STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

JACQUELINE LANE, FRIENDS OF PERDIDO BAY, INC. and JAMES LANE,	)	
Petitioners,	)	
vs.	)	**OGC CASE NOS. 08-1964, 08-2074**
	)	**DOAH CASE NOS. 08-3922, 08-3923**
INTERNATIONAL PAPER COMPANY and DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
Respondents.	)	

FINAL ORDER

On January 27, 2010, an Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH") submitted his Recommended Order ("RO") to the Department of Environmental Protection ("DEP" or "Department") in the above captioned proceedings. A copy of the RO is attached hereto as Exhibit A. The RO indicates that copies were sent to counsel for the Petitioners, Friends of Perdido Bay, Inc., and James Lane ("FOPB") and to the Petitioner, Jacqueline Lane ("Lane"). Copies of the RO were also sent to counsel for the Respondents, International Paper Company ("IP") and the Department. The Petitioner Lane filed her Exceptions to the RO on February 11, 2010. The Respondents IP and the Department filed separate responses to the Petitioner Lane's Exceptions on February 22, 2010. This matter is now before me for final agency action.

BACKGROUND

IP owns and operates the integrated unbleached kraft paper mill in Cantonment. The mill's wastewater effluent is discharged into Elevenmile Creek, which is a tributary of Perdido Bay. In these proceedings, the Department proposed to issue a wastewater operation permit accompanied by a consent order which allows for a compliance schedule under Section 403.088(2)(e) and (f), Florida Statutes. The permit would also constitute IP's National Pollutant Discharge Elimination System ("NPDES") permit[1] authorizing IP to relocate its present discharge in Elevenmile Creek to an existing wetland area owned by IP, known as the "Wetland Tract." Two small lakes, known as Tee and Wicker Lakes, are located within the Wetland Tract. The consent order would authorize IP to operate during an interim period when it is unable to meet permit limits (and, consequently, certain water quality standards) for specific conductance, dissolved oxygen, pH, and turbidity.

In an earlier proceeding, IP applied for a permit and associated authorizations for a similar project at the same discharge location. Following an administrative hearing and a recommended order of denial, the Department entered a Final Order denying that application. *See Lane v. Dep't of Envtl. Protection*, OGC Case No. 04-1202, 29 F.A.L.R. 4063, 2007 WL 2363044 (Fla. DEP 2007). In the prior Final Order, the Department adopted some, but not all, of the ALJ's findings that IP had failed to demonstrate reasonable assurances of compliance with the applicable statutes and rules. The ALJ's recommendation and the Final Order in OGC Case No. 04-1202 were explicitly based

[1] The Department is the state agency authorized under Chapter 403, Florida Statutes, to regulate discharges of industrial wastewater to waters of the state. Under an approval from the United States Environmental Protection Agency, the Department administers the NPDES permitting program in Florida. *See* 60 Fed. Reg. 25718 (May 12, 1995).

on a lack of information to support a finding of reasonable assurances. In that case the Petitioners did not prove that certain adverse consequences would arise, however, the Department adopted the critical findings that information was lacking on (a) the potential effect of the discharge on fauna within the Wetland Tract; and (b) the sufficiency of baseline data on Tee and Wicker Lakes. *Id.* OGC Case No. 04-1202 at pp. 21, 24. In the instant proceedings, the ALJ took official recognition of the prior Final Order in an order entered on June 19, 2009.

After the Final Order in OGC Case No. 04-1202, IP conducted additional studies, modified its project, and re-applied for the four authorizations. During the course of that application, IP evaluated the effects of the planned discharge on pitcher plant habitat, modified the planned flow in the Wetland Tract to reduce adverse effects on that habitat, and committed to the enhancement and preservation of additional habitat through conservation easements. (RO ¶¶ 38-39). IP collected and analyzed new data collected from a pilot wetland, which simulated the effect of IP's effluent. (RO ¶¶ 61-62). IP also collected new data reflecting reductions in pollutant loading from recent process changes and developed new technical solutions (most notably, additional process changes which would enable it to lower specific conductance) which would enable it to achieve water quality standards at the end of the proposed compliance schedule, without a technological need for any additional moderating provisions in effect at that future time.

