SJK 2008-68

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT,

Petitioner,

vs.

A. DUDA AND SONS, INC.,

Respondent.

DOAH Case No. 07-4526

SJRWMD F.O.R. No. 2007-59

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings ("DOAH"), by its designated Administrative Law Judge, the Honorable J. Lawrence Johnston ("ALJ"), held a formal administrative hearing in the above-styled case on January 7-11 and 16-17, 2008, in Altamonte Springs and Tallahassee, Florida.

On April 25, 2008, the ALJ submitted to the St. Johns River Water Management District and all parties to this proceeding a Recommended Order, a copy of which is attached hereto as Exhibit "A." Respondent A. Duda and Sons, Inc. ("Duda" or "Respondent") and Petitioner St. Johns River Water Management District ("District" or "Petitioner") timely filed Exceptions to the Recommended Order. The parties each timely filed Responses to Exceptions. This matter then came before the Governing Board on June 10, 2008, for final agency action and entry of a Final Order.

A. PRELIMINARY STATEMENT

On August 1, 2007, Duda filed a rule challenge with DOAH to various District rules. (The case style of Duda's rule challenge case is A. Duda and Sons, Inc., Petitioner, v. St. Johns River Water Management District, Respondent; DOAH Case No. 07-3545RU). This rule challenge focused on whether certain rules and alleged policies of the District are invalid or contrary to a statutory exemption set forth in section 373.406(2) of the Florida Statutes. This exemption is known as "the agricultural exemption" and provides as follows:

> (2) Nothing herein, or in any rule, regulation, or order adopted pursuant hereto, shall be construed to affect the right of any person engaged in the occupation of agriculture, silviculture, floriculture, or horticulture to alter the topography of any tract of land for purposes consistent with the practice of such occupation. However, such alteration may not be for the sole or predominant purpose of impounding or obstructing surface waters.

The primary focus of Duda's rule challenge centered on the District's interpretation and implementation of section 373.406(2) through its agricultural exemption rule located in section 3.4.1(b) of the Applicant's Handbook: Management and Storage of Surface Waters.

After Duda filed its rule challenge, on September 12, 2007, the District served Duda with an Administrative Complaint and Proposed Order ("Administrative Complaint"). The Administrative Complaint alleged that Duda had excavated ditches and filled wetlands at its Cocoa Ranch in Brevard County without the necessary permits, as required by chapter 373, Florida Statutes, and Rule 40C-4 of the Florida Administrative Code. More specifically, the Administrative Complaint alleged that Duda excavated approximately 70 ditches between the beginning of 1987 and the end of 1993 (referred to as the "enforcement ditches" in the Administrative Complaint) and that

Duda placed fill in wetlands next to two ditches in 2006 (referred to as the "perimeter canal" and "F-17 ditch" in the Administrative Complaint), and that these activities required permits from the District. The Administrative Complaint proposed an order that would require Duda to "restore the Property to its pre-violation condition" in accordance with a specified restoration plan. Duda challenged the Administrative Complaint by filing a request for formal hearing that was forwarded to DOAH, and assigned DOAH Case No. 07-4526. As part of its defense in the enforcement case, Duda alleged that one or more of the affirmative defenses raised by Duda prevent the District from prevailing in the enforcement case. Among other things, Duda alleged that its actions were exempt from the need to obtain a District permit based on the agricultural exemption set forth in section 373.406(2) of the Florida Statutes. This enforcement case was consolidated for purposes of final hearing with DOAH Case No. 07-3545RU, the rule challenge filed earlier by Duda.

After the final hearing, on April 25, 2008, the ALJ in DOAH Case No. 07-3545RU issued his Final Order upholding the challenged District rules, including section 3.4.1(b), and denying Duda's rule challenge petition. The ALJ found that the District's interpretation of section 373.406(2), which has been in place for over 25 years, "is consistent with the legislative intent, as reflected in the legislative journals, and with the Commentary to the Model Water Code." (Final Order at page 17-18, Paragraphs 25-26).

On April 25, 2008, the ALJ also issued a Recommended Order in the District's enforcement case against Duda. The ALJ agreed with District staff's position, found that the enforcement ditches impacted between 500 and 650 acres of wetlands, and

recommended that the District's "Governing Board enter a Final Order requiring Duda to apply for the necessary after-the-fact permit and/or restore wetland impacts," as requested in the District's Administrative Complaint. (Recommended Order at page 28).

By letter dated April 30, 2008, counsel for Duda expressly waived the 45-day statutory timeframe for entry of a final order in this enforcement case and requested that the Final Order (and any exceptions to the Recommended Order and the responses thereto) be considered by the District's Governing Board meeting scheduled for June 2008. Both Duda and the District have timely filed exceptions to the Recommended Order in which these parties describe what they believe are errors in the ALJ's Recommended Order. Duda has filed 20 exceptions, while the District has filed one exception.

B. STATEMENT OF THE ISSUE

The general issue before the Governing Board is whether to adopt the Recommended Order as the District's Final Order, or to reject or modify the Recommended Order in whole or part, under section 120.57(1)(l), Florida Statutes ("F.S."). The specific issue is whether to uphold the District's agency action embodied in its Administrative Complaint and Proposed Order, which is based on the ALJ's findings and conclusions that Duda required a permit for the excavation of the enforcement ditches and the placement of fill in wetlands next to two ditches in 2006 and that none of Duda's defenses applied, as well as the ALJ's ultimate recommendation.

In the Recommended Order, the ALJ recommended that the District's "Governing Board enter a Final Order requiring Duda to apply for the necessary after-the-fact permit and/or restore wetland impacts, as described in Findings 52-53, supra." (Recommended Order at page 28).

C. STANDARD OF REVIEW

The rules regarding an agency's consideration of exceptions to a recommended order are well established. The Governing Board is prescribed by section 120.57(1)(l), F.S., in acting upon a recommended order. The ALJ, not the Governing Board, is the fact finder. Goss v. Dist. Sch. Bd. of St. Johns County, 601 So.2d 1232, 1235 (Fla. 5th DCA 1992); Heifetz v. Dep't of Bus. Regulation, 475 So.2d 1277, 1281-82 (Fla. 1st DCA 1997). A finding of fact may not be rejected or modified unless the Governing Board first determines from a review of the entire record that the finding of fact is not based upon competent substantial evidence or that the proceedings on which the finding of fact was based did not comply with essential requirements of law. Section 120.57(1)(l), F.S. "Competent substantial evidence" is such evidence as is sufficiently relevant and material that a reasonable mind would accept such evidence as adequate to support the conclusion reached. Perdue v. TJ Palm Associates, Ltd., 755 So.2d 660 (Fla. 4th DCA 1999). The term "competent substantial evidence" relates not to the quality, character, convincing power, probative value or weight of the evidence, but refers to the existence of some quantity of evidence as to each essential element and as to the legality and admissibility of that evidence. Scholastic Book Fairs v. Unemployment Appeals Commission, 671 So.2d 287, 289 (Fla. 5th DCA 1996).

If a finding is supported by any competent substantial evidence from which the finding could be reasonably inferred, the finding cannot be disturbed. Freeze v. Dep't of Business Regulation, 556 So.2d 1204 (Fla. 5th DCA 1990); Berry v. Dep't of Envtl. Regulation, 530 So.2d 1019 (Fla. 4th DCA 1998). The Governing Board may not reweigh evidence admitted in the proceeding, may not resolve conflicts in the evidence, may not judge the credibility of witnesses or otherwise interpret evidence anew. Goss, 601 So.2d at 1235; Heifetz, 475 So.2d at 1281-82; Brown v. Criminal Justice Standards & Training Comm'n., 667 So.2d 977 (Fla. 4th DCA 1996). The issue is not whether the record contains evidence contrary to the findings of fact in the Recommended Order, but whether the finding is supported by any competent substantial evidence. Florida Sugar Cane League v. State Siting Bd., 580 So.2d 846 (Fla. 1st DCA 1991). Finally, the Governing Board is precluded from making additional or supplemental findings of fact. Florida Power & Light Co. v. State of Florida, Siting Board, 693 So.2d 1025, 1026-27 (Fla. 1st DCA 1997); Boulton v. Morgan, 643 So.2d 1103 (Fla. 4th DCA 1994).

With respect to conclusions of law in the Recommended Order, the Governing Board may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretations of administrative rules over which it has substantive jurisdiction, provided the reasons for such rejection or modification are stated with particularity and the Governing Board finds that such rejection or modification is as or more reasonable than the ALJ's conclusion or interpretation. Section 120.57(1)(l), F.S. In interpreting the term "substantive jurisdiction," the courts have continued to interpret the standard of review as requiring deference to the expertise of an agency in

interpreting its own rules and enabling statutes. See, e.g., State Contracting & Eng'g Corp. v. Dep't of Transp., 709 So.2d 607, 610 (Fla. 1st DCA 1998).

The Governing Board lacks subject matter jurisdiction to overturn an ALJ's rulings on procedural and evidentiary issues. Barfield v. Dep't of Health, 805 So.2d 1008, 1012 (Fla. 1st DCA 2001) (the agency lacked jurisdiction to overturn an ALJ's evidentiary ruling); Lane v. Dep't of Envtl. Protection, DOAH 05-1609 (DEP 2007) (the agency has no substantive jurisdiction over procedural issues, such as whether an issue was properly raised, and over an ALJ's evidentiary rulings); Lardas v. Dep't of Envtl. Protection, 28 F.A.L.R. 3844, 3846 (DEP 2005) (evidentiary rulings of the ALJ concerning the admissibility and competency evidence are not matters within the agency's substantive jurisdiction).

The Governing Board's authority to modify a Recommended Order is not dependent on the filing of exceptions. Westchester General Hospital v. Dept. Human Res. Servs., 419 So.2d 705 (Fla. 1st DCA 1982). However, when exceptions are filed, they become part of the record before the Governing Board. Section 120.57(1)(f), F.S. In the final order, the Governing Board must expressly rule on each exception, except for any exception that does not clearly identify the disputed portion of the Recommended Order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record. Section 120.57(1)(k), F.S. Thus, the Governing Board is not required to rule on an omnibus exception in which a party states that its exception to a particular finding of fact is also an exception to any portion of the Recommended Order where the finding of fact is restated or repeated. Similarly, an exception that simply refers to or attempts to

incorporate by reference an exception to another finding of fact or conclusion of law fails to comply with the statutory requirements.

