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FILED  
DIVISION OF ADMINISTRATIVE HEARINGS

STATE OF FLORIDA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

TROY AND TRACEY LEE, JOSEPH  
ACQUAOTTA AND LISA GABLER,  
ANTHONY AND VERONICA DALY,  
MICHAEL D'ORDINE AND ANN E.  
HAWKINS, LISA LANDER, and  
INDIAN TRAIL IMPROVEMENT DISTRICT,  
Petitioners,  
vs.  
PALM BEACH COUNTY and DEPARTMENT  
OF ENVIRONMENTAL PROTECTION,  
Respondents.

OGC CASE NO.: 05-1981  
DOAH CASE NO.: 05-2979  
05-2980  
05-2981  
05-2982  
05-2983  
05-2984  
DRA Closed

FINAL ORDER

On October 20, 2005, the Department of Environmental Protection ("DEP") received from the Division of Administrative Hearings ("DOAH") the official Recommended Order and related DOAH record in this formal administrative proceeding. A copy of the Recommended Order ("RO") is attached hereto as Exhibit A. The RO, dated October 18, 2005, indicates that copies thereof were served upon the *pro se* Petitioners, Troy and Tracey Lee, Joseph Acquatta, Lisa Gabler, Anthony and Veronica Daly, Micheal D'Ordine, Ann Hawkins, and Lisa Landers. The RO indicates that copies were also served upon counsel for the Petitioner, Indian Trail Improvement District ("District"), and counsel for the Co-Respondent, Palm Beach County ("County").

This proceeding is governed by the "Expedited Permitting" provisions of § 403.973, Florida Statutes ("Fla. Stat."). Under subsection 403.973(15), DEP must issue the final order in this case "within 10 working days of receipt" of the RO. Section 403.973 does not contain any provisions authorizing the filing of exceptions to recommended orders or the filing of responses to exceptions. Nevertheless, by letter from the DEP General Counsel dated October 5, 2005, the parties were provided the opportunity to file exceptions and responses to exceptions on an expedited basis.

The District filed Exceptions to the RO, and Responses in opposition to the District's Exceptions were subsequently filed on behalf of the County and DEP. The *pro se* Petitioners did not file any Exceptions to the RO. The matter is now before the Secretary of DEP for final agency action.

#### BACKGROUND

On May 12, 2005, DEP's Southeast District Office executed a Notice of Permit Issuance of Permit No. 0048923-017-DWC ("Permit") to the County. The Permit would authorize the County to construct a domestic wastewater collection/transmission system (the "Project") to serve the Palm Beach County Research Village ("Village"). The Village, located in an unincorporated area of the County, will be the home of the Scripps Florida Biomedical Research Institution and Campus ("Scripps Facility").

The wastewater will be pumped through the Transmission Line to the existing East Central Plant, which will be the primary wastewater treatment facility. The East Central Plant is owned and operated by the City of West Palm Beach, but the County has the legal right to utilize between 40 and 45 percent of the treatment capacity of this

plant. In addition, this wastewater system is interconnected, and the wastewater from the Scripps Facility could also be treated at the County's Southern Regional Plant.

On August 15, 2005, the *pro se* Petitioners, who reside in the area where the transmission line will be constructed, filed five identical untitled papers with DEP challenging issuance of the Permit. These papers were treated by DEP as petitions for administrative hearings and were forwarded to DOAH for the assignment of an administrative law judge to conduct a formal hearing. The five Petitions were assigned DOAH Case Nos. 05-2979 through 05-2983. On August 15, 2005, the District filed a Petition for Formal Administrative Hearing also challenging the issuance of the Permit to the County. DEP forwarded the District's Petition to DOAH and it was assigned Case No. 05-2984. On August 23, 2005, all six related cases were consolidated for a DOAH final hearing before Administrative Law Judge, Donald R. Alexander ("ALJ").

On August 22, 2005, DEP filed a Motion for Summary Hearing ("Motion") pursuant to subsection 403.973(15)(b), Fla. Stat., which states in part that "summary proceedings must be conducted within 30 days after a party files the motion for summary hearing, regardless of whether the parties agree to the summary proceeding." Because the Scripps Facility comes within the purview of the Expedited Permitting provisions of § 403.973, the Motion was granted by the ALJ. The ALJ held a summary final hearing in the consolidated cases in West Palm Beach on September 13-15, 2005.