On July 18, 2008, the Department published notice of its intent to issue an NPDES permit, a Consent Order, an exception for the experimental use of wetlands, and a variance for IP's paper mill in Cantonment. Jacqueline Lane filed a petition

challenging the four authorizations. FOPB and James Lane filed a similar petition. The Department referred the petitions to DOAH and they were consolidated for hearing. Prior to the final hearing in this case, IP withdrew its applications for the exception and the associated variance.

Prior to the final hearing in this case, the Petitioners filed prehearing motions arguing different theories on the basis of res judicata and collateral estoppel. The Petitioner Lane argued, in a motion to dismiss, that IP should be barred by res judicata from demonstrating reasonable assurances. IP responded to Lane's position by arguing that res judicata would not prohibit the second application because IP provided new information supporting its application. The ALJ denied Lane's motion to dismiss and issued an Order on June 2, 2009, limiting the case to two general factual issues:

> 1. Whether the revised Consent Order and proposed permit are valid with respect to the effects of the proposed discharge on the wetland system, including Tee and Wicker Lakes, and with respect to any modifications to the effluent distribution and treatment functions of the wetland system following the Final Order issued in DOAH Case No. 05-1609; and
>
> 2. Whether the December 2007 report of the Livingston team demonstrates that the WQBELS[2] are inadequate to prevent water quality violations in Perdido Bay.

RO ¶ 46.

The final hearing was conducted on June 22-24, 30, and July 1, 20-21, 2009, in Pensacola, Florida. The twelve-volume hearing transcript was filed with DOAH, and the parties filed proposed recommended orders. The ALJ subsequently issued his RO on January 27, 2010.

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[2] Water Quality Based Effluent Limits ("WQBELs").

RECOMMENDED ORDER

In the RO the ALJ recommended that the Department enter a final order granting NPDES Permit No. FL0002526 and approving Consent Order No. 08-0358. (RO p. 35). The ALJ determined that IP presented new evidence on the biological community of the wetlands in the effluent distribution system (Wetland Tract) and provided reasonable assurance that IP's effluent would not adversely affect the biological community. (RO ¶ 89). The ALJ found that IP demonstrated that its effluent would enhance the biological diversity and productivity of the wetlands such that granting the permit would be in the public interest. (RO ¶ 92). He determined that the proposed project is important and beneficial to the public health, safety, and welfare because (1) economic benefits would accrue to the local and regional economy from the operation of IP's paper mill, (2) Elevenmile Creek would be set on a course of recovery, (3) the wetlands of the effluent distribution system would become a site of greater biological diversity and productivity, (4) the environmental health of Perdido Bay would be improved, (5) the Department's decades-long enforcement action against IP would be concluded, (6) substantial areas of important habitat would be set aside for permanent protection, and (7) the effluent distribution system would yield important information on a multitude of scientific topics that were debated by the parties. (RO ¶ 74).

He further concluded that the Petitioners failed to prove that any new data in the December 2007 report of the Livingston team demonstrate that the proposed WQBELS are inadequate to prevent water quality violations in Perdido Bay. (RO ¶ 90). The ALJ ultimately concluded that the preponderance of the record evidence established

reasonable assurance that IP's proposed project would comply with all applicable laws and that the Consent Order established reasonable terms and conditions to resolve the Department's enforcement action against IP for past violations. (RO ¶¶ 78, 80-85, 91-93, 97-100).