D. EXCEPTIONS AND RESPONSES

The Administrative Procedure Act provides the parties to an administrative hearing with an opportunity to file exceptions to a Recommended Order. Sections 120.57(1)(b) and (k), F.S. The purpose of exceptions is to identify errors in a Recommended Order for the Governing Board to consider in issuing its Final Order. As discussed above in section C (Standard of Review), the Governing Board may accept, reject, or modify the Recommended Order within certain limitations. When the Governing Board considers a Recommended Order and exceptions, its role is like that of an appellate court in that it reviews the sufficiency of the evidence to support the ALJ's findings of fact and, in areas where the District has substantive jurisdiction, the correctness of the ALJ's conclusions of law. In an appellate court, a party appealing a decision must show the court why the decision was incorrect so that the appellate court can rule in the appellant's favor. Likewise, a party filing an exception must specifically alert the Governing Board to any perceived defects in the ALJ's findings, and in so doing the party must cite to specific portions of the record as support for the exception. John D. Rood and Jamie A. Rood v. Larry Hecht and Department of Environmental Protection, 21 F.A.L.R. 3979, 3984 (DEP 1999); Kenneth Walker and R.E. Oswalt d/b/a Walker/Oswalt v. Department of Environmental Protection, 19 F.A.L.R. 3083, 3086 (DEP 1997); Worldwide Investment Group, Inc. v. Department of Environmental Protection, 20 F.A.L.R. 3965, 3969 (DEP 1998). To the extent that a party fails to file written exceptions to a Recommended Order regarding specific issues, the party has waived such specific objections. Environmental

Coalition of Florida, Inc. v. Broward County, 586 So.2d 1212, 1213 (Fla. 1st DCA 1991).

In addition to filing exceptions, the parties have the opportunity to file responses to exceptions filed by other parties. Rule 28-106.217(2), F.A.C. The responses are meant to assist the Governing Board in evaluating and ultimately ruling on exceptions by providing the Governing Board with legal argument and citations to the record.

E. RULINGS ON EXCEPTIONS

Duda filed 20 exceptions and the District filed one exception. Each party filed a response to the other's exceptions.

Citations to page numbers in the transcript of the formal administrative hearing will be made by identifying the page number in the transcript (e.g.,T: 2253). Citations to exhibits admitted by the ALJ will be made by identifying the party that entered the exhibit followed by the exhibit number (e.g., SJ. Ex. 2 or Duda Ex. 2). Citations to the Recommended Order will be designated by "RO" followed by the page number of the abbreviation "FOF" (Finding of Fact) or "COL" (Conclusion of Law) and paragraph number (e.g., RO, FOF 13). Citations to the District's Applicant's Handbook: Management and Storage of Surface Waters will be designated by the section number, followed by the abbreviation "A.H."

RULINGS ON RESPONDENT'S EXCEPTIONS

Respondent's Exception No. 1

Duda takes exception to the final sentence of FOF 6 on the ground that there was "no competent substantial evidence in the record to support the finding that any of the random ditches had control structures." FOF 6 states:

> 6. The ditches in the improved and unimproved pasturelands were dug in a random pattern generally connecting lower areas that naturally pond. Some of these random ditches also have an outfall ditch which drains to the larger ditch and canal network. Some have control structures; some do not. (Emphasis added).

Duda contends that "the only testimony regarding the presence or absence of control structures in the random ditches was ... that the enforcement ditches did not have culverts with riser boards in them, and did not have earth blocks which might impound water; his testimony was that the enforcement ditches always flow freely." Duda expressed a concern that "the existence of control structures may evidence an intent and design to impound water in a ditch for irrigation purposes," contrary to Duda's contention in this proceeding that the enforcement ditches do not impound water. In their response to this exception, District staff agreed "that none of the enforcement ditches had control structures" (citing T: 1067-68), but also stated that it did not logically follow that all of the non-enforcement ditches in improved pasture lacked control structures.

FOF 6 appears at the end of a section of the Recommended Order titled "History of the Property." The next title heading, which appears immediately before FOF 7, is titled "Pertinent Regulatory History of the Cocoa Ranch." (RO, p. 7). The ALJ's discussion of the enforcement ditches begins later on in FOF 30, in a section of the Recommended Order titled "The Enforcement Ditches," and there is no discussion in that section regarding whether any of the enforcement ditches have control structures. (RO, p. 14). Reading the last sentence of FOF 6 together with the rest of the Recommended Order, it is clear that the ALJ was talking generally about random ditches on Cocoa Ranch pasture lands, and not specifically about the enforcement

ditches (which also happen to be random ditches on pasture land or rangeland). The Board finds that there is competent substantial evidence to support the finding of fact in the final sentence of FOF 6. (T: 662-63, 724, 726; SJ Ex. 176 at 12-3). Therefore, this exception is rejected.

Respondent's Exception No. 2

Duda takes exception to the part of FOF 25 that Duda excavated the southern perimeter ditch and deposited fill adjacent to it "to create a new fill road for Duda's use" on the ground that it is "contrary to the evidence" and "is unsupported by any competent evidence." The first sentence of FOF 25 states:

> In August of 2006 SJRWMD discovered that in July of that year, Duda had excavated the perimeter ditch and deposited the fill on the northwest side of the canal to make a new fill road. (Emphasis added).

The Board finds that there is competent substantial evidence to support the finding that Duda did this work to create a new fill road. (T: 45-46, 1106). It is the province of the ALJ to resolve conflicts and weigh the evidence for inclusion into the findings of fact. Goss, 601 So.2d at 1235 (it is hearing officer's function to consider all 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). The Board cannot reweigh the evidence. Therefore, this exception is rejected.

Respondent's Exception No. 3

> Duda takes exception to the underlined portion of FOF 28, which states:
>
> Mr. Carter's testimony was based on observations on a single day. From that observation, he concluded that the perimeter canal would exert such

> a strong influence that the groundwater table would be two and a half to three feet below the land surface where the fill was deposited next to the canal. However, the evidence was that the before the excavation in 2006 the canal was only about a foot deep. At that depth, the canal would not exert as much influence as it did after excavation, which deepened the canal to 3-4 feet deep according to the evidence. (Emphasis added).

Duda contends that there is no competent substantial evidence from which an inference could be drawn to support the underlined finding of fact.[1] Duda further contends that this alleged erroneous finding is "one of the factual findings from which the ALJ concluded that the spoil had been placed in a wetland."

District Employee Jennifer Cope testified:

> we actually went to where it hadn't been excavated, the southern part down here where the perimeter canal is right around here where the work didn't occur, and it appeared from looking at the District property across the water was only about a foot deep or so.

(T: 138). The reference to "water" is not precise – it reasonably could be read to mean that "the water was only about a foot deep" in the canal or that the canal itself "was only about a foot deep." However, District employee Karen Garrett-Kraus also testified about the same area (the southern part of the F-12 perimeter canal). After discussing photographs of the F-12 perimeter canal area on Bates page numbers 5015-16 of District Exhibit 141 (T: 317-18), Ms. Garrett-Kraus then testified:

> Q Before I go to the F-17 ditch, which is in two other photos there, did you look -- did you go down to the southern end of the canal, the end of it where excavation had not taken place?
> A Yes, I did.
> Q What did you observe?
> A I observed that the ditch wasn't as deep. It was much shallower and had lots of vegetation in it, wasn't -- didn't appear to be as wide or, you know, the banks were densely vegetated.

[1] As part of this exception, Duda also alleged, "the evidence showed that the canal itself was at least six feet deep, but was almost dry at that time." However, Duda did not provide any citations to the record to support its allegation.

Q And was the area on the north side of the canal down at that southern end where the excavation had not taken place a wetland area?
A Yes.
(Emphasis added).

(T: 319). Thus, the Board finds that there is competent substantial evidence from which an inference could be drawn to support the underlined finding of fact. (T: 138, 317-19; SJ Ex. 141). While Duda contends that this alleged erroneous finding of fact led the ALJ to erroneously conclude that the spoil from the perimeter canal and ditch F-17 was placed on wetlands, it should be noted that Duda did not take exception to FOF 26 and has thus waived such objection. Environmental Coalition of Florida, Inc. v. Broward County, 586 So.2d 1212, 1213 (Fla. 1st DCA 1991). Moreover, the Board finds that there is competent substantial evidence to support FOF 26. (T: 305, 306, 309, 317-19, 324, 1122-23; SJ Ex. 141, 176). Therefore, this exception is rejected.

Respondent's Exception No. 4

Duda takes exception to FOF 34 which states:

The enforcement ditches drain approximately 2300 acres of native rangeland on the ranch. This approximation was reasonable for purposes of the District's case.

Duda contends that there is no competent substantial evidence to support FOF 34. However, District engineer Marc Van Heden testified that 2,311 acres of land would drain into the enforcement ditches, and this 2,311 acres number excluded the drainage area from the F-12, F-13, F-17, and F-18 enforcement ditches. (T: 184-191; SJ Ex. 108-110). If the F-12, F-13, F-17, and F-18 enforcement ditches were included, then 2,644 acres of land would drain into the enforcement ditches. (T: 190). Duda engineer Peter Coultas testified that all of the enforcement ditches are in "rangeland." (T: 1100).

Thus, the Board finds that there is competent substantial evidence to support FOF 34. Therefore, this exception is rejected.

Respondent's Exception No. 5

Duda takes exception to all of FOF 35 and the last sentence of 36. In FOF 35, the ALJ found:

> SJRWMD proved that some of the lands drained by the enforcement ditches were wetlands. The acreage of wetlands drained by the enforcement ditches was not precisely determined but was approximated to be between 500 and 650 acres.

In FOF 36, the ALJ found:

> SJRWMD's approximation was determined using DEP's current wetland delineation Rule Chapter 62-340, not the wetland delineation rule in effect before 1994, which might not include some wetlands captured by the current rule. Nonetheless, based on the totality of the evidence, the low end of the approximation (i.e. approximately 500 acres) would be a reasonable approximation of the acreage of wetlands affected by the enforcement ditches for purposes of SJRWMD's case. (Emphasis added).

