW rule.

In its Exceptions IP argues that if the ALJ's conclusions are adopted then the Department "could not approve administrative orders for the experimental use of wetlands," because an applicant "would never be able to provide sufficient data demonstrating with absolute certainty the conditions that would cause, or not cause, a significant adverse impact." (IP Exceptions, page 33, ¶ 74). However, I do not view the ALJ's conclusions as setting forth such a narrow definition of "significant adverse impact" that would defeat the purpose of the exemption. A "significant adverse impact" must by plain reading be more than any impact. Since the wetlands exemption rule is specifically designed to allow the discharger to exceed the water quality criteria in the

receiving wetland it is expected that there will be some effects to the biological community in the receiving waters. The exemption then specifically requires monitoring of these effects and impacts. However, the authorized exceedances of water quality criteria are limited under the exemption. They must continue to protect potable water supplies and human health, cannot interfere with designated use of contiguous waters adjacent to the receiving wetland, and cannot cause significant adverse impacts to the biological community within the receiving water. *See* Rule 62-660.300(1)(a), Fla. Admin. Code. It is clear that the exemption does not contemplate that the receiving water will meet all of its designated uses since the exemption requires the public to be restricted from access to the waters under consideration and that the waters not be used for recreation. Also, since the exemption requires that the discharge cannot interfere with the designated use of contiguous waters adjacent to the receiving wetland it must follow that the receiving wetland may not meet all of its designated uses.

However, I cannot overturn the factual findings of the ALJ regarding the lack of evidence sufficient to demonstrate compliance with the first criterion of the wetlands exemption rule. In this case, the ALJ found that the "Petitioners did not prove that granting the exemption would cause significant adverse impact to the biological community in the freshwater area of the wetland tract." (RO Finding of Fact 154). However, it was IP's burden to "affirmatively demonstrate" the opposite. (RO Finding of Fact 154). A reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See e.g., Belleau v. Dept. of Environmental Protection*, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands County School Board*, 652 So.2d 894 (Fla. 2d. DCA

1995). These evidentiary-related matters are within the province of the ALJ, as the "fact-finder" in these administrative proceedings. *See e.g., Heifetz v. Dept. of Business Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985).

Exception to Finding of Fact 147 – IP takes exception to the last sentence of this finding on the basis that it is not supported by competent substantial evidence. In this sentence the ALJ essentially finds that organisms in the freshwater area of the wetland tract are not salt tolerant (polyhaline). This finding is a reasonable inference drawn by the ALJ from the competent substantial evidence in the record. If the DOAH record discloses any competent substantial evidence supporting a challenged factual finding of the ALJ, I am bound by such factual finding in preparing this Final Order. *See e.g., Florida Dept. of Corrections v. Bradley*, 510 So.2d 1122, 1123 (Fla. 1st DCA 1987). The competent substantial evidence in the record includes the testimony of Dr. Livingston described in Finding of Fact 146 (T. VIII, pp. 1074 - 1075), and Barry Sulkin described in Finding of Fact 152 (T. XII, p. 1564). Therefore, IP's Exception to the last sentence of Finding of Fact 147 is denied.

Exception to Finding of Fact 149 – IP takes exception to the last sentence of Finding of Fact 149 on the basis that the "[n]o competent substantial evidence was presented to refute the demonstration provided by the pilot project." (IP Exceptions, page 20 ¶ 43). However, I have no authority to reweigh the evidence or judge the credibility of witnesses. That is the province of the ALJ as the trier of fact. *See e.g., Heifetz v. Dept. of Business Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Therefore, IP's Exception to the last sentence of Finding of Fact 149 is denied.

Exception to Finding of Fact 152 – IP takes exception to the second sentence of Finding of Fact 152, where the ALJ found that the potential exists for the discharge of specific conductance in the freshwater portion of the wetland tract to reach levels that are too high for fish and other organisms that are not salt tolerant. IP argues that this finding is not supported by competent substantial evidence. However, this finding is a reasonable inference drawn by the ALJ from the competent substantial evidence in the record. (*See* RO Findings of Fact 146, 151; T. VIII, pp. 1074 – 1075; T. XII, p. 1564). Therefore, IP's Exception to the second sentence of Finding of Fact 152 is denied.

Exceptions to Finding of Fact 153 – IP and DEP take exception to the last sentence of Finding of Fact 153, which states that "no evidence was presented about the biological community associated with the sloughs, creeks, and other waters in the wetland tract, other than general statements about the existing plants and the trees that are being planted." Neither IP nor DEP argue that this finding is not supported by the record. IP contends that this is an "erroneous conclusion of law" in which the ALJ "incorrectly characterizes the record." DEP contends that there's no competent substantial evidence to suggest that any potential impacts to the freshwater community are anything other than de minimis. However, this finding is a reasonable inference drawn by the ALJ from the competent substantial evidence in the record. (*See* RO Findings of Fact 146, 151; T. VIII, pp. 1074 – 1075; T. XII, p. 1564). It would be improper for me to label what is essentially an ultimate factual determination as a "conclusion of law" in order to modify or overturn what may be viewed as an unfavorable finding of fact. *See, e.g., Stokes v. State, Bd. of Professional Engineers*, 952 So.2d 1224 (Fla. 1st DCA 2007). I also have no authority to reweigh the evidence in order to

give the finding less persuasive weight than that given by the ALJ. *See e.g., Belleau v. Dept. of Environmental Protection*, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997).

IP also argues that "no dispute was raised as to the specific effects of the discharge on biological communities that may or may not exist in waters in the existing wetland tract." However, as pointed out in the Lane Petitioners' Responses, they did raise the issue of non-compliance with Rule 62-660.300(1)(a), F.A.C., in the Joint Pre-hearing Stipulation in paragraphs 10 and 29 on pages 11 and 12. In addition, as I previously pointed out in footnote no. 2 the issue of whether the Petitioners properly brought these objections and/or whether these objections were subsequently tried by consent of the parties, is solely an evidentiary matter and not within the substantive jurisdiction of the Department. Evidentiary-related matters, such as this, are within the province of the ALJ, as the "fact-finder" in these administrative proceedings. *See e.g., Heifetz v. Dept. of Business Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985).

Therefore, IP and DEP's Exceptions to the last sentence of Finding of Fact 153 are denied.

Exceptions to Finding of Fact 154 – IP and DEP take exception to the second sentence of Finding of Fact 154 which states the ALJ's ultimate factual determination that IP did not adequately address the impact of increased specific conductance levels on fish and other organisms in the freshwater are of the wetland tract, and his conclusion that IP "did not provide reasonable assurance that the discharge would be assimilated so as not to cause a significant adverse impact on the biological community within the wetland tract." Based on my rulings above, denying the Exceptions to Findings of Fact 147, 149, 152 and 153, and my agreement with the ALJ's application of

Rule 62-660.300(1)(a), F.A.C., I deny the Exceptions to the second sentence of Finding of Fact 154.

Exceptions to Finding of Fact 155 – IP and DEP take exception to the first sentence of Finding of Fact 155. Based on my previous ruling above, concurring with the ALJ's reasonable interpretation of the plain language of Rule 62-660.300(1)(a), F.A.C., I deny the Exceptions to the first sentence of Finding of Fact 155.

Exceptions to Finding of Fact 156 – IP and DEP take exception to the last (third) sentence of Finding of Fact 156. Based on my previous ruling above, concurring with the ALJ's reasonable interpretation of the plain language of Rule 62-660.300(1)(a), F.A.C., I deny the Exceptions to the last sentence of Finding of Fact 156.