The ALJ found that the Department's prior Final Order of August 8, 2007, determined that IP had provided reasonable assurance that the NPDES permit, Consent Order, exception for the experimental use of wetlands, and variance were in compliance with all applicable statutes and rules, except for the following area: the evidence presented by IP was insufficient to demonstrate that IP's wastewater effluent would not cause significant adverse impact to the biological community of the wetland tract, including Tee and Wicker Lakes. (RO ¶ 45). Thus, based on the doctrine of collateral estoppel, the ALJ narrowed the disputed issues in these proceedings. (RO ¶ 86). The factual issues were limited to whether IP's effluent would adversely affect the biological community of the effluent distribution system, including Tee and Wicker Lakes, and whether the December 2007 report of the Livingston team demonstrates that the WQBELs are inadequate to prevent water quality violations in Perdido Bay. (RO ¶ 87). The ALJ concluded that the Petitioners were barred by collateral estoppel from re-litigating their opinions about physical and chemical processes that were rejected in the prior DOAH hearing. (RO ¶¶ 45-46, 86, 88).

STANDARDS OF REVIEW OF DOAH RECOMMENDED ORDERS

Section 120.57(1)(l), Florida Statutes, prescribes that an agency reviewing a recommended order may not reject or modify the findings of fact of an ALJ, "unless the agency first determines from a review of the entire record, and states with particularity in

the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2009); *Charlotte County v. IMC Phosphates Co.*, 18 So.3d 1089 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So.2d 61 (Fla. 1st DCA 2007). The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value or weight of the evidence. Rather, "competent substantial evidence" refers to the existence of some evidence (quantity) as to each essential element and as to its admissibility under legal rules of evidence. *See e.g., Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm'n*, 671 So.2d 287, 289 n.3 (Fla. 5th DCA 1996).

A reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See e.g., Rogers v. Dep't of Health,* 920 So.2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep't of Envtl. Prot.,* 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands County Sch. Bd.,* 652 So.2d 894 (Fla. 2d. DCA 1995). These evidentiary-related matters are within the province of the ALJ, as the "fact-finder" in these administrative proceedings. *See e.g., Tedder v. Fla. Parole Comm'n,* 842 So.2d 1022, 1025 (Fla. 1st DCA 2003); *Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Also, the ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. *See e.g., Peace River/Manasota Regional Water Supply Authority v. IMC Phosphates Co.*, 18 So.3d 1079, 1088 (Fla. 2d DCA 2009); *Collier Med. Ctr. v. State, Dep't of HRS*, 462 So.2d 83, 85 (Fla. 1st DCA 1985); *Fla. Chapter of Sierra Club v.*

Orlando Utils. Comm'n, 436 So.2d 383, 389 (Fla. 5th DCA 1983). An agency has no authority to make independent or supplemental findings of fact. *See, e.g., North Port, Fla. v. Consol. Minerals*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994).

Section 120.57(1)(l), Florida Statutes, authorizes an agency to reject or modify an ALJ's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." *See Barfield v. Dep't of Health,* 805 So.2d 1008 (Fla. 1st DCA 2001); *L.B. Bryan & Co. v. Sch. Bd. of Broward County*, 746 So.2d 1194 (Fla. 1st DCA 1999); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So.2d 1140 (Fla. 2d DCA 2001). If an ALJ improperly labels a conclusion of law as a finding of fact, the label should be disregarded and the item treated as though it were actually a conclusion of law. *See, e.g., Battaglia Properties v. Fla. Land and Water Adjudicatory Comm'n*, 629 So.2d 161, 168 (Fla. 5th DCA 1994). However, neither should the agency label what is essentially an ultimate factual determination as a "conclusion of law" in order to modify or overturn what it may view as an unfavorable finding of fact. *See, e.g., Stokes v. State, Bd. of Prof'l Eng'rs*, 952 So.2d 1224 (Fla. 1st DCA 2007).