Duda first states that the findings "are not useful" because the ALJ did not indicate precisely the location, size, boundaries, or configuration of the drained wetlands or indicate the degree to which the wetlands were drained. The perceived "usefulness" of a factual finding is not a valid statutory basis under section 120.57(1)(l) for rejecting or modifying a finding of fact.

Second, Duda contends these findings are not based on competent substantial evidence, and that is a valid statutory basis under section 120.57(1)(l) for rejecting or modifying a finding of fact. However, there is competent substantial evidence to support these findings. (T: 184-191, 252-254, 260-266, 303, 305, 326, 335, 1122, 1230-1234; SJ Ex. 108-110, 120, 121, 128-137, 153, 176).

Notably, District employee Karen Garrett-Kraus used two different approaches to determine wetland areas affected or drained by the enforcement ditches. First, she identified wetlands based on her review of aerial photographs (of 1984, 1995, 2004, and 2005), an SCS soil survey, a geographic information system ("GIS") hydric soil overlay based on the NRCS hydric soil determination and delineation, two wetland maps, and quad maps along with five days of ground truthing of the aerial photographs and various GIS layers. (T: 253, 263). Based on her own wetland identification, she overlaid the drainage basins that District engineer Marc Van Heden had developed for the enforcement ditches (SJ Ex. 108-110), calculated the area of wetlands within those drainage basins, and concluded that there were approximately 650 acres of wetlands impacted by the enforcement ditches. (T: 263-66, 303; SJ Ex. 133-137). That 650 acres number did not include enforcement ditch G-10 or any other wetlands that are not within the drainage basins. (T: 265, 304-05). Second, using maps identifying wetlands and other types of land on Duda's Cocoa Ranch that were prepared by Glatting Jackson as part of an application for the Viera West Development of Regional Impact ("DRI") project[2] (SJ Ex. 120 and 121), Ms. Garrett-Kraus overlaid the same Marc Van Heden drainage basins on those maps, calculated the area of Glatting Jackson-identified wetlands within those drainage basins, and concluded that there were 497 acres of wetlands (as identified by Glatting Jackson) impacted by the enforcement ditches. (T: 335; SJ Ex. 128-132).

[2] The Viera West DRI application was signed jointly by Duda and the Viera Company. (SJ 176). The Viera Company is a wholly-owned subsidiary of Duda. (T: 974). The Viera West DRI includes Duda's Cocoa Ranch. (T: 254; SJ Ex. 120-121).

Third, Duda contends that these findings of fact are "incorrect as a matter of law." This basis for its exception is not one of the statutory grounds for rejecting or modifying a finding of fact. Under section 120.57(1)(l), the Board:

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

Section120.57(1)(l), F.S. Thus, the Board may only reject or modify the findings of fact if, after a review of the entire record, the Board specifically finds either that: (1) the findings of fact were not based upon competent substantial evidence, or (2) the proceeding on which the findings were based (e.g., the final hearing before the ALJ in this enforcement case) "did not comply with essential requirements of law." As concluded above, there is competent substantial evidence to support these findings, and thus the first statutory basis for rejecting a finding of fact has not been met. Moreover, Duda did not allege in this exception that the proceeding (the final hearing before the ALJ in this enforcement case) on which these findings were based "did not comply with essential requirements of law." Thus, Duda has waived any objection to these findings of fact based on the second statutory basis (i.e., failure to "comply with essential requirements of law"). Environmental Coalition of Florida, Inc. v. Broward County, 586 So.2d at 1213 (to the extent that a party fails to file written exceptions to a recommended order regarding specific issues, the party has waived such specific objections).

The underlying basis for Duda's "incorrect as a matter of law" argument is Duda's contention that the District erred by applying chapter 62-340, Florida Administrative

Code, to identify the wetlands impacted by the enforcement ditches, because chapter 62-340 did not become effective until 1994 (after the enforcement ditches had already been excavated[3]). In Duda's view, the "District's burden was to prove Duda had impacted wetlands through unpermitted work" and "show Duda violated the statutes or rules which were in effect when then work was done." (Emphasis in original). Duda's view is incorrect with respect to the enforcement ditch violations that occurred between 1987 and 1993.[4] (RO, FOF 32-33). The District did not have to prove that the enforcement ditches required a permit because the ditches were excavated in wetlands. Instead, the District only needed to prove that Duda's enforcement ditch "excavation activities exceeded a District permitting threshold" and that Duda had constructed the enforcement ditches without a permit. (Joint Prehearing Stipulation at 7 ¶F.4., at 8 ¶G.2., at 11 ¶G.15.-16.). As explained below, Duda's enforcement ditch excavation activities in 1987 – 1993 exceeded a District permitting threshold that had nothing to do with wetlands. Thus, Duda's concern that District staff applied the wrong wetland delineation rule for the enforcement ditches is misplaced.

Duda's enforcement ditch excavation activities in 1987 – 1993 required a District permit because those activities tripped the "40 acre" threshold of Rule 40C-4.041(2)(b)2, Florida Administrative Code. Rule 40C-4.041(2)(b)2 requires permits for the construction, alteration, operation, and maintenance of a surface water management system (SWMS) that "serves a project with a total land area equal to or

[3] Notably, Duda did not take exception to FOF 32 or FOF 33, and the ALJ found that "Duda excavated the enforcement ditches between the beginning of 1987 and the end of 1993." (RO, FOF 32).

[4] Duda may have confused the 2006 wetlands fill violation, which required the District to prove that "the fill placed by Duda next to the perimeter canal (F-12) and ditch F-17 were placed in wetlands" (Joint Prehearing Stipulation at 9 ¶G.3.), with the enforcement ditch violation, which required the District to prove that "Duda's ditch excavation activities exceeded a District permitting threshold." (Joint Prehearing Stipulation at 8 ¶G.2.)

exceeding 40 acres." Rule 40C-4.041(2)(b)2 has been in effect since December 7, 1983, thus that rule applied to Duda's construction of the enforcement ditches during the period of 1987 through 1993. See Rule 40C-4.041(2)(b)2, F.A.C. (1983), and Rule 40C-4.041(2)(b)2, F.A.C. (2007). As noted above, District engineer Marc Van Heden testified that over 2,300 acres of land would drain into the enforcement ditches. (T: 184-191; SJ Ex. 108-110). There is competent substantial evidence to support a finding that the enforcement ditches served a land area exceeding 40 acres and thus a permit was required from the District for the construction/alteration and operation of those ditches. (T: 189-191, 505-507, 562; SJ Ex. 108-110). Therefore, this exception is rejected.

Respondent's Exception No. 6

Duda takes exception to all of FOF 37, which states:

> Neither construction of the perimeter canal by dredge and fill in wetlands, nor the construction of the enforcement ditches that drained wetlands, was consistent with the practice of agriculture. See Final Order, DOAH Case No. 07-3545RU.

Duda raises three arguments in this exception. First, Duda argues that in making this finding the ALJ misread the agricultural exemption in section 373.406(2) of the Florida Statutes. Second, Duda argues that there is "absolutely no evidence" to support this finding, stating that the "sole evidence on the role of the ditches" was that ditches "were necessary to regulate groundwater levels." Third, Duda argues that this finding of fact is "contradicted" by the ALJ's findings in FOF 1-6.

With respect to Duda's first argument, it should be noted that Duda bore the burden to prove its affirmative defense that the enforcement ditches qualified for an agricultural exemption, and it did not meet that burden. (Joint Prehearing Stipulation at

7 ¶F.4.). Duda's agricultural[5] exemption defense is based on section 373.406(2) of the Florida Statutes, which provides:

> Nothing herein, or in any rule, regulation, or order adopted pursuant hereto, shall be construed to affect the right of any person engaged in the occupation of agriculture, silviculture, floriculture, or horticulture to alter the topography of any tract of land for purposes consistent with the practice of such occupation. However, such alteration may not be for the sole or predominant purpose of impounding or obstructing surface waters.

The District has adopted a rule interpreting the section 373.406(2) agricultural exemption in section 3.4.1(b) of the MSSW Applicant's Handbook ("A.H."). Section 3.4.1(b) provides as follows:

> **3.4.1** Florida Statutes specifically exempt certain activities from the requirements of chapters 40C-4, 40C-40, 40C-41, and 40C-400, F.A.C., as well as other regulatory rules implementing part IV, chapter 373, F.S. These statutory exemptions are discussed below:
>
> ***
>
> (b) Subsection 373.406(2), F.S., states that "Nothing herein, or in any rule, regulation or order adopted pursuant hereto, shall be construed to affect the right of any person engaged in the occupation of agriculture, silviculture, floriculture, or horticulture to alter the topography of any tract of land for purposes consistent with the practice of such occupation. However, such alteration may not be for the sole or predominant purpose of impounding or obstructing surface waters."
>
> In determining whether an exemption is available to a person engaged in the occupation of agriculture, silviculture, floriculture or horticulture, the following questions must be addressed:
>
> 1. Is the proposed topographic alteration consistent with the practice of agriculture, silviculture, floriculture or horticulture?
>
> 2. Is the proposed topographic alteration for the sole or predominant purpose of impounding or obstructing surface waters?
>
> If the first question is answered affirmatively and the second is answered negatively, an exemption under subsection 373.406(2), F.S., is available. **The exemption is construed as set forth in the Conference Committee Report on CS/CS/HB 1187, Journal of the House of Representatives,**

[5] Section 373.406(2) provides an exemption not only for certain agriculture activities, but also for certain "silviculture, floriculture, or horticulture" activities. However, for ease of reference this exemption will simply be referred to as the "agricultural exemption." The Board recognizes, and has considered, that Duda is also claiming that certain of its silvicultural activities are exempt under section 373.406(2).

May 29, 1984, page 734 and Journal of the Senate, May 28, 1984, page 475.

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

1. normal site preparation for planting of the tree crop;

2. planting; and

3. harvesting.