#### RECOMMENDED ORDER

In paragraph 50 of the RO, the ALJ determined that the "County has provided reasonable assurance, based on plans, test results, installation of equipment, and other information that the construction and installation of the Transmission Line will not

discharge, emit, or cause pollution in contravention of the Department's standards."

The ALJ also concluded in paragraph 57 of the RO that, since the County had provided reasonable assurance that there is a substantial likelihood that the Transmission Line project will be successfully implemented, the Permit should be issued. The ALJ thus made an ultimate recommendation that DEP enter a final order denying all Petitions and issuing Permit No. 0048923-017-DWC to the County.

#### STANDARD OF REVIEW

Subsection 120.57(1)(l), Fla. Stat., authorizes an agency to modify or reject an administrative law judge's conclusions of law and interpretations of administrative rules "over which it [the agency] has substantive jurisdiction." Accordingly, an agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction and expertise. Public Employees Relations Commission v. Dade County Police Benevolent Assn., 467 So.2d 987, 989 (Fla. 1985). Great deference should be accorded to agency interpretations of statutes and rules within their regulatory jurisdiction, and such interpretations should not be overturned unless "clearly erroneous." Dept. of Environmental Regulation v. Goldring, 477 So.2d 532, 534 (Fla. 1985). These agency statutory and rule interpretations do not have to be the only reasonable interpretations; it is enough if they are "permissible" ones. Suddath Van Lines v. Dept. of Environmental Protection, 668 So.2d 209, 212 (Fla. 1st DCA 1996).

An administrative law judge's factual findings may not be rejected or modified by an agency, "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". See Section 120.57(1)(l), Fla. Stat. It is the ALJ's

function to consider all the evidence, resolve conflicts, draw permissible inferences, judge the credibility of witnesses, and make ultimate factual findings based on competent substantial evidence; an agency is not authorized to perform such functions or substitute its judgment for that of the ALJ on these evidentiary matters. Heifetz v. Dept. of Business Regulation, 475 So.2d 1277, 1281-82 (Fla. 1st DCA 1985); accord Perdue v. South Fla. Water Mgmt. District, 755 So.2d 660, 665 (Fla. 4th DCA 1999).

#### RULINGS ON THE DISTRICT'S EXCEPTIONS TO RECOMMENDED ORDER

##### Exception No. 1

The District's initial Exception objects to the first sentence of Finding of Fact 11 where the ALJ finds that the County "commenced construction of the Transmission Line in May of 2005 when the Department issued the Permit." This challenged finding of the ALJ is supported by the testimony of Bevin Beaudet, Director of the County's Water Utilities Department, and is adopted. (Tr. at 110-111) I also conclude that the challenged portion of paragraph 11 of the RO is a subordinate factual finding having no bearing on the outcome of these proceedings. Exception No. 1 is thus denied.

##### Exception No. 2

The District's second Exception challenges the portion of Finding of Fact 12 where the ALJ is summarizing the allegations in the District's Petition. The ALJ states, in pertinent part, that the District contends that the Project will be located on the District's "right-of-way." The District asserts in this Exception that it has contended that the Project will be located on easements that it owns, rather than on any rights-of-way. The record does reflect that the District alleged that the Project would be located on an "easement" it owned and not on a "right-of-way." However, I view this arguable

mischaracterization by the ALJ of one of the District's contentions to be a technical matter and "harmless error" at worst. Accordingly, as limited, Exception 2 is granted.

### Exception No. 3

The District's third Exception objects to the ALJ's Finding of Fact 13. The District first contends that the ALJ erred by asserting that the County "plans to place the Transmission Line in property that it either owns or has an easement, in property that it is in the process of condemning, or in a public right-of-way." Based on a review of the record in this case, I find this description by the ALJ of the County's plans for the location of the Scripps Project Transmission Line to be accurate.