Exceptions to Finding of Fact 157 – IP and DEP take exception to the second sentence in Finding of Fact 157. Based on my previous ruling above, concurring with the ALJ's reasonable interpretation of the plain language of Rule 62-660.300(1)(a), F.A.C., I deny the Exceptions to the second sentence of Finding of Fact 157.

Exceptions to Finding of Fact 162 – IP takes exception to Finding of Fact 162 (except for Dr. Nutter's comparison of the effluent to Gatorade), on the basis that the findings are not based on competent substantial evidence. However, as previously described in my rulings on Exceptions to Findings of Fact 149, 152, 153 and 154, the findings are reasonable inferences drawn by the ALJ from the competent substantial evidence in the record. *See e.g., Greseth v. Dept. of Health and Rehabilitative Services*, 573 So.2d 1004, 1006-1007 (Fla. 4th DCA 1991). If the DOAH record discloses any competent substantial evidence supporting a challenged factual finding of the ALJ, I am bound by such factual finding in preparing this Final Order. *See e.g.,*

Florida Dept. of Corrections v. Bradley, 510 So.2d 1122, 1123 (Fla. 1st DCA 1987). The competent substantial evidence in the record from which the ALJ may draw permissible inferences and reach ultimate findings of fact, includes the testimony of Dr. Livingston described in Finding of Fact 146 (T. VIII, pp. 1074 - 1075), and Barry Sulkin described in Finding of Fact 152 (T. XII, p. 1564). Therefore, IP's Exception to Finding of Fact 162 is denied.

DEP takes exception to the second sentence of Finding of Fact 162 on the basis that it's a conclusion of law representing the ALJ's misinterpretation of Rule 62-660.300(1)(a), F.A.C. However, based on my previous ruling above, concurring with the ALJ's reasonable interpretation of the plain language of Rule 62-660.300(1)(a), F.A.C., I deny DEP's Exception to Finding of Fact 162.

Exceptions to Finding of Fact 163 – IP and DEP take exception to the second and third sentences of Finding of Fact 163 on the basis that they are conclusions of law regarding the correct interpretation and application of the public interest criterion of Rule 62-660.300(1)(a), F.A.C. However, based on my previous ruling above, concurring with the ALJ's reasonable interpretation of the plain language of Rule 62-660.300(1)(a), F.A.C., I deny the Exceptions to Finding of Fact 163.

Exceptions to Finding of Fact 164 – IP and DEP take exception to Finding of Fact 164 on the basis that it is a conclusion of law that does not correctly interpret and apply the public interest criterion of Rule 62-660.300(1)(a), F.A.C. However, based on my previous ruling above, concurring with the ALJ's reasonable interpretation of the plain language of Rule 62-660.300(1)(a), F.A.C., I deny the Exceptions to Finding of Fact 164.

Exceptions to Finding of Fact 171 – IP and DEP take exception to Finding of Fact 171. Based on my previous ruling above, rejecting this determination for the same reasons set forth in Section I. and in ruling on the Exceptions relating to interpretation and application of the OFW rule, I grant the Exceptions to Finding of Fact 171.

Exceptions to Finding of Fact 174 – IP takes exception to Finding of Fact 174 "[i]n an abundance of caution," to the extent the paragraph may reiterate the ALJ's conclusion that IP did not provide sufficient information regarding Tee and Wicker Lakes. Based on the above rulings and the rulings in Section I., IP's Exception to Finding of Fact 174 is denied.

Exceptions to Conclusion of Law 205 – IP and DEP take exception to Conclusion of Law 205, which concluded that "IP did not provide reasonable assurance that the mill's effluent would be assimilated so as not to cause significant adverse impact on the biological community within the wetland tract." Based on the above rulings and the rulings in Section I., the Exceptions to Conclusion of Law 205 are denied.

Exceptions to Conclusion of Law 207 – IP and DEP take exception to Conclusion of Law 207. I previously granted the exception to that portion of the paragraph that finds that IP did not make a sufficient showing regarding the Perdido River OFW. However, based on the above rulings, and the rulings in Section III. below, the Exceptions to the other portions of Conclusion of Law 207 are denied.

Exceptions to Conclusions of Law 210 – IP and DEP take exception to Conclusion of Law 210 on the basis that it represents the ALJ's misinterpretation of Rule 62-660.300(1)(a), F.A.C. However, based on my previous ruling, concurring with

the ALJ's reasonable interpretation of the plain language of Rule 62-660.300(1)(a), F.A.C., I deny the Exceptions to Conclusion of Law 210.

III. SECTION 403.088(2)(E) AND (F), F.S. AND THE PROPOSED CONSENT ORDER.

IP and DEP's Exceptions address portions of findings of fact (RO Findings of Fact 73, 74, 75, 76, 184, 186, and 187), and conclusions of law (RO Conclusions of Law 206, 207, 208, 216, 217, 218, 219, 220) where the ALJ ultimately determined that because IP did not meet all of the conditions in Section 403.088(2)(e), F.S., the proposed consent order should not be approved. In addition, the ALJ concluded that the proposed consent order's contingency plan appeared to pre-authorize future action without reasonable assurance that the future action would be appropriate.

Sections 403.088(2)(d), (e), and (f), F.S., provide, in pertinent part, as follows:

> (d) . . . No operation permit shall be renewed or issued if the department finds that the discharge will not comply with permit conditions or applicable statutes or rules.
>
> (e) However, <u>if the discharge will not meet permit conditions or applicable statutes and rules, the department may issue, renew, or reissue the operation permit if</u>:
>
> 1. The applicant is constructing, installing, or placing into operation, or has submitted plans and a reasonable schedule for constructing, installing, or placing into operation, an approved pollution abatement facility or alternative waste disposal system;
>
> 2. The applicant needs permission to pollute the waters within the state for a period of time necessary to complete research, planning, construction, installation, or operation of an approved and acceptable pollution abatement facility or alternative waste disposal system;
>
> 3. There is no present, reasonable, alternative means of disposing of the waste other than by discharging it into the waters of the state;

> 4. The granting of an operation permit will be in the public interest; or
>
> 5. The discharge will not be unreasonably destructive to the quality of the receiving waters.
>
> (f) A permit issued, renewed, or reissued pursuant to paragraph (e) shall be accompanied by an order establishing a schedule for achieving compliance with all permit conditions. Such permit conditions may require compliance with the accompanying order. (Emphasis added)

The provisions of Section 403.088(2) (e) and (f), F.S., express the clear intent of the Florida Legislature to provide the DEP with the authority to issue permits that do not meet all the regular standards for the proposed activity, provided that at least one of the stated conditions of the statutory provision is met. Consequently, Sections 403.088(2) (e) and (f), constitute a limited statutory exception to the "reasonable assurance" permitting requirement set forth in Rule 62-4.070, F.A.C. *See e.g. Valencic v. Miami-Dade County Water and Sewer Dept.*, 23 FALR 1966, 1969 (Fla. DEP 2001), *aff.* 803 So.2d 719 (Fla. 1st DCA 2001).

The ALJ misinterprets the statute by concluding that all five factors listed in Section 403.088(2)(e) must be met by the permit applicant. (RO Conclusions of Law 216 and 220). Only one factor needs to be met in order to apply the provision. In the RO Conclusion of Law 216 the ALJ concludes that "because IP did not comply with all the special conditions of Section 403.088[2](e), Florida Statutes, the proposed Consent Order should not be approved." (Emphasis added). However, subsections 1 through 5 of Section 403.088(2)(e), are linked by the disjunctive "or." Each subsection provides a separate and independent basis for the Department to issue a proposed permit and order even though the discharge will not meet permit conditions or applicable statutes

and rules. I conclude that the statute cannot reasonably be construed to require IP to satisfy the requirements of each and every subsection. An agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction and expertise. *See, e.g., Public Employees Relations Commission v. Dade County Police Benevolent Association*, 467 So.2d 987, 989 (Fla. 1985); *Florida Public Employee Council, 79 v. Daniels*, 646 So.2d 813, 816 (Fla. 1st DCA 1994). Therefore, I reject the ALJ's interpretation that an applicant must satisfy all five factors in Section 403.088(2)(e), in order for the Department to issue a proposed permit with an order that establishes a schedule for achieving compliance with all permit conditions. *See* § 403.088(2)(f), Fla. Stat. (2006).