If any activity is undertaken to place the property into a use other than silviculture (for example: harvesting which is designed to clear property in preparation for commercial, industrial or residential development rather than regeneration) the activity is not considered to be consistent with the practice of silviculture and will be subject to the permitting jurisdiction of the District. **Examples of activities which are considered to be for the sole or predominant purpose of impounding or obstructing surface waters because they have the effect of more than incidentally trapping, obstructing or diverting surface water are activities which create canals, ditches,** culverts, impoundments or fill roads.

In determining consistency with the practice of agriculture occupations, the District will refer to the following publication: "A Manual of Reference Management Practices for Agricultural Activities (November, 1978)" The following practices described in the manual are considered as having impoundment or obstruction of surface waters as a primary purpose:

1. **Diversion, when such practice would cause diverted water to flow directly onto the property of another landowner**

2. Floodwater Retarding Structure

3. Irrigation Pit or Regulating Reservoir

4. Pond

5. Structure for Water Control

6. Regulating Water in Drainage Systems

7. Pumping Plant for Water Control, when used for controlling water levels on land

Other practices which are described in the manual and which are constructed and operated in compliance with Soil Conservation

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

(Emphasis added) Section 3.4.1(b) provides that the agricultural exemption is to be "construed as set forth in the Conference Committee Report on CS/CS/HB 1187, Journal of the House of Representatives, May 29, 1984, page 734 and Journal of the Senate, May 28, 1984, page 475." (T. 529-535; SJ Ex. 158 at 481; Ex. 159 at 742). The report for each house contained the identical statement on section 403.913, which was a new law:

> The language contained in s. 403.913, relating to agricultural activities, shall be construed in conjunction with s. 373.406(2) to exempt from permitting only those activities defined as "agricultural activities" pursuant to this act in accordance with the Commentary to s. 4.02(2) of the Model Water Code.

(T. 529-535; SJ Ex. 158 at 481; Ex. 159 at 742). Through this legislative statement, Florida's Legislature directed that the agriculture exemption in section 373.406(2) be interpreted to exempt from permitting "agricultural activities" as defined in section 403.913, and be interpreted "in accordance with the Commentary to s. 4.02(2) of the Model Water Code."

Section 403.913, which was later codified as section 403.927, contains the following definition of "agricultural activities" to be used in determining those activities that would be exempt under section 373.406(2):

> "Agricultural activities" includes **all necessary farming and forestry operations which are normal and customary for the area**, such as site preparation, clearing, fencing, contouring to prevent soil erosion, soil preparation, plowing, planting, harvesting, construction of access roads,

> and placement of bridges and culverts, **provided such operations do not impede or divert the flow of surface waters**.

Section 403.927(4)(a), F.S. (emphasis added). Notably, this definition contains critical language regarding the limitation of the agriculture exemption to those activities that are "normal and customary for the area" and do not "impede or divert" the flow of surface waters.

Similar language linking the agriculture exemption to only those activities that do not impede or divert the flow of surface waters is found in the other guiding document the legislature directed be used, the Commentary to section 4.02(2) of the Model Water Code. (T: 511-12). The Commentary states:

> COMMENTARY. The intent of this subsection is to allow persons engaged in agricultural, floricultural, and horticultural operations to engage in ordinary farming and gardening without obtaining a construction permit under [sec.] 4.04. Theoretically, such operations **may incidentally trap or divert** some surface water. For example, by plowing a pasture a farmer is **trapping** and **diverting** surface water that would have constituted part of the runoff and eventually would have become part of the surface water of the state. Without this exemption the farmer would have theoretically been required to obtain a permit under [sec.] 4.04. In addition, it would appear that all changes of topography which would alter natural runoff, such as contour plowing, would also require a construction permit under [sec.] 4.04. **The quantity of the water being diverted and trapped is so small that it would serve no practical purpose to require a permit for such work.** In addition, the administrative burden of regulating such operations would be enormous. This subsection is original.

Maloney, et al., A Model Water Code 224 (emphasis added) (SJ Ex. 76). This guiding document also points out that the agriculture exemption was to apply to activities that "incidentally trap or divert some surface water," where "[t]he quantity of the water being diverted and trapped is so small that it would serve no practical purpose to require a permit for such work." The District specifically refers to and relies on the legislature's direction, noting in section 3.4.1(b) of the Applicant's Handbook that the language of the

agricultural exemption "is construed as set forth in" the legislature's conference committee report for the Henderson Act. (T: 511-12, 529-535).

The agricultural exemption contains a three-part test. To qualify for the agricultural exemption, a person must be engaged in the occupation of agriculture (the first prong of the test), the topographical alteration to be exempted from regulation under part IV of chapter 373 must be for "purposes consistent with the practice of agriculture" (the second prong), and the alteration "may not be for the sole or predominant purpose of impounding or obstructing surface waters" (the third prong). In this exception, Duda argues that the ALJ has misread the second prong of the agricultural exemption in section 373.406(2) of the Florida Statues.

The Board is required to follow its rules as written, not as the Board or someone else might wish to modify them. Boca Raton Artificial Kidney Center, Inc. v. Department of Health and Rehabilitative Services, 493 So.2d 1055 (Fla. 1st DCA 1986). After promulgating a rule that interprets a statute, the Board may not change its interpretation of that statute without first amending its rule pursuant to established rulemaking procedures. Cleveland Clinic Florida Hospital v. Agency for Health Care Administration, 679 So.2d 1237 (Fla. 1st DCA 1996), rev. denied, South Broward Hosp. Dist. v. Cleveland Clinic Florida Hosp., 695 So.2d 701 (Fla. 1997). The agricultural exemption rule in section 3.4.1(b), A.H., which interprets section 373.406(2) of the Florida Statutes, is one of the rules that Duda unsuccessfully challenged in DOAH Case No. 07-3545RU37 (that case is referenced at the end of FOF 37). Unless and until section 3.4.1(b) is either amended by the Board or declared invalid in a successful rule challenge, the Board must follow this rule that interprets section 373.406(2). Id. For

these reasons, the Board cannot grant this exception on the ground that the ALJ allegedly misread the second prong of the agricultural exemption.

With respect to Duda's second argument, there is competent substantial evidence to support this finding, as will be explained below. Under section 3.4.1(b), A.H., practices that are not described in "A Manual of Reference Management Practices for Agricultural Activities (November, 1978)" (SJ Ex. 163) "are presumed to be inconsistent with the practice of agriculture ... ." The activities consistent with the practice of agriculture are listed in Appendix A to that Manual and that same list appears in Appendix H of the Applicant's Handbook. (T: 519; SJ Ex. 162, 163). If a person engaged in the practice of agriculture does an activity that is not on the list, then that person bears the burden to demonstrate that the activity is consistent with the practice of agriculture. (T: 523). The draining of wetlands or ditching of wetlands is not listed in Appendix A to the Manual or in Appendix H, A.H. (SJ Ex. 162, 163).

There is competent substantial evidence that since at least 1984, the draining of wetlands without a permit has not been a "normal and customary" practice of Florida's farmers. Competent substantial evidence supporting this fact comes from several sources, starting with language used by the Florida Legislature in enactment of the Henderson Act, which was adopted in 1984. Ch 84-79, LOF, §1. The Henderson Act states, in pertinent parts: "agricultural development of this state . . . has necessitated the . . . drainage . . . of wetlands;" "the continued elimination or disturbance of wetlands in an uncontrolled manner will cause extensive damage . . . to the . . . values which Florida's remaining wetlands provide;" "it is the policy of this state to establish reasonable regulatory programs which provide for the preservation and protection of

Florida's remaining wetlands to the greatest extent practicable;" and, "continued agricultural activity is compatible with wetlands protection." Ch 84-79, LOF, §1. Thus, in 1984 the Florida Legislative established the policy of protecting wetlands from drainage by agriculture and other interests "to the greatest extent practicable."

As part of the Henderson Act, the Legislature adopted section 403.913, titled "Agricultural Activities." Ch 84-79, LOF, §1. Section 403.913(1) states, in pertinent part, that "continued agricultural activity is compatible with wetlands protection." In order for agricultural activity to be compatible with wetlands protection, there cannot be an exemption that allows farmers to drain wetlands without going through the permitting process. Such an exemption from permitting review would be contrary to "protection of Florida's remaining wetlands to the greatest extent practicable," as stated in the Henderson Act's preamble, unless that exemption did not allow farmers to drain wetlands.

Additional competent substantial evidence supporting this finding appears in the "best management practices" ("BMPs") published by the Florida Department of Agriculture and Consumer Services ("DACS"), and in BMPs in the Conservation Plan prepared for Duda's Cocoa Ranch by the United States Soil Conservation Service ("SCS"). None of DACS BMPs for "Florida Vegetable and Agronomic Crops," "Florida Sod," or "Florida Cow/Calf Operations" included draining wetlands as a "normal and necessary" activity that may qualify for the agricultural exemption. (SJ. Ex. 124-126). Instead, those DACS BMPs recommend avoiding wetland impacts and providing buffers around the wetlands. (T: 1272; SJ. Ex. 124-126). Furthermore, the BMPs in the Conservation Plan prepared by the SCS for the Cocoa Ranch did not list constructing

ditches in wetlands as part of the recommended activities. (T: 1106; Duda Ex. 78). While the BMPs in the SCS Conservation Plan for Duda's sod fields mentioned cleaning and maintaining ditches/canals, the BMPs for Duda's rangeland, where the enforcement ditches are located, did not mention ditches or drainage at all. (T: 949-950, 1106; Duda Ex. 78).

Furthermore, there is competent substantial evidence from several witnesses, including two of Duda's own witnesses, that the draining of wetlands (or ditching of wetlands) without a permit is inconsistent with the normal and customary practice of agriculture in Florida. (T: 908, 919-921, 1101-1102, 1106, 1268-1286; SJ Ex. 124-126, 193g; Duda Ex. 78). The ALJ found that the enforcement ditches drained 500 to 650 acres of wetlands (in FOF 35-36) and Duda's own witness admitted that "60 percent" of the wetlands identified under the current rule that have been drained by the enforcement ditches would qualify as wetlands under the rules that existed when the enforcement ditches were dug. (T: 1140-1141). Thus, competent substantial evidence supported the ALJs' findings in FOF 37.