I do not view this description of the County's plans for locating the Transmission Line to be a "determination concerning property rights" as asserted by the District. To the contrary, the ALJ correctly concluded in paragraph 56 of the RO that disputed real property issues are beyond the jurisdiction of these administrative proceedings and must be resolved by the courts. See, e.g., Buckley v. Dept. of Health and Rehab. Services, 516 So.2d 1008, 1009 (Fla. 1st DCA 1987); Miller v. Dept. of Environmental Regulation, 504 So.2d 1325, 1327 (Fla. 1st DCA 1987); Safe Harbor Enterprises, Inc. v. Dept. of Environmental Protection, 21 FALR 2318, 2322 (Fla. DEP 1999).

Page 6 of the RO reflects that the ALJ actually took official recognition of a pending court action, Indian Trail Improv. Dist. v. Palm Beach County, Case No. 502005CA000956XXXMB (Cir. Ct. 15th Jud. Cir.), where the District and the County are presently litigating the respective property rights of the parties relating to the County's plans for the location of the Scripps Project Transmission Line. However, the existence of this pending circuit court dispute over the respective property rights of the

District and the County as related to the planned location of the Transmission Line does not warrant a denial of the Permit sought by the County in these proceedings.

The challenged Domestic Wastewater/Transmission Permit issued by DEP to the County on May 12, 2005, contains several Permit Conditions. Permit Condition 1 states that the Permit "is subject to the general conditions of Rule 62-4.160, F.A.C." Subsection (3) of Rule 62-4.160 states in part that **"the issuance of this permit does not convey any vested rights or any exclusive privileges. Neither does it authorize any injury to public or private property."** (emphasis added) The related provisions of subsection (4) of Rule 62-4.160 state in part that **"[t]his permit conveys no title to land or water, [and] does not constitute state recognition or acknowledgment of title."** (emphasis added)

The District contends that the County did not "produce any evidence regarding any [prior] condemnation efforts," despite the ALJ's finding to the contrary in paragraph 13 of the RO. However, Mr. Beaudet testified at the final hearing that the County has initiated condemnation proceedings against an individual and against the City of West Palm Beach. (Tr. at 119-120) Furthermore, contrary to the District's contention, the ALJ did not find in paragraph 13 of the RO that the County has commenced condemnation proceedings against the District. Rather, the ALJ stated in pertinent part that "the County plans to place the Transmission Line in property it either owns or has an easement, in property that it is in the process of condemning, or in a public right-of-way." Mr. Beaudet's testimony cited above supports this finding of the ALJ.

In Gregory v. Indian River County, 610 So.2d 547 (Fla. 1st DCA 1992), the appellate court affirmed a DER final order granting a stormwater treatment facility

construction permit to Indian River County, even though the County was not the owner of the land required for the stormwater project during the course of the administrative proceedings. In fact, Indian River County actually initiated a condemnation suit in the circuit court after the DOAH final hearing on the contested permit was concluded. Id. at 550 n.1; see also Safe Harbor Enterprises, 21 FALR at 2322, where DEP entered a final order determining that the applicant was entitled to a general permit for a solid waste transfer facility, even though the ALJ found in the recommended order that the applicant had "not resolved the dispute surrounding the use of the easement."

Finally, the District contends that certain preliminary findings of the circuit judge in his order denying the District's Renewed Motion for Temporary Injunction in the above-discussed pending circuit court action constitute a judicial determination that the County's claimed right to use the District's easements to locate the Transmission Line in this proceeding is "without merit." This contention is not supported by the case law of Florida. See, e.g., Klak v. Eagles' Reserve Homeowner's Assn., 862 So.2d 947, 952-53 (Fla. 2d DCA 2004) (concluding that findings in court orders denying or granting requests for temporary injunctions are interlocutory in nature and have no binding effect on the final resolution of the case).

The Responses of the County and DEP assert that the judge has made no final determination in this pending Palm Beach County Circuit Court case as to the parties' respective property rights in the disputed easements; and there is no assertion to the contrary in the District's Exceptions. In addition, there is no copy of any such circuit court final judgment in the record in this case.

In view of the above rulings, the District's Exception No. 3 is denied.