Similarly, the ALJ concludes in Conclusion of Law 206 that the statute requires that an applicant show "that issuing the permit will be in the public interest and the discharge will not be unreasonably destructive to the quality of the receiving waters." (Emphasis added) (RO Conclusion of Law 206). Although the ALJ misconstrues the statute, he determines from the evidence and makes factual findings that neither of those factors was satisfied. (RO Conclusion of Law 207). However, the ALJ did determine that the proposed consent order's compliance schedule for the WWTP upgrades, pipeline construction, and other activities required by the proposed permit, was reasonable. (RO Finding of Fact 181). The ALJ basically found that a continued discharge to Elevenmile Creek was necessary in the interim period associated with construction of the WWTP upgrades and effluent pipeline. (RO Finding of Fact 182). In addition, the ALJ concluded that the proposed permit would effectuate some improvement in Elevenmile Creek and Perdido Bay during this interim construction

phase. (RO Finding of Fact 182). Therefore, the ALJ's findings would support a conclusion that IP met the first two factors of Section 403.088(2)(e), such that the proposed consent order could be approved.

With regard to the proposed consent order's contingency plan, the ALJ concluded that it is impossible to determine now whether future actions by IP under the contingency plan's alternative (relocate all or part of the discharge to Lower Elevenmile Creek) would be reasonable. (RO Finding of Fact 185 and Conclusion of Law 218; Joint Trial Exhibit 18, Attachment I). The ALJ was concerned that the contingency plan appeared to pre-authorize future action without reasonable assurance that the future action would be appropriate. (RO Conclusion of Law 218). The ALJ determined that if the contingency plan is intended to authorize future action, then the plan is "too vague." However, the plan is adequate if its purpose is "merely to establish a framework for future decision-making that would be subject to permit modification, public review and challenge." (RO Finding of Fact 186). The ALJ ultimately determined that "[c]larification is needed" regarding the plan's purpose and it "should be amended to clarify what agency action, if any, is required to implement the management alternatives." (RO Finding of Fact 186 and Conclusion of Law 218). These findings question the adequacy of the consent order and associated contingency plan to achieve eventual compliance with all permit conditions (along with underlying applicable statutes and rules) as required by Section 403.088(2)(f), F.S.

It is 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. *See e.g., Greseth v.*

Dept. of Health and Rehabilitative Services, 573 So.2d1004, 1006-1007 (Fla. 4th DCA 1991); *Tedder v. Florida Parole Commission*, 842 So.2d 1022 (Fla. 1st DCA 2003). It is a gross abuse of discretion for an agency to disregard findings of fact where findings are based upon competent and substantial evidence. *See e.g., Southpointe Pharmacy v. Dept. of Health and Rehabilitative Services*, 596 So.2d 106 (Fla. 1st DCA 1992). If there is evidence to sustain the ALJ's findings, the agency cannot reject such findings and adopt its own, even if there is competent substantial evidence to the contrary. *See e.g., Kibler v. Dept. of Professional Regulation*, 418 So.2d 1081 (Fla. 4th DCA 1982).

Exception to Finding of Fact 73 – DEP takes exception to the last sentence of Finding of Fact 73 on the basis that it is not supported by competent substantial evidence. DEP contends that the ALJ did not acknowledge that the proposed permit provides that IP will still be authorized to discharge from D-001 in emergency situations. However, the last sentence of Finding of Fact 73 references Endnote number 7, which states that "[t]he proposed permit allows for discharges to Elevenmile Creek from D-001 in an emergency situation, such as a pipeline break." (RO Endnote 7, page 92). Therefore, DEP's Exception is denied.

Exception to Finding of Fact 74 – DEP takes exception to the last sentence in Finding of Fact 74 on the basis that it is a conclusion of law that incorrectly implies that the proposed third set of interim limits for D-003 "are established through the experimental wetland order." (DEP Exceptions, page 53). I disagree with DEP's labeling of the ALJ's finding. Finding of Fact 74 is simply a description of the contents of the proposed Consent Order (Joint Trial Ex. 18). However, I'm granting DEP's Exception on the basis that the last portion of that sentence is not supported by

competent substantial evidence. The competent substantial evidence shows that the interim limits are established in the proposed consent order. For example, Section 6 of the Fact Sheet (Joint Trial Ex. 12) states that the "CO establishes interim effluent limitations." Also, the Notice of Intent for the Experimental Wetlands Order states on the first page that "[t]he facility's discharge must comply with the interim limits set forth in Table 3, Paragraph 16 of the Consent Order entered in OGC Case No. 04-1202." (Joint Trial Ex. 3; T. X, p. 1320). Therefore, DEP's Exception to the final portion of the last sentence of Finding of Fact 74 is granted.

Exception to Finding of Fact 75 – IP takes exception to the second sentence of Finding of Fact 75 on the grounds that it is not based on competent substantial evidence. The sentence addresses a transparency study required under paragraph 11(a) of the proposed Consent Order (Joint Trial Ex. 18, page 6). The finding states that the Department "must be satisfied that the study shows the transparency standard will not be violated before the wetlands can be used for the discharge." At the hearing, the transparency study was admitted into evidence (IP Ex. 79). However, the Department had not reviewed the study and placed a limited objection on the record to that effect. (T. IV, pp. 503-505).

Contrary to IP's contention that "a review of the entire record does not reveal any competent, substantial evidence," the second sentence in Finding of Fact 75 is supported by statements on page 16 of the Fact Sheet (Joint Trial Ex. 12) in paragraph 3.e. The Fact Sheet states that "[p]rior to discharge to the wetlands project," IP should provide "additional reasonable assurance" that the wetlands discharge to Lower

Elevenmile Creek will not violate the transparency water quality criteria. Therefore, IP's Exception to the second sentence of Finding of Fact 75 is denied.

Exception to Finding of Fact 76 – DEP takes exception to the second sentence of Finding of Fact 76 on the basis that it is not supported by competent substantial evidence. The finding no longer accurately describes paragraph 11(d) of the proposed Consent Order. Paragraph 11(d) was revised during the hearing and is accurately stated in Joint Trial Exhibit 18. Therefore, DEP's Exception to the second sentence of Finding of Fact 76 is granted.

Exception to Finding of Fact 184 – IP takes exception to Finding of Fact 184 in which the ALJ describes the provisions of the proposed consent order's contingency plan. (Joint Trial Ex. 18, Attachment I). IP contends that the entire finding is either not based on competent substantial evidence, or should be labeled a conclusion of law and rejected as speculation. I reject IP's contention because, as the trier of fact, it is 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. *See e.g., Greseth v. Dept. of Health and Rehabilitative Services*, 573 So.2d1004, 1006-1007 (Fla. 4th DCA 1991); *Tedder v. Florida Parole Commission*, 842 So.2d 1022 (Fla. 1st DCA 2003).