With respect to Duda's third argument (that FOF 37 is "contradicted" by FOF 1-6), Duda argues that in FOF 2 the ALJ "expressly found ... that the ditches in question served an agricultural purpose...." Duda's argument is misplaced. It is clear from reading the section title for FOF 1-6 ("History of the Property") and the first sentence of FOF 2 ("[a]s early as the 1950's, ditches were dug on the Cocoa Ranch") that the ALJ was not referring to the enforcement ditches. The enforcement ditches were described later on, under a section titled "The Enforcement Ditches," as being excavated between 1987 and 1993. (FOF 32-33). Therefore, this exception is rejected.

Respondent's Exception No. 7

Duda takes exception to all of FOF 38, which states:

> Even if those activities might be considered to be consistent with the practice of agriculture, they had the predominant purposes of impounding or obstructing surface waters. The enforcement ditches obstructed surface waters in that they had the effect of more than incidentally diverting surface water from its natural flow patterns into the ditches, which drained the wetlands affected by the ditches. SJRWMD reasonably determined that the predominant purpose of the enforcement ditches was to obstruct surface waters. See Final Order, DOAH Case No. 07-3545RU.

In this exception, which relates to the third prong of the agricultural exemption, Duda first argues that this finding is not supported by competent substantial evidence. There is competent substantial evidence to support this finding. (T: 201-03, 715, 808-09, 815-16, 831-32, 864, 893, 1017, 1064, 1106-07, 1236-38, 1248-1252, 1255, 1257-63, 1292-93, 1296, 1307; SJ Ex. 193c, 193d, 193f; Duda Ex. 73). Moreover, under section 3.4.1(b), A.H., activities that create ditches are considered to be "for the sole or predominant purpose of obstructing or impounding surface waters." Thus, by rule the enforcement ditches are considered to be "for the sole or predominant purpose of obstructing or impounding surface waters." Section 3.4.1(b), A.H. Furthermore, under section 3.4.1(b), A.H., one of the practices described in "A Manual of Reference Management Practices for Agricultural Activities (November, 1978)" that is "considered as having impoundment or obstruction of surface waters as a primary purpose" is "[d]iversion, when such practice would cause diverted water to flow directly onto the property of another landowner." The water from the enforcement ditches drains off site to the St. Johns River (T: 1106-1107).

Duda next argues that the "only evidence in the record" was "that the only purpose of these ditches was to control the level of groundwater to allow or enhance agricultural production." Duda failed to provide any citations to the record to support this argument. The decision to accept the testimony of one witness over that of another and thereby weigh witness credibility is left to the discretion of the ALJ, and cannot be changed absent a complete lack of competent substantial evidence from which the finding of fact could be reasonably inferred. Perdue v. TJ Palm Associates, Ltd., 755 So.2d 660 (Fla. 4th DCA). As shown above, there is competent substantial evidence to support this finding, and thus the Board declines the invitation to reweigh the evidence. Notably, the District's engineer, Jeff Elledge, testified that to control the groundwater table a ditch must first drain the surface water. (T: 1237-1238, 1292-1293). Furthermore, Mr. Elledge testified that the enforcement ditches were not designed to control groundwater levels, but to obstruct surface waters and drain wetlands, because the ditches are irregularly spaced, random ditches instead of a network of closely spaced parallel ditches found in other areas of the Ranch where water table control is actually accomplished (like in the sod fields). (T: 1235, 1237-1238, 1261-1263, 1293). As Mr. Elledge testified, "They basically connected the dots of the various wetlands out there on the property in order to drain the wetlands." (T: 1237).

Finally, Duda argues that the ALJ's finding in FOF 38 that the enforcement ditches obstructed surface waters conflicted with his finding in FOF 37 that the enforcement ditches drained wetlands. There is no conflict. Both these findings appear within the second sentence of FOF 38 and the ALJ explains their connection: "The enforcement ditches obstructed surface waters in that they had the effect of more than

incidentally diverting surface water from its natural flow patterns into the ditches, which drained the wetlands affected by the ditches." Therefore, this exception is rejected.

Respondent's Exception No. 8

Duda takes exception to FOF 41, which states:

> In addition, Duda did not prove that none of the perimeter canal was dug deeper or wider in 2006 than initially permitted. To the contrary, it appears that Duda dug it deeper and wider in places.

Duda argues this finding "should be stricken because it is beyond the scope of the issues as framed by the parties in this proceeding" in the Joint Prehearing Stipulation. Duda argues that it was "not on notice that it needed to establish the original design parameters of the canal." As a result, Duda argues that "it would be denied due process" if it were found to have engaged in an "activity that was not alleged by the District" in the issues framed in the Joint Prehearing Stipulation. While not expressly stated in its exception, Duda appears to be claiming that the proceeding "did not comply with essential requirements of law," and that is a valid statutory basis for challenging this exception. However, as will be explained below, Duda's "beyond the scope of the issues" argument is misplaced.

FOF 41 appears under a section of the Recommended Order titled "Maintenance Exemption Defense." In the Joint Prehearing Stipulation, the parties expressly stipulated that "the maintenance exemption of 403.813(2)(g)" was one of Duda's two affirmative defenses to the District's claim "that Duda placed fill in wetlands in approximately 2006 without a permit next to the perimeter canal (F-12) and ditch F-17." (Joint Prehearing Stipulation at 6 ¶E.4). The parties also stipulated that it was Duda's burden to prove its affirmative defenses. (Joint Prehearing Stipulation at 7 ¶F.4.).

The maintenance exemption provision in section 403.813(2)(g) states that a permit is not required under chapter 373 of the Florida Statutes for the:

> maintenance of existing . . . irrigation and drainage ditches, provided that spoil material is deposited on a self-contained, upland spoil site which will prevent the escape of the spoil material into waters of the state. . . . In all cases, no more dredging is to be performed than is necessary to restore the . . . drainage ditch to its original design specifications. (Emphasis added).

Section 403.813(2)(g), F. S. (2007). Thus, to establish its entitlement to the maintenance exemption, Duda had to prove that "no more dredging [was] performed than is necessary to restore the . . . drainage ditch to its original design specifications." Section 403.813(2)(g), F. S. (2007). The ALJ simply found in FOF 41 that Duda had failed to prove one of the elements of its maintenance exemption affirmative defense, which the parties had expressly placed in issue. (Joint Prehearing Stipulation at 6 ¶E.4, at 7 ¶F.4., at 10 ¶G.11.(d)). There is competent substantial evidence to support this finding. (T: 138, 317-19; SJ Ex. 141). Therefore, since the ALJ's finding is squarely within the scope of the issues expressly raised in this proceeding, Duda's exception is rejected.

Respondent's Exception No. 9

Duda takes exception to the underlined part of FOF 42, which states:

> While geographically covering the entire Cocoa Ranch as it existed at the time, the 1994 permit only permitted the reservoir and works in the pump-drained area and, in the gravity-drained area, the works in the major canals specially identified and supported by appropriated documentation in Duda's application submittals. It did not permit the enforcement ditches. (Emphasis added).

Duda first argues that the underlined findings are not supported by competent substantial evidence. There is competent substantial evidence to support this finding – the express language of the 1994 permit. (T: 1286-88; SJ Ex. 47).

In 1994, based upon application documents submitted by Duda, the District issued a Management and Storage of Surface Waters permit to Duda ("the 1994 permit"). The 1994 permit specifically stated that it was:

> A Permit Authorizing: Construction of a 452 acre wet detention reservoir to serve 2935 acres of pumped drained pasture also for the continued operation of two pump stations which drain 1830 acres of pasture and drainage improvements recently completed in the major canals draining +/-25,000 acres of Ranch.

(SJ Ex. 47 at 1848). Duda contends that the 1994 permit provided after-the-fact authorization for the enforcement ditches, in addition to the separate and distinct "drainage improvements recently completed in the major canals," which are specifically identified in the permit's paragraph describing the activities authorized by the permit. The permit's description of the activities authorized does not include construction or operation of the enforcement ditches. The permit could not have included construction or operation of the enforcement ditches because, as found by the ALJ in FOF 30, the District did not learn of the enforcement ditches until 2006. (Notably, Duda did not take exception to FOF 30). Logically, the District could not have first learned of the enforcement ditches in 2006, yet have issued a permit twelve years earlier, authorizing the construction and operation of ditches that were at that time unknown. Notably, even one of Duda's own engineers, who had worked on the application that led to the 1994 permit, admitted that he was unaware of the enforcement ditches until August 2006. (T: 1085). Moreover, the ALJ also found that "[i]t was unreasonable for Duda to infer from the application process that the undisclosed enforcement ditches would be included in

the eventual [1994] permit or 'grandfathered'." (RO, FOF 45). Significantly, Duda did not take exception to this finding in FOF 45. By not taking exception to this finding, Duda has accepted that it is correct. Couch v. Commission on Ethics, 617 So.2d 1119, 1124 (Fla. 5th DCA 1993); Dept. of Corrections v. Bradley, 510 So.2d. 1122, 1124 (Fla. 1st DCA 1987). Therefore, competent substantial evidence supports the ALJ's correct determination that the 1994 permit did not authorize either construction or operation of the enforcement ditches.

In this exception (to FOF 42), Duda also incorporates by reference its arguments in Exception No. 17 to COL 62 and 63, and refers to supposedly "uncontradicted evidence." However, this exception (to FOF 42) does not contain a single citation to record evidence – "uncontradicted" or otherwise. For the reasons set forth above and in the Board's ruling on Exception No. 17 (regarding COL 62 and 63), this exception is rejected.

Respondent's Exception No. 10

Duda takes exception to FOF 43, which states:

> As part of the process leading to the 1994 Permit, the 1993 Consent Order addressed the detention pond and continued operation of the drainage pumps in the pump-drained part of the Ranch and the works in the major canals in the gravity-drained part of the Ranch. It did not address the undisclosed enforcement ditches.

FOF 43 appears in a section of the Recommended Order titled "Res Judicata Defense." In this exception, Duda argues that "the ALJ totally misses the point regarding what constitutes *res judicata*[6]." Duda also incorporates by reference its legal arguments to its

[6] The doctrine of *res judicata* generally provides that an existing final order or judgment rendered on the merits without fraud or collusion is conclusive of the same rights, questions, and facts placed in issue in a subsequent action, and thus bars relitigating those issues. See Black's Law Dictionary 1174 (5th Ed.).