Exception No. 4

The District's fourth Exception objects to the portion of Finding of Fact 19 where the ALJ finds that the C-905 PVC pipe selected by the County for use in the Transmission Line meets the applicable design standards of the American Water Works Association ("AWWA"). This finding is supported by the testimony at the final hearing of Robert Walker, accepted by the ALJ as an expert in the field of wastewater engineering. (Tr. 574-608) Mr. Walker, a professional engineer and AWWA member, is Executive Director of the Unibell PVC Pipe Association, which provides technical support to the PVC industry (Tr. 574-576) Mr. Walker also was co-chairman of the AWWA committee that authored the design standards for the C-905 PVC pipe. (Tr. 579)

The District's citations to other expert testimony of record are not persuasive. The ALJ's decision to accept one expert's testimony over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of competent substantial evidence of record from which the finding could be reasonably inferred. See Collier Medical Center v. Dept. of Health & Rehab. Services, 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). I have ruled above that Robert Walker's expert testimony constitutes substantial competent evidence supporting the ALJ's finding challenged in this Exception.

In this Exception, the District quotes a portion of the testimony at the final hearing of its chief expert witness, David Farabee. Mr. Farabee was of the opinion that the C-905 PVC pipe selected by the County, having a dimension ratio (DR) of 32.5,<sup>1</sup> was too

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<sup>1</sup> The "dimension ratio" of the PVC pipe is the ratio of the outside diameter of the pipe to its thickness.

thin and undersized. However, in paragraphs 25, 32, and 35 of the RO, the ALJ expressly discounted the probative value of portions of Mr. Farabee's expert testimony.

In contrast, in paragraphs 26 and 27 of the RO, the ALJ refers with apparent approval to the expert testimony of Robert Walker who, as noted above, co-chaired the AWWA committee that authored the design standards of the PVC pipe at issue in these proceedings. Mr. Walker opined that the DR 32.5 PVC pipe selected by the County was adequate and meets the Department's pressure ratings requirements for the anticipated pressure of the wastewater in the Transmission Line. (Tr. 586-89)

The District thus basically disagrees with the ALJ as to the weight given to the evidence, his assessment of the credibility of the witness, and his resolution of conflicting expert testimony. The District also essentially requests that I reweigh the evidence in a manner more favorable to the District. However, I decline to substitute my judgment for that of the ALJ on these evidentiary decisions within his discretion as the fact-finder in these formal administrative proceedings. Heifetz, 475 So.2d at 1282.

Based on the above rulings, the District's Exception No. 4 is denied.

#### Exception No. 5

In the first sentence of its fifth Exception, the District objects to a portion of the third sentence of the ALJ's Finding of Fact 22 stating that "[t]his is not the first time the County has used DR 32.5 PVC piping for one of its projects." Yet, in the second sentence of this internally inconsistent Exception, the District asserts that the County "has only one other project using this size of pipe," thus actually affirming the ALJ's challenged finding. The District also cites to testimony of record actually supporting the challenged finding of the ALJ. (Tr. 161, 203-04) In any event, I conclude that a factual

finding that the County has used DR 32.5 PVC pipe on other projects is not essential to a determination in this case that the County has provided reasonable assurance that the subject Transmission Line project will not contravene applicable DEP rules and standards. Consequently, Exception No. 5 is denied.

Exception No. 6

The District's sixth Exception objects to the last sentence of Finding of Fact 38 where the ALJ finds that the "Permit issued by the Department indicates the Transmission Line would be constructed with ductile iron pipe, but this was a typographical error." This challenged finding appears to be a reasonable factual inference drawn by the ALJ from the final hearing testimony of Brian Shields, Timothy Powell, and Michael Bechtold, and is adopted in this final order. (Tr. at 213-14, 315-16, 381-82)

Even if the "ductile iron pipe" reference in the Permit were the result of a County or DEP oversight or other mistake not typographical in nature, I would deem it to be harmless error. There is no finding by the ALJ, or even any claim by the District, that the use of ductile iron pipe in the Transmission Line is mandated by any DEP rules or standards. To the contrary, the ALJ's key finding in paragraph 18 of the RO that the "Transmission Line was designed in accordance with the technical standards and criteria for wastewater transmission lines in the Florida Administrative Code" was not even challenged in the District's Exceptions. Furthermore, the District also failed to object to Finding of Fact 24, where the ALJ found that PVC pipe is actually superior to ductile iron pipe in several aspects: (1) PVC is more corrosion resistant; (2) PVC has

superior ability to absorb cyclical surges; (3) PVC is easier to install; and (4) PVC has smoother interior flow characteristics. Exception 6 is thus denied.