I conclude that the ALJ's factual findings are permissible inferences drawn from the competent substantial evidence (E.g., Attachment I to Joint Trial Exhibit 18). I have no authority to reweigh the evidence in order to give the finding less persuasive weight than that given by the ALJ. *See e.g., Belleau v. Dept. of Environmental Protection*, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997). Also, it would be improper for me to label what

is essentially an ultimate factual determination as a "conclusion of law" in order to modify or overturn what may be viewed as an unfavorable finding of fact. *See, e.g., Stokes v. State, Bd. of Professional Engineers*, 952 So.2d 1224 (Fla. 1st DCA 2007).

Therefore, IP's Exception to Finding of Fact 184 is denied.

Exceptions to Finding of Fact 186 and Conclusions of Law 217 and 218 - IP and DEP take exception to portions of Finding of Fact 186 and Conclusions of Law 217 and 218. (IP did not challenge Conclusion of Law 217). In those mixed findings of fact and law, the ALJ describes the effects of the provisions of the proposed consent order's contingency plan. (Joint Trial Ex. 18, Attachment I). The ALJ ultimately determined that the contingency plan alternative gives IP upfront permission for future actions, but that there is insufficient detail regarding those future actions. Specifically, there are no criteria to determine whether those actions are the appropriate response if NSAI monitoring shows adverse impacts to the wetland tract.

Respondents contend that the ALJ's interpretation of the contingency plan provisions are legal conclusions that I should reject or alternatively make substituted conclusions of law. I conclude that the ALJ's findings are not pure legal conclusions that I can modify or reject. It would be improper for me to label what is essentially an ultimate factual determination as a "conclusion of law" in order to modify or overturn what may be viewed as an unfavorable finding of fact. *See, e.g., Stokes v. State, Bd. of Professional Engineers*, 952 So.2d 1224 (Fla. 1st DCA 2007). Further, I conclude that the ALJ's factual findings are permissible inferences drawn from the competent substantial evidence (Attachment I to Joint Trial Exhibit 18).

DEP contends that because of the size and complexity of this project the contingency plan needs to be flexible. In this way, it is similar to corrective actions for groundwater contamination. In that typical scenario, a consent order "merely sets the stage for subsequent agency actions." *See West Coast Regional Water Supply Authority v. Central Phosphates, Inc.*, 11 FALR 1917 (Fla. DER 1988). However, in this case the evidence did not clearly establish the purpose of the contingency plan. The ALJ ultimately determined that "[c]larification is needed" regarding the plan's purpose and it "should be amended to clarify what agency action, if any, is required to implement the management alternatives." (Attachment I, Joint Trial Ex. 18; RO Finding of Fact 186 and Conclusion of Law 218).

Therefore, based on the foregoing, the Exceptions to Finding of Fact 186 and Conclusions of Law 217 and 218 are denied.

Exceptions to Conclusion of Law 206 – IP and DEP take exception to Conclusion of Law 206 on the basis that it is an erroneous interpretation of the requirements of Section 403.088(2)(e), F.S. As discussed above, I reject the ALJ's erroneous conclusion that the statute's provisions require that both factors noted in Conclusion of Law 206 must be met. However, I accept the ALJ's ultimate factual finding that 'IP did not make an adequate showing on these two criteria."

Therefore, IP and DEP's Exceptions to Conclusion of Law 206 are granted in part and denied in part.

Exceptions to Conclusion of Law 216 – IP and DEP take exception to Conclusion of Law 216 in which the ALJ concluded that "because IP did not comply with all the special conditions of Section 403.088[2](e), Florida Statutes, the proposed

Consent Order should not be approved." As discussed above, I reject the ALJ's erroneous conclusion that the statute's provisions require that all the "special conditions" must be met. Accordingly, IP and DEP's Exceptions to Conclusion of Law 216 are granted.

Exceptions to Finding of Fact 187 and Conclusion of Law 219 – IP takes exception to Finding of Fact 187 and Conclusion of Law 219 in which the ALJ makes findings on the adequacy of stipulated penalties in the proposed Consent Order. The Department has previously ruled that the adequacy of penalties in a consent order is solely within the enforcement discretion of the Department and not within the province of an ALJ. An ALJ has no legal authority to assess penalties under Section 403.141(1), F.S. *See e.g., North Fort Myers Homeowners Assoc., Inc. v. Dept. of Environmental Regulation*, 14 FALR 1502 (Fla. DER 1992); *West Coast Regional Water Supply Authority v. Central Phosphates, Inc.*, 11 FALR 1917 (Fla. DER 1988).

Accordingly, IP's Exceptions to Finding of Fact 187 and Conclusion of Law 219 are granted.

Exceptions to Conclusion of Law 208 - IP and DEP's exceptions to Conclusion of Law 208 are denied based on the above rulings and my previous rulings in Sections I. and II.

Exceptions to Conclusion of Law 220 – IP and DEP's exceptions to Conclusion of Law 220 are denied based on the above rulings and my previous rulings in Sections I. and II.

Exception to Conclusion of Law 221 – IP takes exception to the last statement in Conclusion of Law 221 that it's showing was "insufficient." I deny IP's exception based on the above rulings and my previous rulings in Sections I. and II.

Exception regarding Procedural Errors – IP contends in this exception that the ALJ committed substantial and prejudicial procedural errors in reaching many of the findings of fact and conclusions of law in the RO. IP complains that the ALJ raised "speculative issues" not identified in the pleadings or the prehearing stipulation, and interjected "issues that were not identified in the pleadings or the prehearing stipulation." These types of procedural issues and evidentiary rulings of the ALJ are not matters over which I have substantive jurisdiction under the agency review provisions of Chapter 120. *See e.g., Martuccio v. Dept. of Professional Regulation*, 622 So.2d 607 (Fla. 1st DCA 1993); *Heifetz v. Dept. of Business Regulation*, 475 So.2d 1277(Fla. 1st DCA 1985).

Accordingly IP's procedural errors exception is denied.

Exceptions to Ultimate Recommendation – IP and DEP take exception to the ALJ's recommendation that I enter a final order denying the requested authorizations. In addition, DEP requests that I enter an order of remand based on the reasons set forth in its motion for remand.

Based on my previous rulings in Sections I, II, and III above, IP and DEP's Exceptions to the ALJ's recommendation are denied.

RULINGS ON PETITIONERS FOPB EXCEPTIONS

Exception to Page 3, Line 21 - FOPB asserts a technical exception that there is a typographical error on page 3, line 21 of the RO that misspells the acronym that is used

through out the RO for Friends of Perdido Bay, Inc., as "FOBP." Comparing the name with the rest of the RO, it is clear that this is merely a typographical error. Accordingly, I grant the FOPB's technical exception to page 3, line 21 and the RO is modified to reflect the name "FOPB" in the referenced sentence.

Exception to Paragraph 16 - FOPB asserts a technical exception that there is a typographical error in first sentence of paragraph 16 of the RO stating, "The water removed from the dewatering basins moves into to the first aeration basin." (Emphasis Added). It is clear that inclusion of the additional preposition "to" is a scrivener's error. Accordingly, I grant FOPB's technical exception to paragraph 16, and the RO is modified to omit the word "to" in the referenced sentence.

Exception to Paragraph 31 - FOPB proposes to modify paragraph 31 of the RO by adding additional findings. FOPB never asserts that the findings in the paragraph 31 are not supported by competent substantial evidence. Section 120.57(1)(l), F.S., prescribes that an agency reviewing a recommended order may not reject or modify the findings of fact of an ALJ, unless "the findings of fact were not based on competent substantial evidence." In addition, an agency head has no authority to make independent or supplemental findings of fact in the course of reviewing a DOAH recommended order. *See, e.g., North Port, Fla. v. Consolidated Minerals*, 645 So.2d 485, 487 (Fla. 2d DCA 1994). I conclude that because the FOPB does not claim that the findings are unsupported by competent substantial evidence and because I cannot make supplemental findings of fact, FOPB's exception to RO paragraph 31 is denied.