Exception No. 18 to COL 64 and 65, wherein Duda argues that "the ALJ misconstrued the law regarding *res judicata* and applied the wrong test."

Duda's affirmative defense of *res judicata* relates to a 1993 Consent Order between Duda and St. Johns. (SJ Ex. 1) The ALJ concluded that, when its provisions are read together, the Consent Order could not "be reasonably understood as authorizing construction and operation of the enforcement ditches." (RO, COL 64). There is competent substantial evidence to support the finding that the 1993 Consent Order "did not address the undisclosed enforcement ditches" – the express language of the 1993 Consent Order. (SJ Ex. 1).

Both of Duda's *res judicata*-related exceptions are based on its view of the legal doctrine of *res judicata*, as opposed to the ALJ's view of the doctrine. The applicability of *res judicata* to the facts of this case is not a matter within the District's substantive jurisdiction, and the factual findings in FOF 43 are supported by competent substantial evidence. Thus, the Board cannot reject or modify these findings. Section 120.57(1)(l), F.S.; Deep Lagoon Boat Club, Ltd. v. Sheridan, 784 So.2d 1140 (Fla. 2d DCA 2001). For the reasons set forth above and in the Board's ruling on Exception No. 18 (regarding COL 64 and 65), this exception is rejected.

Respondent's Exception No. 11

Duda takes exception to FOF 46, which states:

> Even if it were reasonable for Duda to infer from the application process itself or from statements made by SJRWMD staff that existing enforcement ditches would be included in the eventual permit or "grandfathered," Duda did not prove that it actually relied on any such inference. To the contrary, Mr. Beasley testified that Duda believed the ditches being dug during the application process were exempt from permitting.

Duda argues that this finding is "not supported by the evidence, and is contrary to the evidence in the record." For the reason described below, the Board grants the exception in part. The last sentence of FOF 46 is modified as follows:

> To the contrary, Mr. Coultas ~~Beasley~~ testified that Duda believed the ditches being dug during the application process were exempt from permitting.

Based on a review of the entire record, it does not appear that Mr. Beasley, an employee of Duda, testified to that effect. However, there is competent substantial evidence to support a finding that another employee of Duda, Peter Coultas, testified to that same effect:

> Q The fact that the District was asking you to get a permit for digging out in the major canals never suggested to anyone at Duda the District would also want to know about any other changes to things contributing to those canals?
>
> A We were confounded because **we felt like all that work was exempt**. (Emphasis added).

(T: 1081). The misattribution of this statement to Mr. Beasley, instead of Mr. Coultas, is a scrivener's error by the ALJ that does not change the substance of this finding, which is supported by competent substantial evidence. (T: 1081). Correcting this scrivener's error will not change the outcome of the proceeding.

Notably, the only record evidence cited by Duda was to Duda Exhibit 24 – a December 22, 1992 request for additional information ("RAI") letter from the District to Duda. Apparently, Duda Exhibit 24 is the "contrary evidence" referenced by Duda. The ALJ clearly considered Duda Exhibit 24 because FOF 13 contains findings of fact regarding the December 22, 1992 RAI letter. (RO, FOF 13). Furthermore, the ALJ specifically found that "it was unreasonable for Duda to infer from the application

process or from statements made by SJRWMD staff that the enforcement ditches would be included in the eventual [1994] permit or 'grandfathered'." (RO, FOF 45). Significantly, Duda did not take exception to FOF 45. By not taking exception to this finding, Duda has accepted that it is correct. Couch v. Commission on Ethics, 617 So.2d at 1124; Dept. of Corrections v. Bradley, 510 So.2d at 1124.

Duda's argument regarding "contrary evidence" appears to be an implicit request that the Board reweigh the evidence. The Board may not reweigh the evidence. Gross v. Department of Health, 819 So.2d 997, 1001 (Fla. 5th DCA 2002). Therefore, this exception is rejected except for correcting the scrivener's error described above.

Respondent's Exception No. 12

Duda takes exception to the ALJ's FOF 47-51 and COL 68 regarding Duda's affirmative defense of "laches[7]". Laches can arise if, in addition to other essential elements, there is an unreasonable delay in asserting a known right. Life Marketing, Inc. v. A.I.G. Life Ins. Co., 588 So.2d 663 (Fla. 5th DCA 1991). Thus, to have established its affirmative defense of laches, Duda needed to prove, in addition to other elements, that the District had knowledge of Duda's enforcement ditch violations, but unreasonably delayed in beginning an enforcement action. Among other things, the ALJ found that District staff discovered the enforcement ditches in October of 2006. (RO, FOF 30). [8] On September 12, 2007, less than a year after the District first discovered the

[7] The doctrine of laches is generally defined as the failure to assert a right or claim for an unreasonable length of time, which causes prejudice to the adverse party (due to the passage of time and other circumstances), and acts a bar to the right or claim. See Black's Law Dictionary 787 (5th Ed.).

[8] Notably, Duda did not take exception to the correctness of FOF 30, therefore this finding is incontestable. Couch v. Commission on Ethics, 617 So.2d at 1124 (Fla. 5th DCA 1993); Dept. of Corrections v. Bradley, 510 So.2d. at 1124 (Fla. 1st DCA 1987).

enforcement ditch violations, District staff served the Administrative Complaint and Proposed Order on counsel for Duda. The passage of less than one year does not appear to be an unreasonable delay in beginning an enforcement action. The ALJ found that the facts did not support Duda's laches defense and he ultimately concluded that Duda failed to establish its affirmative defense of laches.

Duda's exception also focuses on the fact that the enforcement ditch violations occurred approximately 20 years ago. Duda implicitly argues that the ALJ misunderstands or misapplied the law of laches, because, according to Duda, "the test for laches" is that "the passage of time hindered the ability to defend against the charges." Application of the law of laches is not within the substantive jurisdiction of this agency. Since the Board may reject or modify only conclusions of law over which it has substantive jurisdiction, Duda's exception to the ALJ's application of the law of laches must be rejected. Section 120.57(1)(l), F.S.; Deep Lagoon Boat Club, Ltd. v. Sheridan, 784 So.2d 1140.

Duda also challenges the additional basis used by the ALJ to find against Duda on its laches defense. In FOF 51, the ALJ found:

> Finally, Duda did not prove that it has "clean hands" for its Laches defense. In light of the RAIs issued in the application process leading to the 1994 Permit, Duda had numerous opportunities if not direct requests for information about works on the gravity-drained part of the ranch, which would include the enforcement ditches. Duda also had an agreement with SJRWMD that it would advise SJRWMD of any new ditch construction. Not having disclosed this existence of the enforcement ditches, Duda cannot now claim "clean hands."

Duda argues that no competent substantial evidence supports the finding that "Duda also had an agreement with SJRWMD that it would advise SJRWMD of any new ditch construction." However, there is competent substantial evidence that supports the

existence of the agreement described in FOF 51, from the testimony of Duda employees Peter Coultas and Mike Howeller. (T: 969-70, 1108).[9] Therefore, this exception is rejected.

Respondent's Exception No. 13

Duda takes exception to FOF 53, which states:

> The alternative corrective actions are reasonable. Certainly, an after-the-fact permit and restoration of the 2006 perimeter ditch dredge and fill are reasonable. As to restoration of impacts from the earlier enforcement ditches, the evidence was not sufficient to specifically pinpoint all former wetlands, as defined before 1994, affected by the enforcement ditches. However, it is reasonable to infer that the depressions circles on SJRWMD Exhibit 139 were freshwater marches that were impacted by the enforcement ditches.

Duda's exception relates to the restoration associated with the enforcement ditches, not the restoration related to the 2006 wetland filling. Specifically, Duda asserts that the record contains no competent substantial evidence to show that the depressions circled in neon green on SJRWMD Exhibit 139 "were wetlands at the time the activities took place" or to show that they "were freshwater marshes that were impacted by the enforcement ditches."

There is competent substantial evidence that the freshwater marsh depressions circled on SJRWMD Exhibit 139[10] are wetlands, both historically and under current

[9] Duda also argues that "[a]ccording to Mr. Coultas, this 'agreement' to advise the District related only to structures, not ditches." (Emphasis in original). Duda cites to transcript pages 1082 through 1084, but those pages do not appear to support the purported statement of Coultas. Regardless, by arguing about evidence that is contrary to the competent substantial evidence, Duda is asking for a reweighing of the evidence, which is impermissible.

[10] Duda is correct that SJ Exhibit 139 was received into evidence for the limited purpose of showing the wetlands the District was seeking to have roller chopped if the ALJ recommended in the District's favor. Duda is also correct that the witness sponsoring SJ Exhibit 139, did not identify any of the circled areas as wetlands. However, another District witness (Karen Garrett-Kraus) testified that the circled areas on Exhibit 139 are wetlands or historically were wetlands in their un-impacted state. (T 336-39, 341). Thus, the evidence supporting the fact that the freshwater marshes are or were wetlands is not SJ Exhibit 139,

rules.[11] (T: 336-39, 341, 827; RO, FOF 32). There is also competent substantial evidence that the freshwater marshes were impacted by the enforcement ditches. (T: 181, 184-85, 188, 338-41; SJ Ex. 108-110).

The requirement for corrective action through roller-chopping does not hinge on the freshwater marshes having been classified as wetlands at the time the enforcement ditches were excavated. Rather, corrective action is required because the freshwater marshes are presently classified as wetlands and are currently being drained by the unpermitted enforcement ditches. Ever since the enforcement ditches were constructed, Duda has been operating them without a permit. (See rule 40C-4.041(2)(b)2, F.A.C., and the Board's discussion of Duda's Exception No. 5 above regarding the "forty acre project" permitting threshold). One consequence of operating a surface water management system without a required permit is that such operation subjects the system owner to corrective action for impacts related to the unauthorized operation. For the reasons set forth above and in the Board's ruling on Exception No. 5 (regarding FOF 35 and 36), this exception is rejected.

---

as claimed by Duda, but the testimony of Ms. Garrett-Kraus (at transcript pages 336-39, 341). The purpose of SJ Exhibit 139 was simply to identify the areas to be roller-chopped. The classification of those areas as wetlands was based on the testimony of Ms. Garrett-Kraus, not SJ Exhibit 139.