#### Exception No. 7

The District's seventh Exception objects to paragraph 39 of the RO where the ALJ rejects the District's contention that the County's Permit application was deficient because no separate engineering report was attached. I agree with the District to the limited extent that the portions of paragraph 39 concluding that the Permit application is sufficient to fulfill DEP requirements are actually more in the nature of legal conclusions than pure factual findings. I thus view paragraph 39 of the RO, in its entirety, to be a mixed statement of fact and law. However, if a finding of fact is improperly labeled as a conclusion of law in a recommended order, the label should be disregarded on administrative or judicial review, and the item should be treated as though it were actually a conclusion of law. Battaglia Properties v. Fla. Land and Adjudicatory Commission, 629 So.2d 161, 168 (Fla. 5th DCA 1993).

Treating paragraph 39 as containing mixed statements of fact and law, I reject the District's contention that a purported technical deficiency in the County's Permit application warrants denial of the Transmission Line Permit. I find this focus on technical deficiencies in the application to be misplaced. A DOAH final hearing is not merely an administrative review of prior agency action, but is a *de novo* proceeding intended to formulate final agency action; and the parties are allowed to present additional evidence not included in the permit application and other documents previously submitted to or by DEP during the permit review process. See, e.g., Hamilton County Commissioners v. State Dept. of Environmental Regulation, 587 So.2d

1378, 1387 (Fla. 1st DCA 1991); Florida Dept. of Transportation v. J.W.C. Company, Inc., 396 So.2d 778, 785 (Fla. 1st DCA 1981).

What the County or DEP did or failed to do during the prior permit application review process was not the primary focus of the final hearing in this case. McDonald v. Dept. of Banking and Finance, 346 So.2d 569, 584 (Fla. 1st DCA 1977); Clarke v. Melton, 12 FALR 4946, 4949 (Fla. DER 1990). Rather, the primary focus at the final hearing was to determine whether the County provided reasonable assurance at that time that the Transmission Line project would not violate applicable DEP rules and standards. Id. The ALJ correctly found in the last sentence of paragraph 39 of the RO that "further explanation and clarification of the technical aspects of the application was given by the County at the final hearing." (Tr. 206-51; DEP Ex. 7; County Exhibits 1, 4, 6, 7, 12-20, 92, 107, 152)

The County's contention concerning the significance of the Permit application not including an attached engineering report is further undermined by its failure to take exception to the ALJ's related findings in paragraph 40 of the RO that:

At the same time, the Department engineer who oversaw the permitting of this project [Michael Bechtold], testified that a detailed engineering report was not necessary. This engineer has extensive experience in permitting transmission lines for the Department and has worked on over five hundred permits for wastewater transmission and collection systems. The undersigned has accepted his testimony that, in a relatively straightforward permit such as this, the application and attachments themselves can function as a sufficient engineering evaluation. This is especially true here since the County is seeking only approval of a pipeline project, which would not authorize the receipt of wastewater flow unless other wastewater facilities are permitted.

A party disputing findings of fact in a DOAH recommended order has the burden of alerting the reviewing agency to any perceived defects in the factual findings by filing exceptions with the agency. See Couch v. Commission on Ethics, 617 So.2d 1119,

1124 (Fla. 5th DCA 1993); Florida Dept. of Corrections v. Bradley, 510 So.2d 1122, 1124 (Fla. 1st DCA 1987). The District's failure to file exceptions to the ALJ's findings in paragraph 40 of the RO bars it from presenting a different version of the facts, and will preclude any argument on appeal that DEP erred in accepting these factual findings of the ALJ in this final order. Id. at 1124; accord Kantor v. School Board of Monroe County, 648 So.2d 1266, 1267 (Fla. 3d DCA 1995).

In view of the above rulings, the District's Exception 7 is denied.