An agency's review of legal conclusions in a recommended order, are restricted to those that concern matters within the agency's field of expertise. *See, e.g., Charlotte County v. IMC Phosphates Co., 18 So.3d 1089 (Fla. 2d DCA 2009); G.E.L. Corp. v. Dep't of Envtl. Prot.*, 875 So. 2d 1257, 1264 (Fla. 5th DCA 2004). An agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction and expertise. *See, e.g., Pub. Employees Relations Comm'n v. Dade County Police Benevolent Ass'n*, 467 So.2d 987, 989 (Fla. 1985); *Fla. Public Employee Council, 79 v. Daniels*, 646 So.2d 813, 816 (Fla. 1st DCA 1994). Considerable deference should be

accorded to these agency interpretations of statutes and rules within their regulatory jurisdiction, and such agency interpretations should not be overturned unless "clearly erroneous." *See, e.g., Falk v. Beard*, 614 So.2d 1086, 1089 (Fla. 1993); *Dep't of Envtl. Regulation v. Goldring*, 477 So.2d 532, 534 (Fla. 1985). Furthermore, agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be the only reasonable interpretations. It is enough if such agency interpretations are "permissible" ones. *See, e.g., Suddath Van Lines, Inc. v. Dep't of Envtl. Prot.,* 668 So.2d 209, 212 (Fla. 1st DCA 1996). The Department has substantive jurisdiction over the statutes and rules governing wastewater operation permits in Part I of Chapter 403, Florida Statutes, and the rules promulgated thereunder.

However, agencies do not have jurisdiction to modify or reject rulings on the admissibility of evidence. Evidentiary rulings of the ALJ that deal with "factual issues susceptible to ordinary methods of proof that are not infused with [agency] policy considerations," are not matters over which the agency has "substantive jurisdiction." *See Martuccio v. Dep't of Prof'l Regulation*, 622 So.2d 607, 609 (Fla. 1st DCA 1993); *Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985); *Fla. Power & Light Co. v. Fla. Siting Bd.*, 693 So.2d 1025, 1028 (Fla. 1st DCA 1997). Evidentiary rulings are matters within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. *See Martuccio,* 622 So.2d at 609. Agencies do not have the authority to modify or reject conclusions of law that apply general legal concepts typically resolved by judicial or quasi-judicial officers. *See, e.g., Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140, 1142 (Fla. 2d DCA 2001).

RULINGS ON EXCEPTIONS

The case law of Florida holds that parties to formal administrative proceedings must alert reviewing agencies to any perceived defects in DOAH hearing procedures or in the findings of fact of ALJs by filing exceptions to DOAH recommended orders. *See, e.g., Comm'n on Ethics v. Barker,* 677 So.2d 254, 256 (Fla. 1996); *Henderson v. Dep't of Health, Bd. of Nursing,* 954 So.2d 77 (Fla. 5th DCA 2007); *Fla. Dep't of Corrs. v. Bradley*, 510 So.2d 1122, 1124 (Fla. 1st DCA 1987). Having filed no exceptions to certain findings of fact the party "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Envtl. Coalition of Fla., Inc. v. Broward County*, 586 So.2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Medical Ctr., Inc. v. State of Fla., Agency for Health Care Admin.,* 847 So.2d 540, 542 (Fla. 4th DCA 2003). However, even when exceptions are not filed, an agency head reviewing a recommended order is free to modify or reject any erroneous conclusions of law over which the agency has substantive jurisdiction. *See* § 120.57(1)(l), Fla. Stat. (2009); *Barfield v. Dep't of Health,* 805 So.2d 1008 (Fla. 1st DCA 2001); *Fla. Public Employee Council, 79 v. Daniels*, 646 So.2d 813, 816 (Fla. 1st DCA 1994).

Finally, in reviewing a recommended order and any written exceptions, the agency's final order "shall include an explicit ruling on each exception." *See* § 120.57(1)(k), Fla. Stat. (2009). However, the agency need not rule on an 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." *Id.*

RULINGS ON LANE'S EXCEPTIONS TO THE RECOMMENDED ORDER

The Petitioner Lane filed fifty numbered exceptions to the RO. The exceptions are mainly categorized to correspond with the sections of the RO. However, my rulings below will consolidate some of Lane's categories where logical and appropriate.

Outstanding legal issues surrounding this case

First legal issue: Should collateral estoppel have barred any further discussion about International Paper's ("IP") effects on the biological community in the wetland? (Lane Exception Nos. 1.A., 17, 19, 21, 22, 23, 24, 25, 32, 34, 35, 36, 37, 38, 39, 40, 41, 43, 47, 48, 49).