[11] At all times relevant in this case, wetlands have been defined by District rule as including freshwater marshes. In the version of rule 40C-4.021(11), F.A.C., that became effective December 7, 1983, the definition of "wetlands" stated, in pertinent part, "wetlands generally include swamps, marshes, bogs, and similar areas." (SJ Ex. 161, emphasis added). The current version of rule 40C-4.021 states, in the definition of "wetlands," "Florida wetlands generally include swamps, marshes, bay heads, bogs, cypress title marshes, mangrove swamps and other similar areas." Rule 40C-4.021(31), F.A.C. (SJ Ex. 161, emphasis added). Accordingly, the District's rules have always identified the type of freshwater marsh plant community circled on SJRWMD Exhibit 139 as "wetlands."

Respondent's Exception No. 14

Duda takes exception to COL 55, wherein the ALJ decided, as a conclusion of law, that the District's burden of proof in this enforcement case is only preponderance of the evidence. Duda stated:

> Duda does not believe the Board has authority to determine the applicable standard of proof in an enforcement proceeding, and that issues of standing of proof are not within the District's substantive jurisdiction; this exception is filed in an abundance of caution to avoid waiver of this issue for purposes of subsequent appeal.

In their response to this exception, District staff agreed with Duda "that the correct standard of proof is not within the District's substantive jurisdiction."

The Board finds that determining the correct standard of proof in an enforcement proceeding is not a matter within the District's substantive jurisdiction. Thus, the Board cannot reject or modify this conclusion of law. Section 120.57(1)(l), F.S.; Deep Lagoon Boat Club, Ltd. v. Sheridan, 784 So.2d 1140. Therefore, this exception is rejected.

Respondent's Exception No. 15

COL 57, which appears under the title heading "Proof of Alleged Violations," states:

> Based on the findings, it is concluded that Duda dredged and filled wetlands in and along the perimeter canal in 2006 and dug the enforcement ditches during 1987 through 1993 without the permits required under Florida Administrative Code Rules 40C-4.041 and 40C-44.041.

(Emphasis). Duda challenges COL 57 on two grounds. First, Duda takes exception to the precision of the statement "Duda dredged and filled wetlands in and along the perimeter canal in 2006." Duda reads this sentence to mean that Duda dredged wetlands in the perimeter canal. Notably, the Administrative Complaint did not allege

that Duda dredged wetlands in the perimeter canal, and the parties' Joint Prehearing Stipulation did not raise that as an issue.

In their response to this exception, District staff read this sentence to mean that "Duda, in 2006, both dredged in the perimeter canal and filled wetlands along the perimeter canal." (This reading of the sentence is consistent with the Administrative Complaint and the Joint Prehearing Stipulation). Moreover, District staff stated that they "would have no objection if the sentence is found to contain a scrivener's error and modified to assuage Duda's concern that the ALJ found Duda guilty of dredging wetlands in the perimeter canal, even though that was not an issue in the case." The Board finds that District's staff's reading of the challenged portion of the first sentence is a more reasonable interpretation and is consistent with the pleadings. Therefore, the Board reads the phrase "Duda dredged and filled wetlands in and along the perimeter canal in 2006" in COL 57 as meaning "Duda, in 2006, both dredged in the perimeter canal and filled wetlands along the perimeter canal," which makes Duda's first argument moot.

Second, Duda takes exception to the ALJ's conclusion that the enforcement ditches were dug "without the required permits," arguing that no permits would be required if, contrary to the ALJ's rulings, Duda prevailed on one or more of the various affirmative defenses it raised. Since the ALJ was correct in concluding that Duda failed to establish any of its affirmative defenses, permits for both the construction and operation of the enforcement ditches were required, and Duda's argument is without merit. Therefore, this exception is rejected.

Respondent's Exception No. 16

Duda takes exception to COL 59, which states:

> As found, Duda's dredge and fill of wetlands in and along the perimeter canal in 2006 and the enforcement ditches dug during 1987 through 1993 had the effect of draining wetlands and more-than-incidentally trapping, obstructing or diverting surface water. For those reasons, those activities were not exempt under section 373.406(2), Florida Statutes. See Final Order, DOAH Case No. 07-3545RU.

As grounds for this exception, Duda states that it is "for the same reasons set forth in the exception to Finding of Fact paragraphs 37 and 38, supra." Duda is seeking a different interpretation of section 373.406(2) of the Florida Statutes. The interpretation that Duda seeks would conflict with the District's interpretation of section 373.406(2) as set forth in a District rule – section 3.4.1(b), A.H.

Generally, the Board is free to reject or modify an ALJ's recommended conclusions of law over which the Board has substantive jurisdiction and may apply its own understanding and interpretation of law in its final order. See, Section 120.57(1)(l), F.S.; University Community Hosp. v. Dep't of Rehabilitative Serv., 610 So.2d 1342 (Fla. 1st DCA 1992); Harloff v. City of Sarasota, 575 So.2d 1324 (Fla. 2d DCA), rev. denied, 583 So.2d 1035 (Fla. 1991). The Board has substantive jurisdiction over COL 59 because the interpretation of section 373.406(2) is within the area of expertise of the Board and section 3.4.1(b), A.H., is a rule adopted by the Board. However, the Board is required to follow its rules as written, not as the Board or someone else might wish to modify them. Boca Raton Artificial Kidney Center, Inc. v. Department of Health and Rehabilitative Services, 493 So.2d 1055. After promulgating a rule that interprets a statute, the Board may not change its interpretation of that statute without first amending its rule pursuant to established rulemaking procedures. Cleveland Clinic

Florida Hospital v. Agency for Health Care Administration, 679 So.2d 1237. The agricultural exemption rule in section 3.4.1(b), A.H., which interprets section 373.406(2) of the Florida Statutes, is one of the rules that Duda unsuccessfully challenged in DOAH Case No. 07-3545RU (that case is referenced at the end of FOF 37, FOF 38, and COL 59). Unless and until section 3.4.1(b) is either amended by the Board or declared invalid in a successful rule challenge, the Board must follow this rule that interprets section 373.406(2). Id. Thus, the Board cannot grant this exception on the ground that the ALJ allegedly misinterpreted the agricultural exemption. For the reasons set forth in the Board's ruling on Exception Nos. 6 and 7 (regarding FOF 37 and 38), this exception is rejected.

Respondent's Exception No. 17

> Duda takes exception to COL 62 and 63, which state:
>
> 62. The language of the 1994 Permit is unambiguous with respect to what is authorized. See Centenial Mortgage, Inc. v. SG/SC, Ltd., 772 So. 2d 564, 565 (Fla. 1st DCA 2000)(internal citations omitted)(the existence of ambiguity in a written instrument is a question of law). Therefore, parole or extrinsic evidence in the form of staff RAI letters cannot vary or contradict the terms of the Governing Board's unambiguous permit). See Bucacci v. Boutin, 933 So. 2d 580, 583 (Fla. 3d DCA 2006); Jenkins v. Eckerd Corp., 913 So. 2d 43, 52 (Fla. 1st DCA 2005).
>
> 63. Based on the findings, it is concluded that the enforcement ditches dug by Duda during 1987 through 1993 were not authorized by the 1994 Permit.

Duda argues the ALJ "disallowed Duda's defense that its activities were subject to the surface water management permit issued to it in 1994 by the District" despite contrary evidence[12]. As discussed above in Respondent's Exception No. 9 (to FOF 42), there is

[12] The foundation for its arguments regarding contrary evidence appears in one sentence of the District's December 1992 RAI letter: "Modification of the water management system, as implied by Mr. Howeller's

competent substantial evidence to support this conclusion – the express language of the 1994 permit, and the ALJ's unchallenged finding that the District first learned of the enforcement ditches in 2006. (T: 1286-88; SJ Ex. 47; RO, FOF 30).

The ALJ considered all of the language in all of the District's RAIs and all of Duda's responses to those RAIs. (RO, FOF 9-14, COL 51). Duda's argument regarding the RAI letters appears to be an implicit request that the Board reweigh the evidence, something which the Board cannot do. Gross v. Department of Health, 819 So.2d at 1001.

As part of its argument in Exception No. 17, Duda characterizes the Recommended Order as concluding that "anything stated in an RAI is not binding." What the ALJ actually stated was very specific and very different: "evidence in the form of staff RAI letters cannot vary or contradict the terms of the Board's unambiguous permit." (RO, COL 62). The ALJ's statement is consistent with the Board's own rules that the Board, not District staff, decides what to authorize in a permit issued by the Board. In addition, the ALJ's statement is grounded on multiple provisions of the Applicant's Handbook that establish that the decision to approve or deny a rule 40-4 permit[13] (also called an "individual permit") rests solely with the Board (which receives the District staff's recommendations in the form of a technical staff report ("TSR")). Sections 5.0 - 5.5.3, A.H. (December 7, 1983) (SJ Ex. 162 at 4730-4735); Sections 5.0 - 5.5.2, A.H. (April 1, 1990) (SJ Ex. 162); Sections 5.0 - 5.5.2, A.H. (December 3, 2006) (SJ Ex. 162). Section 5.5.2, A.H., which has remained virtually unchanged since 1983,

---

submittal and Mr. Kamal's submittal requires the entire contiguous Ranch to be permitted." (Duda Ex. 24 at 660).

[13] This is the type of permit that Duda's activities required.

has clearly stated that the Board makes the permitting decision on rule 40-4 permit ("individual permit") applications:

> Upon presentation of an application, the Board will either approve the application, approve the application with modifications, deny the application, or continue the application for consideration at a later date within applicable time frames established by the provisions of chapter 120, F.S. (Emphasis added).

See Section 5.5.2, A.H. (December 7, 1983) (SJ Ex. 162 at 4734); Section 5.5.2, A.H. (April 1, 1990) (SJ Ex. 162); Section 5.5.2, A.H. (December 3, 2006) (SJ Ex. 162). For the reasons set forth above and in the Board's ruling on Exception No. 9 (regarding FOF 42), this exception is rejected.