#### Exception No. 8

This brief Exception consists of a one-sentence assertion by the District that it "takes exception to the Findings of Fact contained in paragraph 50 of the RO, as this paragraph is entirely a conclusion of law rather than a statement of fact." This Exception is devoid of any legal arguments or citations to legal authorities arguably warranting a ruling that the challenged statements of the ALJ in paragraph 50 constitute reversible error on their merits. A bare assertion by the District that the ALJ's statements are legal conclusions, rather than factual findings, does not comply with the provisions of subsection 120.57(1)(k), Fla. Stat., requiring that exceptions to recommended orders "identify the legal basis for the exception."

I do agree that the ALJ's statement in paragraph 50 that the "County has provided reasonable assurance that the Transmission Line will not discharge, emit, or cause pollution in contravention of the Department's standards" is not a pure factual finding. However, as discussed in the preceding ruling, the fact that an ALJ erroneously labels a conclusion of law as a finding of fact does not warrant its rejection by a

1124 (Fla. 5th DCA 1993); Florida Dept. of Corrections v. Bradley, 510 So.2d 1122, 1124 (Fla. 1st DCA 1987). The District's failure to file exceptions to the ALJ's findings in paragraph 40 of the RO bars it from presenting a different version of the facts, and will preclude any argument on appeal that DEP erred in accepting these factual findings of the ALJ in this final order. Id. at 1124; accord Kantor v. School Board of Monroe County, 648 So.2d 1266, 1267 (Fla. 3d DCA 1995).

In view of the above rulings, the District's Exception 7 is denied.

Exception No. 8

This brief Exception consists of a one-sentence assertion by the District that it "takes exception to the Findings of Fact contained in paragraph 50 of the RO, as this paragraph is entirely a conclusion of law rather than a statement of fact." This Exception is devoid of any legal arguments or citations to legal authorities arguably warranting a ruling that the challenged statements of the ALJ in paragraph 50 constitute reversible error on their merits. A bare assertion by the District that the ALJ's statements are legal conclusions, rather than factual findings, does not comply with the provisions of subsection 120.57(1)(k), Fla. Stat., requiring that exceptions to recommended orders "identify the legal basis for the exception."

I do agree that the ALJ's statement in paragraph 50 that the "County has provided reasonable assurance that the Transmission Line will not discharge, emit, or cause pollution in contravention of the Department's standards" is not a pure factual finding. However, as discussed in the preceding ruling, the fact that an ALJ erroneously labels a conclusion of law as a finding of fact does not warrant its rejection by a

reviewing agency. Instead, the mislabeled portion of the RO should simply be treated as a legal conclusion and considered on its merits.

Whether an applicant has provided "reasonable assurance"<sup>2</sup> in a contested permit proceeding that a proposed project will be successfully implemented involves a mixed question of fact and law where the applicable DEP rules and standards are construed in light of the material facts as found by the ALJ. The ultimate determination of whether a permit applicant has provided this necessary reasonable assurance that a proposed project will not contravene DEP rules and standards is a decision that, in the final analysis, must be made by DEP. See, e.g., Putnam County Env. Council v. Dept of Environmental Protection, 24 FALR 4674, 4685 (Fla. DEP 2002), *cert. denied*, 825 So.2d 1044 (Fla. 1st DCA 2002) ; Miccosukee Tribe of Indians v. South Florida Water Mgmt. Dist., ER FALR 98:119, p.5 (Fla. DEP 1998), *affirmed*, 721 So.2d 389 (Fla. 3d DCA 1998); Save our Suwanee v. Piechocki, 18 FALR 1467, 1471 (Fla. DEP 1996).

Like the ALJ, I also conclude that the County provided reasonable assurance that the Transmission Line project will comply with applicable DEP rules and standards. This reasonable assurance determination is supported by the expert testimony at the final hearing of DEP professional engineers and permitting specialists, Michael Bechtold, Robert Heilman, and Timothy Powell, who testified that the County's Transmission Line project, utilizing the DR 32.5 PVC pipe, would not contravene DEP rules and standards. The construction by agency officials of technical matters inherent in rules and statutes the agency administers is entitled to great weight. Gregory, 610

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<sup>2</sup> "Reasonable assurance" has been defined by Florida case law to mean "a substantial likelihood that the proposed project will be successfully implemented." See Metro Dade County v. Coscan Florida, Inc., 609 So.2d 644, 648 (Fla. 3d DCA 1992). This term "reasonable assurance" is set forth in § 373.414(1), Fla. Stat., and Rule 62-4.070(1), F.A.C. The cited statute and rule are regulatory provisions administered and enforced by DEP.