The Petitioner Lane takes exception to the ALJ's rulings on various prehearing motions where he denied her request to apply the doctrines of *res judicata* and *collateral estoppel* to bar IP's second permit application; and he granted IP's request to apply the doctrine of *collateral estoppel* to limit the disputed factual issues to those he outlined in Finding of Fact 46 of the RO.[3]

Under Section 120.57(1)(l), Florida Statutes, I am only authorized to reject or modify an ALJ's conclusions of law and interpretations of administrative rules over which the agency has substantive jurisdiction. *See Barfield v. Dep't of Health,* 805 So.2d 1008 (Fla. 1st DCA 2001); *L.B. Bryan & Co. v. Sch. Bd. of Broward County*, 746 So.2d 1194 (Fla. 1st DCA 1999); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So.2d 1140 (Fla. 2d DCA 2001). Furthermore, I do not have the authority to modify or reject conclusions of law that apply general legal concepts, such as *res judicata* and *collateral*

[3] The ALJ entered Orders on August 28, 2008; September 16, 2008; October 14, 2008; July 23, 2009.

estoppel, typically resolved by judicial or quasi-judicial officers. *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140, 1142 (Fla. 2d DCA 2001).

The Petitioner Lane also argues that "[a]s a result of the uncertainty about what issues had been previously litigated and what issues hadn't, confusing and unfair rulings to the Petitioners resulted." *See* Lane Exceptions at page 6. It is clear under the applicable standard of review that I do not have jurisdiction to modify or reject rulings on the admissibility of evidence. Evidentiary rulings are matters within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. *See Martuccio v. Dep't of Prof'l Regulation*, 622 So.2d 607, 609 (Fla. 1st DCA 1993); *Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985).

The ALJ narrowed the disputed factual issues by applying the general legal doctrine of *collateral estoppel* because the same parties previously litigated factual issues associated with IP's proposed project in DOAH Case No. 05-1609. (RO ¶ 86). The doctrine of collateral estoppel - which is also known as issue preclusion - bars relitigation of the same issues between the same parties in connection with a different cause of action. The purpose of the doctrine of issue preclusion is to prevent the repetitious litigation of what is essentially the same dispute. The essential elements of the doctrine are that the parties and issues are identical and that the particular matter was fully litigated and determined in a contest that results in a final decision. *See Dep't of Health and Rehab. Services v. B.J.M.*, 656 So. 2d 906 (Fla. 1995). The application of collateral estoppel may be avoided by a showing of a material change in circumstances. *M.C.G. v. Hillsborough Cty. School Bd.*, 927 So. 2d 224 (Fla. 2d DCA 2006).

The ALJ did not apply the doctrine of *res judicata* to bar IP's second permit application since he clearly concluded that IP proved "new facts, changed conditions, or additional submissions" in support of its second application. *See Thomson v. Dep't of Envtl. Regulation*, 511 So. 2d 989, 991 (Fla.1987); *University Hosp., Ltd, v. Agency for Health Care Admin.*, 697 So. 2d 909, 912 (Fla. 1st DCA 1997).

In Lane Exception Nos. 17, 19, 21, 22, 23, 24, 25, 32, 34, 35, 36, 37, 38, 39, 40, 41, 43, 47, 48, and 49, she reiterates her arguments regarding the collateral estoppel effect of the prior Final Order in OGC Case No. 04-1202. As I've explained above I do not have the authority to modify or reject the ALJ's conclusions of law where he applies this general legal concept. *See Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140, 1142 (Fla. 2d DCA 2001). Lane's Exceptions also object to specific findings in the RO, challenging the sufficiency of evidence to support those findings, arguing the weight of the evidence, and requesting that I make alternative findings in this Final Order.

A reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See e.g., Rogers v. Dep't of Health,* 920 So.2d 27, 30 (Fla. 1st DCA 2005). These evidentiary-related matters are within the province of the ALJ, as the "fact-finder" in these administrative proceedings. *See e.g., Tedder v. Fla. Parole Comm'n,* 842 So.2d 1022, 1025 (Fla. 1st DCA 2003); *Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Also, the ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence

of record supporting this decision. *See e.g., Peace River/Manasota Regional Water Supply Authority v. IMC Phosphates Co.,* 18 So.3d 1079, 1088 (Fla. 2d DCA 2009); *Collier Med. Ctr. v. State, Dep't of HRS*, 462 So.2d 83, 85 (Fla. 1st DCA 1985); *Fla. Chapter of Sierra Club v. Orlando Utils. Comm'n*, 436 So.2d 383, 389 (Fla. 5th DCA 1983). I conclude, as detailed below, that the ALJ's factual findings, which underlie his application of the general legal doctrines of *collateral estoppel* and *res judicata*, are supported by competent substantial record evidence.

Therefore, based on the foregoing, Lane's Exception No. 1.A. is denied.

Exception No. 17: Lane takes exception to Finding of Fact 47 in the RO. She argues that "the issues raised by Petitioners and the evidence presented should not have been barred by collateral estoppel." *See* Lane Exceptions at page 15. Based on the foregoing and my ruling on Lane's Exception No. 1.A., this Exception is denied.

Exception No. 19: Lane takes exception to Finding of Fact 49 in the RO. The factual findings in paragraph 49 are supported by competent substantial record evidence. [Lane T. XI p. 1472; White T. X pp. 1331-1353; Nutter T. III p. 427; Pruitt T. IV pp. 606-609 and T. XII pp. 1567-1574, 1582-1584.] Contrary to Lane's argument, Dr. White was allowed to testify about his projections on the effects of BOD (Biological Oxygen Demand). [White T. X pp. 1331-1353.] The ALJ was free to reject Dr. White's theory on that topic, and instead to attach more weight to the contrary evidence offered by Dr. Nutter and Dr. Pruitt. *See e.g., Peace River/Manasota Regional Water Supply Authority v. IMC Phosphates Co.,* 18 So.3d 1079, 1088 (Fla. 2d DCA 2009); *Collier Med. Ctr. v. State, Dep't of HRS*, 462 So.2d 83, 85 (Fla. 1st DCA 1985).

Therefore, this exception is denied. To the extent this exception also relates to the ALJ's application of the legal doctrine of *collateral estoppel*, it is denied.

Exception No. 21: Lane takes exception to Finding of Fact 58 in the RO on the bases that "[t]he question about specific conductance ... should have been barred by collateral estoppel;" and that the second sentence is not based on competent substantial evidence. *See* Lane Exceptions at pages 17-18. Contrary to Lane's argument, the second sentence of paragraph 58 is supported by competent substantial evidence, including the testimony of Dr. Mike Steltenkamp. [T. I p. 6365, T. XII pp. 1627-1628]. Based on the foregoing, this exception is denied. To the extent this exception also relates to the ALJ's application of the legal doctrine of *collateral estoppel*, it is denied.

Exception No. 22: Lane takes exception to Finding of Fact 59 in the RO on the basis that the "reference to what happened after conversion to brown paper should be struck because this was an issue which was barred ...." *See* Lane's Exceptions at page 18. Finding of Fact 59 is supported by competent substantial record evidence. [Steltenkamp T. I pp. 67-68; Pruitt T. IV pp. 627-628]. Based on the foregoing, this exception is denied.

Exception No. 23: Lane takes exception to Finding of Fact 62 in the RO on the basis that "[r]eferences to the pilot wetland should have been barred from this hearing due to collateral estoppel." *See* Lane's Exceptions at page 18. The competent substantial record evidence shows that the ALJ *sua sponte* prohibited testimony of prior studies on the pilot wetlands (i.e., before the formal hearing in OGC Case No. 04-1202). [T. VI pp. 832-834]. As a result, the testimony in the instant proceedings was based

solely on new studies and new information collected after the entry of the Final Order in OGC Case No. 04-1202. [Bays T. VI pp. 831-834].