Exception to Paragraph 32 - FOPB proposes to modify paragraph 32 of the RO by adding additional findings. FOPB never asserts that the findings in the paragraph 32

are not supported by competent substantial evidence. I conclude that because the FOPB does not claim that the findings are unsupported by competent substantial evidence and because I cannot make supplemental findings of fact, FOPB's exception to RO paragraph 32 is denied.

Exception to Paragraph 33 - FOPB takes exception to paragraph 33 of the RO and requests that the last sentence of paragraph 33 be deleted. FOPB asserts that there is no competent substantial evidence in the record to support the finding that an "extension of the compliance deadline was ever 'agreed' upon."

I find that the testimony of Bill Evans is the competent substantial evidence in the record to support the ALJ's finding in this paragraph. (*See* T. Vol. VIII, p. 1423, 1755-1756). A reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See e.g., Belleau v. Dept. of Environmental Protection*, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands County School Board*, 652 So.2d 894 (Fla. 2d. DCA 1995). These evidentiary-related matters are within the province of the ALJ, as the "fact-finder" in these administrative proceedings. *See e.g., Heifetz v. Dept. of Business Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). If the record discloses any competent substantial evidence supporting a challenged factual finding of the ALJ, I am bound by such factual finding in preparing this Final Order. *See e.g., Florida Dept. of Corrections v. Bradley*, 510 So.2d 1122, 1123 (Fla. 1st DCA 1987).

Accordingly, FOPB's exception to RO paragraph 33 is denied.

Exception to Paragraph 34 - FOPB takes exception to paragraph 34 of the RO and asserts that the last sentence of the paragraph should be deleted. Paragraph 34

contains part of the regulatory history of the Cantonment mill. The last sentence states, "Today, the Cantonment mill is still operating under the 1989 TOP which, due to the administrative extension, did not terminate in December 1994, as stated on its face." FOPB believes this sentence should be deleted because the ALJ's "denial of the permit applied for in this proceeding supersedes the TOP."

First, this finding is supported by competent substantial evidence in the record. (*See* T. Vol. XIII, p. 1753-1755; *Lane v. International Paper Company,* 24 F.A.L.R. 262, 273 (Fla. DEP 2001)). Second, FOPB is incorrect in their assertion that the ALJ's RO of denial is a final agency action that would supersede or terminate the administrative continuance of the TOP. This Final Order is the final agency action in this proceeding. *See* §120.57(1)(k) and (l), Fla. Stat. (2006). I conclude that because the ALJ's factual finding in Paragraph 34 is supported by the competent substantial record evidence FOPB's exception is denied.

Exception to Paragraph 69 - FOPB asserts that paragraph 69 of the RO should be modified by adding their suggested sentences. Paragraph 69 of the RO merely summarizes the contents of the proposed wetlands exemption order at issue in this case. FOPB's exception makes substantive arguments as to why the proposed wetlands exemption order should not be issued but fails to assert that the ALJ's summary of its contents is unsupported by competent substantial evidence. In fact I find that the ALJ's summary in paragraph 69 is supported by competent substantial evidence. (*See* Joint Trial Ex. 3). In addition, as stated above, an agency head has no authority to make independent or supplemental findings of fact in the course of reviewing a DOAH recommended order. *See, e.g., North Port, Fla. v. Consolidated*

Minerals, 645 So.2d 485, 487 (Fla. 2d DCA 1994). Accordingly, I deny FOPB's exception to paragraph 69.

Exception to Paragraph 70 - FOPB asserts that in paragraph 70 the ALJ made an incorrect finding "that the exemption in this case is for 5 years beginning with the commencement of the discharge to the wetland tract." FOPB goes on to offer substitute language for paragraph 70. Curiously FOPB only states that the ALJ's finding is incorrect but does not claim that the findings in paragraph 70 are unsupported by competent substantial evidence. Again I find that the ALJ's findings in paragraph 70 are supported by competent substantial evidence. (See Joint Trial Ex. 3). Accordingly, I deny FOPB's exception to paragraph 70.

Exception to Paragraph 76 – FOPB asserts that the ALJ improperly described the initial rather than the Revised Consent Order in paragraph 76 of the RO. I adopt my previous ruling on the DEP's Exception to paragraph 76 above.

Exception to Paragraph 78 - FOPB asserts that the ALJ made an incorrect statement in the parenthetical contained in paragraph 78 that IP could discharge to the wetland tract for five years instead of seven years. FOPB goes on to offer substitute language for paragraph 78. Curiously FOPB only states that the ALJ's finding is incorrect but does not claim that the findings in paragraph 70 are unsupported by competent substantial evidence. Again I find that the ALJ's findings in paragraph 70 are supported by competent substantial evidence in the record. (See T. Vol. X at 1316-1325; Joint Trial Exs. 2, 3 and 18).

Accordingly, I deny FOPB's exception to paragraph 78.

Exception to Paragraph 80 - FOPB asserts that the second sentence in paragraph 80 should be deleted because the Consent Order does not place a $10,000.00 cap on civil penalties. Again, FOPB only states that the ALJ's finding is incorrect but does not claim that the findings in paragraph 80 are unsupported by competent substantial evidence. I find that the ALJ's findings in paragraph 80 are supported by competent substantial evidence in the record. (*See* Joint Trial Ex. 18 at paragraphs 20 and 27). Accordingly, I deny FOPB's exception to paragraph 80.

Exception to Paragraph 105 - In their exception to paragraph 105, FOPB recognizes my lack of authority to reweigh the evidence presented at hearing but then FOPB go on to make that exact request. FOPB ask that I replace the ALJ's finding that Dr. Livingston's analysis "was more persuasive" than the Petitioners evidence with additional sentences more favorable to the Petitioners. FOPB claims that this is appropriate because Dr. Livingston's testimony regarding the appropriate benchmark years for developing WQBEL was not based on competent substantial evidence.

The ALJ's finding that the baseline years selected by Dr. Livingston were appropriate and more persuasive than the Petitioner's evidence is supported by competent, substantial evidence. (See T. Vol. VII, p. 930-937; IP Ex. 83(c) at 6; Joint Ex. 6, Tab "WQBEL," attached report at ii; Joint Trial Ex. 12 (Fact Sheet), attachment 5 at 3). FOPB argue an incorrect test for competent substantial evidence in their exception. Once an expert witnesses' opinion is given at hearing, unless an objection to that testimony is sustained, it can become the competent substantial evidence to support a finding by the ALJ. The basis for that opinion does not also need to be

supported by competent substantial evidence but be within the scope of materials an expert may rely upon in forming an opinion. *See* §90.704, Fla. Stat. (2006).

Where, as here, there is competent substantial evidence to support the ALJ's challenged factual determination, I may not reweigh the evidence presented at hearing. *Belleau*, 695 So. 2d at 1307. Accordingly, I deny FOPB's exception to paragraph 105.

Exception to Paragraphs 116, 117, 118 - FOPB asserts that paragraphs 116, 117 and 118 of the RO should be deleted because the ALJ's findings in those paragraphs concerning the "isotope study of sediment in the Perdido Bay by Coffin and Cifuentes" was not entered into evidence and the testimony offered by expert witnesses about the report is not supported by competent substantial evidence. FOPB then states that these paragraphs should be replaced with a sentence that includes additional findings of fact.