So.2d at 555. This agency testimony supporting a reasonable assurance determination is also supplemented by the final hearing testimony of the County's expert witnesses, Bevin Beaudet, Leisha Pica, Brian Shields, and Robert Walker.

Based on the above rulings, the District's Exception No. 8 is denied.

#### Exception No. 9

The District's ninth Exception objects to paragraph 55 of the RO where the ALJ summarizes the various grounds for his ultimate legal conclusion that the "County has established that it meets all relevant criteria for issuance of the Permit." In this Exception, the District essentially recaps the primary contentions asserted in its prior Exceptions. This ninth Exception is denied for the reasons set forth in detail in the above rulings denying the District's Exception Nos. 3, 4, 6, 7, and 8, which rulings are incorporated by reference herein. An additional factor supporting denial of this Exception is the District's failure to take exception to the ALJ's related Conclusion of Law 57 stating:

Because reasonable assurance has been given by the County that Department standards and rules will not be contravened, and there is a likelihood that the project will be successfully implemented, the Permit should be issued.

#### Exception No. 10

The District's final Exception challenges Conclusion of Law 56 where the ALJ correctly concludes that neither he nor DEP has jurisdiction in these administrative proceedings to resolve the disputed real property issue of whether the County may locate the Transmission Line, or portions thereof, in easements allegedly owned by the District. The District merely contends in this Exception that it "did not request that the DEP or the ALJ make a legal determination of its property rights at the Permit hearing."

I do not construe paragraph 56 of the RO to state that the District made such a real property determination request as is implied in this Exception. Even if paragraph 56 could be fairly construed to contain a finding by the ALJ that the District requested a determination of its property rights at the DOAH final hearing, such a finding would have no bearing on the ultimate disposition of these administrative proceedings. The District's Exception No. 10 is thus denied.

### CONCLUSION

In contested permit proceedings before DOAH administrative law judges, expert witnesses for the opposing parties often render conflicting opinions as to whether the proposed permits should be issued. Florida case law holds that, in such cases where there is conflicting testimony of record, it is the role of the administrative law judges "to decide the issue one way or the other." Heifetz, 475 So.2d at 1281. In this case, the ALJ weighed the evidence, judged the credibility of the witnesses, and decided the major disputed factual issues in favor of the County. I will not attempt to "second guess" the ALJ on these evidentiary decisions as requested by the District.

It is therefore ORDERED:

A. With the minor modifications noted in the above rulings on the District's Exception Nos. 3, 7, and 8, the Recommended Order (Exhibit A) is otherwise adopted and incorporated by reference herein.

B. The term "polyvinyl chloride (PVC) pipe" is substituted in place of the term "ductile iron pipe" in DEP Permit No. 0048923-017-DWC and the supporting documents.

C. As amended, Permit No. 0048923-017-DWC is hereby ISSUED to the County, subject to the conditions in the Domestic Wastewater Collection/Transmission Individual Permit document issued by the Southeast District Office on May 12, 2005.

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to § 120.68, Fla. Stat., by filing a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the Department clerk 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 Department clerk.

DONE AND ORDERED this 1st day of November, 2005, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION.



COLLEEN M. CASTILLE

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.

  
CLERK

11/1/05  
DATE

**CERTIFICATE OF SERVICE**

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

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13881 40<sup>th</sup> Street North  
Royal Palm Beach, FL 33411-8491

Troy and Tracey Lee  
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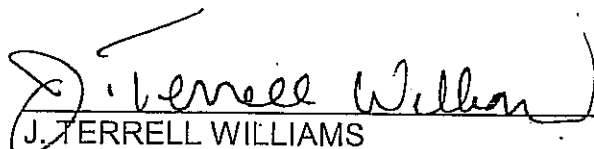
Ann Cole, Clerk and  
Donald R. Alexander, Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, FL 32399-1550

and by hand delivery to:

Francine M. Ffolkes, Esquire  
Department of Environmental Protection  
3900 Commonwealth Blvd., M.S. 35  
Tallahassee, FL 32399-3000

this 01 day of November, 2005.

STATE OF FLORIDA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION



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