Respondent's Exception No. 18

In its exception to COL 64 and 65 (regarding Duda's *res judicata* defense), Duda argues that "the ALJ misconstrued the law regarding *res judicata* and applied the wrong test." As explained in the Board's ruling on Exception No. 10 (regarding FOF 43), the applicability of *res judicata* to the facts of this case is not a matter within the District's substantive jurisdiction, and the factual findings in FOF 43 are supported by competent substantial evidence. Thus, the Board cannot reject or modify this conclusion of law. Section 120.57(1)(l), F.S.; Deep Lagoon Boat Club, Ltd. v. Sheridan, 784 So.2d 1140. For the reasons set forth above and in the Board's ruling on Exception No. 10 (regarding FOF 43), this exception is rejected.

Respondent's Exception No. 19

In its exception to COL 66 and 67, Duda argues the ALJ "improperly evaluated Duda's defense of estoppel" and "also applied the incorrect legal standard." The applicability of estoppel to the facts of this case is not a matter within the District's

substantive jurisdiction, and the factual findings in FOF 46 are supported by competent substantial evidence. Thus, the Board cannot reject or modify this conclusion of law. Section 120.57(1)(l), F.S.; Deep Lagoon Boat Club, Ltd. v. Sheridan, 784 So.2d 1140. For the reasons set forth above and in the Board's rulings on Exception No. 11 (regarding FOF 46) and Exception No. 17 (regarding COL 62 and 63), this exception is rejected.

Respondent's Exception No. 20

> Duda takes exception to the ALJ's Recommendation:
>
> Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Governing Board enter a Final Order requiring Duda to apply for the necessary after-the-fact permit and/or restore wetland impacts, as described in Findings 52-53, supra.

Duda's exception to the ALJ's Recommendation is a *pro forma* request that the Governing Board reject that recommendation if the Governing Board rejects the ALJ's conclusions that Duda violated District rules and also rejects the ALJ's conclusions that Duda failed to establish entitlement to any of its affirmative defenses. Since Duda's exceptions related to those issues were substantively rejected, its exception to the ALJ's Recommendation is also substantively rejected.

However, there are two points in the ALJ's "Recommendation" that are worth clarifying in this Final Order.[14] First, the ALJ's "Recommendation" to the Governing Board was that it enter a final order requiring Duda to implement the corrective actions sought by the District as described in FOF 52 and 53 . (RO at 28). The corrective

[14] An agency head may modify a recommended order even though no exceptions were filed by the agency. Winchester Gen. Hosp. v. Dep't of Health and Rehabilitative Serv., 419 So.2d 705 (Fla. 1st DCA 1982)

actions sought by the District for the violations established in this case were for Duda, within a reasonable time, to: (1) apply for and obtain an after-the-fact permit for the fill next to the perimeter canal and for the enforcement ditches; (2) remove the fill next to the perimeter canal and restore the wetlands upon which it was placed and fill in the enforcement ditches and restore, through roller-chopping, the freshwater marsh wetlands circled on SJRWMD Exhibit 139; or (3) a combination of after-the-fact permit and restoration. (RO, FOF 52 and 53; District's Proposed Recommended Order at 6 ¶12, at 13 ¶ 28, and at 45-46 Recommendation). This "after-the-fact permit" corrective action in the "Recommendation[15]" represents a departure from the Administrative Complaint. The Administrative Complaint, which did not mention the possibility of obtaining an after-the-fact permit in lieu of restoration, ordered Duda to take, among other things, the following corrective actions:

> The District proposes the following order in this matter:
>
> A. Respondent shall restore the Property to its pre-violation condition in accordance with the following restoration plan:
>
> 1. All ditches excavated without the requisite District authorization must be restored to their historic grade. These ditches are delineated in Exhibits 3 through 8. Any fill placed within adjacent wetlands must be used to fill the ditches or be removed and placed in a contained upland area. The wetland areas must be regraded to historic grade.
>
> 2. After the work in paragraph 1 is completed, the entirety of each wetland from which any of the ditches leads must be roller chopped.
>
> 3. The corrective actions outlined in paragraphs 1 and 2 above shall be completed within twenty-one (21) days of rendition of the final order. The historic grade is the elevation of the adjacent uplands or wetlands that have not been filled.

[15] This "after-the-fact permit" aspect of FOF 52-53 and the "Recommendation" is supported by competent substantial evidence. (T: 68, 74-75).

4. The restored wetland areas will be allowed to re-vegetate via natural recruitment for a period of one year following rendition of the final order. If, within one year, the wetland restoration areas have re-vegetated with at least 70% cover by desirable wetland species, no planting will be required. Desirable wetland species must be defined as those facultative wet and obligate plants listed in Chapter 62-340 of the Florida Administrative Code.

(Administrative Complaint at 5-6).

Second, the Recommendation references corrective actions described in FOF 53. In FOF 53, the ALJ found:

> The alternative corrective actions are reasonable. Certainly, an after-the-fact permit and restoration of the 2006 perimeter ditch dredge and fill are reasonable. As to restoration of impacts from the earlier enforcement ditches, the evidence was not sufficient to specifically pinpoint all former wetlands, as defined before 1994, affected by the enforcement ditches. However, it is reasonable to infer that the depressions circles on SJRWMD Exhibit 139 were freshwater marches that were impacted by the enforcement ditches.

Since the Recommendation references "SJRWMD Exhibit 139" with regard to the area to be roller-chopped, to avoid any confusion as to the areas to be roller-chopped SJRWMD Exhibit 139 will be attached to this Final Order and referenced in the Administrative Complaint. Thus, the language of the Administrative Complaint will be modified to clarify both these issues raised by the Recommendation. In all other respects, this exception is denied.

RULINGS ON DISTRICT'S EXCEPTION

District's Exception No. 1

The District takes exception to the first sentence of FOF 30 on the grounds that there is no competent substantial evidence to support the sentence as written. For the reason described below, the Board grants the exception. The first sentence of FOF 30 is modified as follows:

> In October 2006, while investigating the perimeter canal violations, SJRWMD staff reviewed aerial photographs from 1984 ~~1994~~ and 1995 and discovered that ditches had been excavated between those dates on various parts of the Cocoa Ranch not sold to SJRWMD.

There is no competent substantial evidence to support the reference to 1994 aerial photographs. The uncontroverted evidence shows that in October 2006 District staff reviewed aerial photographs dated 1984 and 1995. (T: 47). This appears to be a scrivener's error. Duda concurs with the District's exception. Correcting this scrivener's error will not change the outcome of the proceeding.

FINAL ORDER

ACCORDINGLY, IT IS HEREBY ORDERED:

The Recommended Order dated April 25, 2008, attached hereto as Exhibit A, is adopted in its entirety except as modified by the final action of the Governing Board of the St. Johns River Water Management District in the rulings on Duda's Exception No. 11 (FOF 46) and District's Exception No. 1 (FOF 30).[16] This Final Order also directs Duda to undertake and complete the corrective actions described in paragraph 52 of the Recommended Order in the following manner:

Duda is ordered to either: obtain an "after-the-fact" permit for the unauthorized activity; restore the wetlands impacted; or a combination of after-the-fact permit and restoration. In the case of the 2006 perimeter ditch dredge and fill, Duda shall restore the wetland area next to the perimeter ditch by removing the fill to an upland area and

[16] In addition, the Board also granted, in part, Duda's Exception No. 20 (Recommendation). The ruling on this exception did not result in a textual modification of the Recommended Order. The Recommended Order should be construed consistent with the Board's ruling on all of the exceptions.

returning the area beneath the fill to its historic grade (the elevation of the adjacent wetlands that have not been filled), to be followed by monitoring and, if necessary, planting and further monitoring in accordance with paragraphs A.4 through A.11 of the Administrative Complaint[17], attached hereto and incorporated herein as Exhibit "B." In the case of the earlier enforcement ditches, which are specifically identified in Recommended Order paragraph 33 and are among the ditches delineated in Exhibits 3 through 8 of the Administrative Complaint, the restoration shall consist of filling the enforcement ditches and, after filling the ditches, roller-chopping shrubby vegetation that invaded former freshwater marshes after the ditches altered hydro-periods. The former freshwater marshes to be roller-chopped are the depressions circled in green on SJRWMD Exhibit 139.

All restoration construction activity (filling of ditches, roller-chopping, and removal of fill material from wetlands) shall be completed by Duda within 90 days of the rendition of this order, except restoration related to those unauthorized activities for which Duda applies for and receives an after-the-fact permit. Any "after-the-fact" permit application for the unauthorized activities must be filed with the District within 21 days of the rendition of this order. If Duda applies for an "after-the-fact" Environmental Resource Permit for any of the unauthorized activities and later chooses to withdraw any of the activities from that application, or withdraws the entire application, or the application is partially or wholly denied, then Duda must restore the unpermitted activities, completing the restoration construction activity within 90 days of withdrawing the permit application,

[17] Duda is referred to as "Respondent" in the Administrative Complaint. Any references to "Respondent" in the Administrative Complaint shall mean Duda.

withdrawing activities from the permit application, or denial, in whole or in part, of the permit application.

Paragraph C of the Administrative Complaint, attached as Exhibit "B," is specifically incorporated by reference for purposes of providing authorized District representatives access to the Property for determining compliance with the terms of this Order. A color copy of SJRWMD Exhibit 139 (also known as "SJ Ex. 139"), a composite exhibit consisting of seven (7) pages, is attached hereto and incorporated herein as Exhibit "C." The timeframes to undertake and complete the corrective actions set forth herein shall commence on the date of rendering of this Final Order.

DONE AND ORDERED this 11th day of June, 2008, in Palatka, Florida.

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT

BY: _____
KIRBY B. GREEN III
EXECUTIVE DIRECTOR

RENDERED this 11 day of June, 2008.

BY: Robert L. Nawrocki
ROBERT NAWROCKI
DISTRICT CLERK

Copies to:

William H. Congdon, Esquire
Timothy A. Smith, Esquire
4049 Reid Street
Palatka, FL 32177-2529

Kenneth G. Oertel, Esq.
M. Christopher Bryant, Esq.
Oertel, Fernandez, Cole & Bryant, P.A.
P. O. Box 1110
Tallahassee, FL 32302-1110