I conclude that the findings in paragraphs 116, 117 and 118 are supported by competent substantial evidence in the record by the testimony of Dr. Livingston and Mr. Gallagher. (*See* T. Vol. IV –VII pg. 435-1017). These paragraphs merely recount Dr. Livingston and Mr. Gallagher's opinion on the source of the sediments, which includes their knowledge of the Coffin and Cifuentes study. While the Coffin and Cifuentes study may have been hearsay, the ALJ found that the experts' opinions were not solely based on this study and therefore the testimony on the study was used supplement other evidence (*See* Tr. Vol. IIV at 983-989). *See* § 120.57(1)(c), Fla. Stat. (2006). Further, this study is within the scope of materials an expert may rely upon in forming an opinion. *See* § 90.704, Fla. Stat. (2006). The ALJ's acceptance of Dr. Livingston and Mr. Gallagher's evidence on this matter is solely an evidentiary matter and not within the

substantive jurisdiction of the Department. Evidentiary-related matters, such as this, are within the province of the ALJ, as the "fact-finder" in these administrative proceedings. *See e.g., Heifetz v. Dept. of Business Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Accordingly, I deny FOPB's exceptions to paragraphs 116, 117 and 118.

Exception to Paragraph 129 - FOPB takes exception to the ALJ's finding in paragraph 129 that "DEP Exhibit 38 is hearsay and no non-hearsay evidence was presented on the issue of mutagenic compounds in the mill's effluent." The ALJ also found that the "Petitioners did not raise the issue of mutagenic compounds in the mill's effluent discharge in their petitions for hearing or in the pre-hearing stipulation." FOPB claims that Mr. Moore testified regarding the mutagenic compounds therefore DEP Exhibit 38 was not the sole evidence on this issue. FOPB does not refute that this issue was not raised in their petition or the pre-hearing stipulation but argues that this issue "tried by consent." FOPB then requests that paragraph 129 be replaced with their suggested finding that IP failed to provide reasonable assurances that the mutagenic compounds in the mill's effluent will not cause adverse impacts on aquatic life..."

Obviously the ALJ did not believe that Mr. Moore's testimony regarding the mutagenic affect of the mill's past effluent on fish was adequate to support the hearsay evidence of DEP exhibit 38. The ALJ's ruling that no non-hearsay evidence was presented is exclusively an evidentiary ruling and not within the Department's substantive jurisdiction. Evidentiary-related matters, such as this, are within the province of the ALJ, as the "fact-finder" in these administrative proceedings. *See e.g., Heifetz v. Dept. of Business Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Regardless, an agency head has no authority to make independent or supplemental

findings of fact in the course of reviewing a DOAH recommended order as requested by FOPB in this exception. *See, e.g., North Port, Fla. v. Consolidated Minerals*, 645 So.2d 485, 487 (Fla. 2d DCA 1994).

Accordingly, I deny FOPB's exception to paragraph 129.

Exception to Paragraph 152 - FOPB asserts that there is a typographical error in the first sentence of paragraph 152, which reads "The wetland tract would not assimilate TDS in mill's effluent." FOPB suggest modifying the sentence to read, "The wetland tract would not assimilate TDS from the mill's effluent." (Emphasis Added). I do not believe the typographical error in this sentence, if any, makes the sentence ambiguous and therefore, I do not believe it is necessary to modify the finding in paragraph 152. Accordingly, I deny FOPB's exception to paragraph 152.

Exception to Paragraph 165 - In paragraph 165 of the RO the ALJ finds that IP presented a sufficient prima facie case that the proposed permit will not cause or contribute to a violation of water quality standards applicable to pathogenic bacteria and that the Petitioners did not provide sufficient evidence to rebut that showing. FOPB speculates that the ALJ overlooked record evidence and claims that the record is void of any effort by IP to provide reasonable assurances that Klebsiella bacteria will not create a violation of water quality standards or be a health concern.

The ALJ's findings in paragraph 165 are supported by competent substantial evidence in the record. (See T. Vol. III, p. 318-320; Tr. Vol. I at 106-108). As stated above, when there is competent, substantial evidence to support the ALJ's challenged factual determination, I may not reweigh the evidence presented at hearing. *Belleau*,

695 So. 2d at 1307. Additionally, I have no authority to make independent or supplemental findings of fact. Accordingly, I deny FOPB's exception to paragraph 165.

Exception to Paragraph 166 - In paragraph 166 of the RO the ALJ finds that any bacteria discharged in the proposed effluent would not pose a threat to public health and that the Petitioners did not provide sufficient evidence to show otherwise. FOPB's exception requests a substituted finding of fact for paragraph 166.

The ALJ's findings in paragraph 166 are supported by competent substantial evidence in the record. (See T. Vol. I, p. 106-108; Tr. Vol. I at 318-320). When there is competent substantial evidence to support the ALJ's challenged factual determination, I may not reweigh the evidence presented at hearing. *Belleau*, 695 So. 2d at 1307. Additionally, I have no authority to make independent or supplemental findings of fact. Accordingly, I deny FOPB's exception to paragraph 166.

Exception to Paragraph 175 - FOPB asserts that the ALJ is incorrect as to the duration of the proposed exemption order. FOPB disputes the ALJ's finding that the duration of the exemption order is five years beginning when IP starts to discharge effluent at D-003 into the wetland tract. The ALJ's findings in paragraph 175 are supported by competent, substantial evidence in the record. (See Joint Trial Ex. 3). When there is competent substantial evidence to support the ALJ's challenged factual determination, I may not reweigh the evidence presented at hearing. *Belleau*, 695 So. 2d at 1307. Additionally, I have no authority to make independent or supplemental findings of fact. Accordingly, I deny FOPB's exception to paragraph 175.

Exception to Paragraph 182 - While FOPB agrees with the first two sentences of paragraph 182 of the RO, they contend that the entire paragraph should be deleted

because even though they advocated the relocation of the discharge to Escambia River they never suggested that IP's discharge should be allowed to continue in Elevenmile Creek, even during a transition period. FOPB also claims that there is no competent substantial evidence in the record to support the ALJ's finding that Elevenmile Creek is a stable biological system.

The ALJ's finding in paragraph 182 that any alternative would require "a transition period during which the discharge to Elevenmile Creek" would continue is not asserting the position of FOPB but is a reasonable inference by the ALJ based on the evidence presented. (*See* T. Vol. X. p. 1307-1318; Joint Trial Exs. 1, 2, and 18). I also conclude that the ALJ's finding that Elevenmile Creek is a stable biological system is supported by competent substantial evidence in the record. (*See* T. Vol. XIV, p. 2006-2008). Accordingly, I deny FOPB's Exception to paragraph 182.

Exception to Paragraph 187 - FOPB's exception to paragraph 187 is unclear. FOPB does not expressly state which part of paragraph 187 they disagree with and they do not claim that any portion of the finding is unsupported by competent substantial evidence. Having said that, it appears that FOPB is challenging the ALJ's finding that the Petitioner's "did not present evidence to show what size penalty would be appropriate." Still FOPB does not point in the record where they presented the evidence. In any event, the Department has previously ruled that the adequacy of penalties in a consent order is solely within the enforcement discretion of the Department and not within the province of an ALJ. An ALJ has no legal authority to assess penalties under Section 403.141(1), F.S. *See e.g., North Fort Myers Homeowners Assoc., Inc. v. Dept. of Environmental Regulation*, 14 FALR 1502 (Fla.

DER 1992); *West Coast Regional Water Supply Authority v. Central Phosphates, Inc.*, 11 FALR 1917 (Fla. DER 1988).

FOPB's exception to RO paragraph 187 is denied.

Exception to Paragraph 214 - FOPB asserts that there is a typographical error in the first sentence of paragraph 214 of the RO, which reads "However, it is recommended that IP's petition for exemption be denied and the waiver would serve no independent purpose." (Emphasis added.) FOPB suggests modifying the sentence to read, "However, it is recommended that IP's petition for exemption be denied as the waiver would serve no independent purpose." (Emphasis Added). I do not believe there is any reason to believe that the ALJ made a typographical error in this sentence. If there is a typographical error I do not believe that it makes the sentence ambiguous and therefore I do not believe it is necessary to modify the conclusion in paragraph 214 of the RO. Accordingly, I deny FOPB's exception to paragraph 214.

RULINGS ON EXCEPTIONS OF LANE PETITIONERS

Lane Exception to Paragraph 6, Line 15 - Lane asserts there is a typographical error in paragraph 6, page 38, line 15 stating: "U.S. 90 crosses the Bay, going east and west, and forms the boundary..." (emphasis added). There is no question this is a scrivener's error and the number "90" was intended to be "98." (*See* Joint Trial Exhibit 12, attachment 3, p. 6.) Accordingly, I grant this exception. The RO shall be modified to insert the number "98" in place of the number "90" in the referenced sentence.

Lane Exception to Paragraph 57; P. 26, Ln. 11 - Lane asserts that Dr. Livingston's use of the 1988 and 1989 nutrient loading of the mill to establish the

proposed WQBEL is inappropriate and that the Petitioners presented evidence that was ignored by the ALJ.

Paragraph 57 is merely summary of evidence that was presented at the hearing describing the development of the proposed WQBEL. The ALJ's findings in this paragraph are support by competent, substantial evidence. (T. Vol. VI, pp. 830-831, 871-873, 895-896; Tr. Vol. VII 930-937; IP Ex. 83(c); Joint Ex. 6, Tab "WQBEL"; Joint 12, attachment 5, p. 3). A reviewing agency may not reweigh the evidence, resolve the conflicts therein, or judge the credibility of witnesses, as those are evidentiary matters within the province of the ALJ as the finder of the facts. *See e.g., Heifetz v. Dept. of Business Regulation*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). Accordingly, this exception is denied.

Lane Exception to Paragraph 58; P. 26, Ln. 21 - Lane disagrees with the ALJ's finding that the proposed WQBEL was developed to assure compliance with water quality standards and claims that there was no evidence presented that the BOD limits will assure that compliance.

Paragraph 58 is also merely summary of evidence present at the hearing describing the development of the proposed WQBEL. To the extent this exception challenges the sufficiency of the evidence supporting the BOD limit, I find that there was competent substantial evidence in the record to support the ALJ's finding in this paragraph. (Joint Trial Ex. 12, attachment 5). Therefore, this exception is denied.

Lane Exception to Paragraph 59; P. 27, Ln. 13 - Lane asserts that she did dispute whether the reconfigured WWTP was capable of achieving the TBELs and WQBELs, but does not cite any record evidence to support this assertion. Then, Lane

asks for a substituted finding of fact that the reconfigured WWTP was not capable of achieving the TBELs and WQBELs.

Section 120.57(1)(k), F.S., requires each exception to include an appropriate and specific citation to the record. As explained in *Florida Power & Light Co. v. Florida Siting Bd.*, 693 So.2d 1025, 1026-27 (Fla. 1st DCA 1997), it is not appropriate for me to make new findings regarding an issue on which the ALJ made no findings. For these reasons, this exception is denied.

Lane Exception to Paragraph 73; P. 32, Ln. 8 - Lane asserts there is a typographical error in paragraph 73, page 32, line 8 stating: "... Mill's discharge form Elevenmile Creek to the wetland track" (emphasis added). There is no question this is a scrivener's error and the word "form" was intended to be "from." Accordingly, I grant this technical exception. The RO shall be modified to insert the word "from" in place of the word "form" in the referenced sentence.

Lane Exception to Paragraph 96; P. 41, Lns. 16-17 - Lane asserts that the ALJ's general characterization of the Petitioners' testimony is unsupported by the record and therefore should be deleted.

The ALJ's characterization is supported by competent substantial evidence in the record and although there may be some evidence to the contrary, I may not reweigh the evidence presented at hearing. (*See* T. Vol. XX, pp. 2833-2835). Accordingly, this exception is denied.

Lane Exception to Paragraph 97; P. 41, Lns. 22-25; P.42, Lns. 1-8 - As in the exception above, Lane asserts that the ALJ's general characterization of the Petitioners' testimony in paragraph 97 is unsupported by the record evidence.

The ALJ's characterization is supported by competent substantial evidence in the record. (T. Vol. X, pp. 1351-1352, 1355-1359, 1384-1385). Accordingly, this exception is denied.

Lane Exception to Paragraphs 103, 104, 105 and 106; P. 44, Lns. 13-24; P.45 (all); P.46, Lns. 1-9 - Lane takes exception to paragraphs 103, 104, 105 and 106 of the RO all located under the subheading "Selection of the 1988 and 1989 Mill Loadings as a Benchmark for the WQBELS." In these paragraphs the ALJ describes the information on which the WQBEL was developed and finds that Dr. Livingston's evidence in support of using the 1988 and 1989 loadings was more persuasive than the Petitioners' contrary evidence.

The ALJ's findings in these paragraphs are supported by competent substantial evidence in the record. (See T. Vol. VI, p. 821, 843; Tr. Vol. VII, p. 930-937; IP Ex. 83(c) at 6; Joint Trial Ex. 6, Tab "WQBEL," attached report at ii; Joint Ex. 12 (Fact Sheet), attachment 5 at 3). Where, as here, there is competent substantial evidence to support the ALJ's challenged factual determination, I may not reweigh the evidence presented at hearing. *Belleau*, 695 So. 2d at 1307.

Accordingly, I deny Lane's exception to paragraphs 103, 104, 105, and 106.

Lane Exception to Paragraphs 110, 112, 113, 115-118 (all) - Lane asserts that the findings in paragraphs 110, 112, 113, 115, 116, 117 and 118 regarding low dissolved oxygen in the sediments and the Coffin and Cifuentes study contain incorrect statements and are not based on competent substantial evidence.

I conclude that the findings in paragraphs 110, 112, 113, 115 116, 117 and 118 are supported by competent substantial evidence in the record by the testimony of Dr.

Livingston and Mr. Gallagher. (See T. Vol. IV –VII pg. 435-1017). These paragraphs merely recount Dr. Livingston and Mr. Gallagher's opinion on the source of the sediments, which included their knowledge of the Coffin and Cifuentes study. While the Coffin and Cifuentes study may have been hearsay, the ALJ found that the experts' opinions were not solely based on this study and therefore the testimony on the study was used to supplement other evidence (See T. Vol. IIV, p. 983-989). *See* § 120.57(1)(c), Fla. Stat. (2006). Further, this study is within the scope of materials an expert may rely upon in forming an opinion. *See* § 90.704, Fla. Stat. (2006). The ALJ's acceptance of Dr. Livingston and Mr. Gallagher's evidence on this matter is solely an evidentiary matter and not within the substantive jurisdiction of the Department. Evidentiary-related matters, such as this, are within the province of the ALJ, as the "fact-finder" in these administrative proceedings. *See e.g., Heifetz v. Dept. of Business Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Section 120.57(1)(l), F.S., prescribes that an agency reviewing a recommended order may not reject or modify the findings of fact of an ALJ, unless "the findings of fact were not based on competent substantial evidence." Where, as here, there is competent substantial evidence to support the ALJ's challenged factual determination, I may not reweigh the evidence presented at hearing. *Belleau*, 695 So. 2d at 1307.

Accordingly, I deny Lane's exceptions to paragraphs 110, 112, 113, 115, 116, 117, 118.

Lane Exception to Paragraph 123; P. 53, Lns. 2-5 - Lane asserts that the ALJ's findings in paragraph 123 regarding toxicity are not supported by competent substantial evidence. I conclude that these findings are supported by competent,

substantial evidence in the record. (See T. Vol. I, p. 113-116; Tr. Vol. III, p. 320-325). Accordingly, this exception is denied.

Lane Exception to Paragraph 129; P. 55, Lns. 12-15 - Lane asserts that she did raise the issue of mutagenic compounds in the mill's effluent discharge in the Joint Prehearing Stipulation and while cross examining Kyle Moore. Although Lane did cite Florida Administrative Code Rules 62-302.530(43), 62-302.530(62), and 62-302.500 in the Joint Prehearing Stipulation, she never alleged that mutagenic compounds were in the mill's effluent. Asking Kyle Moore whether he was familiar with studies showing fish changing sex in Elevenmile Creek on cross examination is not the same as affirmatively disputing whether mutagenic compounds were in the Mill's effluent discharge. Accordingly, this exception is denied.

Lane Exception to Paragraph 143; P. 60, Ln. 17 - Lane asserts that the ALJ's finding that Dr. Nutter expected PH levels to be in the range of 6.5 to 8.0 in the Wetland Tract is not supported by competent, substantial evidence. This is an incorrect assertion. (See T. Vol. IX, p. 1360-1363.) Accordingly, the finding is supported by competent substantial evidence and this exception is denied.

Lane Exception to Paragraph 154; P. 64, Ln. 13 - Lane asserts that the ALJ's finding that Petitioners did not prove granting the wetlands exemption would cause significant adverse impact to the biological community in the Wetland Tract is erroneous. In support of this assertion, Lane argues that the ALJ should have been persuaded by Barry Sulkin's testimony. A reviewing agency may not reweigh the evidence, resolve the conflicts therein, or judge the credibility of witnesses, as those are evidentiary matters within the province of the ALJ as the finder of the facts. *See e.g.,*

Heifetz v. Dept. of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Accordingly, the ALJ's factual determination that Petitioners did not prove granting the wetlands exemption would cause significant adverse impact to the biological community in the Wetland Tract may not be disturbed, and this exception is denied.

Lane Exception to Paragraph 165; P.69, Lns. 1-8 - Lane takes exception to the ALJ's finding that Petitioners did not present competent evidence about the likely fate of Klebsiella bacteria in the proposed effluent distribution system. It is the ALJ's duty to weigh evidence and make findings of fact, not the Secretary's. *See, e.g., Heifetz,* 475 So. 2d at 1281. Thus, it would be improper for me to re-weigh the evidence make a contrary finding.

Lane also argues the ALJ incorrectly found that IP presented a prima facie showing that the proposed permit would not cause or contribute to a violation of water quality standards applicable to pathogenic bacteria. However, this finding is based on the hearing testimony of Kyle Moore and Glen Daigger (T. Vol. I, pp. 106-08 & Tr. Vol. III, pp. 318-20). Because the ALJ's finding is supported by competent, substantial evidence – i.e., hearing testimony – it must not be disturbed. *See, e.g., Florida Dept. of Corrections v. Bradley*, 510 So.2d 1122, 1123 (Fla. 1st DCA 1987). Based on these reasons, this exception is denied.

Lane Exception to Paragraph 166; P.69, Lns. 15-22 - Lane asserts that the ALJ's factual finding that solar radiation would destroy the bacteria in the Wetland Tract is not supported by competent substantial evidence. This assertion is incorrect. The deposition testimony of Leslee Williams on pages 101-102 in Petitioner's Exhibit 52 is

competent substantial evidence to support this finding. (See *also* T. Vol. I, p. 106-108; Tr. Vol. III, p. 318-320). Accordingly, this exception is denied.

Lane Exception to Paragraph 170; P. 71, Lns. 6-10 - Lane takes exception to the ALJ's finding that detritus vegetation in the Wetland Tract would not have to be periodically removed. Lane fails to claim that the ALJ's findings are not supported by competent substantial evidence and basically requests that I reweigh the testimony of two experts. The ALJ's findings in paragraph 170 are supported by competent substantial evidence. (Tr. Vol XXI, p. 2919-2927). I am not authorized to reweigh the evidence and substitute an alternate finding of fact. *See e.g., Martuccio v. Dept. of Professional Regulation,* 622 So.2d 607 (Fla. 1st DCA 1993). Accordingly, this exception is denied.

CONCLUSION

The Florida courts have held that there are some circumstances under which agency remand to DOAH is not only appropriate, but is actually "dictated." *See, e.g., Miller v. Dept. of Environmental Regulation*, 504 So.2d 1325, 1327 (Fla. 1st DCA 1987); *Cohn v. Dept. of Environmental Regulation*, 477 So.2d 1039, 1047 (Fla. 3d DCA1985). I conclude that the subject consolidated proceedings does not constitute one of those circumstances where remand to DOAH is dictated. The ALJ fulfilled his role as to factual findings. I disagree with the ALJ's legal conclusions regarding the proper application of the OFW rule and the proper interpretation of Section 403.088(2)(e) and (f), F.S. However, I am not authorized to remand an administrative proceeding back to DOAH for the purpose of allowing a party to present evidence that the party failed to introduce during the original hearing. *See e.g., Henderson Signs v. Dept. of*

Transportation, 397 So.2d 769 (Fla. 1st DCA 1981); *Florida Dept. of Transportation v. J.W.C.*, 396 So.2d 778 (Fla. 1st DCA 1981).

In the RO, the ALJ acknowledged that IP has sponsored a comprehensive study of the Perdido Bay system by an independent team of scientists. The team was led by Dr. Robert Livingston, an aquatic ecologist and professor at Florida State University. Dr. Livingston's studies developed a chemical and biological history of the Bay with the aim of correlating the impact of the paper mill's discharge on the health of the Bay. The ALJ described the Livingston Studies as "perhaps the most complete scientific evaluation ever made of a coastal ecosystem." This research was used to establish a water quality based effluent limit which would assure compliance with water quality standards. In addition, Dr. Livingston developed a comprehensive monitoring program, included in the proposed permit, to monitor the impacts of the proposed discharge on the Bay.

The ALJ gave great weight to the Livingston Studies and concluded that the proposed permit would significantly improve the Perdido Bay system. However, the ALJ ultimately concluded that additional evidence was necessary in order for IP to demonstrate compliance with all applicable Department standards and rules.

It is therefore ORDERED:

A. The ALJ's Recommended Order (Exhibit A), as modified in the above rulings in this Final Order, is adopted and incorporated by reference herein.

B. The proposed revised NPDES permit no. FL0002526-001/001-IW1S is DENIED.

C. The Consent Order No. 04-1202 is DISAPPROVED.

D. The petition for authorization for the experimental use of wetlands exemption is DENIED.

E. The petition for waiver is DENIED.

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the clerk of the Department.

DONE AND ORDERED this 8th day of August, 2007, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

MICHAEL W. SOLE
Secretary

Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

FILED ON THIS DATE PURSUANT TO § 120.52, FLORIDA STATUTES, WITH THE DESIGNATED DEPARTMENT CLERK, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.

Deputy CLERK

8.8.07
DATE

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing Final Order has been sent by United States Postal Service to:

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Claudia Llado, Clerk and
Bram D. E. Canter, Administrative Law Judge
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and by hand delivery to:

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Stacey D. Cowley, Esquire
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Department of Environmental Protection
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Tallahassee, FL 32399-3000

this 8th day of August, 2007.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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