Based on the foregoing, this exception is denied. To the extent this exception also relates to the ALJ's application of the legal doctrine of *collateral estoppel*, it is denied.

Exception No. 24: Lane takes exception to Finding of Fact 63 on the bases that it is not supported by competent substantial evidence and "should be struck because the effect of salts in IP's effluent on the wetland has already been litigated ..." *See* Lane's Exceptions at page 19. Contrary to Lane's assertion this finding of fact is supported by the expert testimony of Dr. Bruce Pruitt [T. XII at 1561-1565]. Therefore, based on the foregoing, this exception is denied.

Exception No. 25: Lane takes exception to Finding of Fact 64 in the RO on the same bases as Exception No. 24. This finding of fact is supported by the expert testimony of Dr. Bruce Pruitt and Dr. Robert Livingston. [Pruitt T. XII pp. 1561-1566; Livingston T. II p. 276]. Therefore, based on the foregoing, this exception is denied.

Exception No. 32: Lane takes exception to Finding of Fact 72 in the RO. Lane's exception argues that the ALJ did not allow the Petitioners to submit certain evidence since "the matter was collateral estoppel." *See* Lane's Exceptions at page 22. As outlined above the evidentiary and procedural rulings of the ALJ are not within my substantive jurisdiction. *See, e.g., Lane v. Dep't of Envtl. Protection*, OGC Case No. 04-1202, 29 F.A.L.R. 4063, 4068 (Fla. DEP 2007), *citing Martuccio v. Dep't of Professional Regulation*, 622 So. 2d 607 (Fla. 1st DCA 1993). Therefore, based on the foregoing, Lane's Exception No. 32 is denied.

Exception No. 34: Lane takes exception to Finding of Fact 74 in the RO on the basis that "the issue is collateral estoppel and should not have been allowed to be re-litigated." *See* Lane's Exceptions at page 23. Based on the foregoing, this exception is denied.

Exception No. 35: Lane takes exception to Finding of Fact 75 in the RO on the basis that "the issue is collateral estoppel and should have been barred from re-litigation." *See* Lane's Exceptions at page 23. Based on the foregoing, this exception is denied.

Exception No. 36: Lane takes exception to Finding of Fact 76 in the RO on the basis that "the issue is collateral estoppel and should have been barred from further litigation." *See* Lane's Exceptions at page 23. Based on the foregoing, this exception is denied.

Exception No. 37: Lane takes exception to Finding of Fact 78 in the RO on the basis that "the issue is collateral estoppel." Lane also argues that the finding is not supported by competent substantial evidence. *See* Lane's Exceptions at pages 23-24. In Finding of Fact 78 the ALJ ultimately determined that:

> 78. The preponderance of the record evidence establishes reasonable assurance that IP's proposed project would comply with all applicable laws and that the Consent Order establishes reasonable terms and conditions to resolve the Department's enforcement action against IP for past violations.

Lane argues that this finding "should be struck" because there is "no competent substantial evidence to back up the fact that the Consent order is a resolution of enforcement actions for past violations," and the issue "should be barred by collateral estoppel." *See* Lane's Exceptions at pages 23-24. Contrary to Lane's argument the

proposed consent order (Joint Ex. 4) states that it is entered between the Department and IP "to reach settlement of certain matters at issue between the Department and [IP]," including "violations of state water quality standards in Elevenmile Creek," and noncompliance "with some of the limits in the Existing Permit and related authorizations." (Joint Ex. 4, p. 1; p. 4 ¶ 4; and p. 5 ¶ 6).

Therefore, based on the foregoing, this exception is denied. To the extent this exception also relates to the ALJ's application of the legal doctrine of *collateral estoppel*, it is denied.

Exception No. 38: In this exception, Lane states that she "objects to all Findings of Fact in this Recommended Order, 1 through 78, because all the issued covered in the Findings of Fact are issues which were previously litigated in the first hearing." *See* Lane's Exceptions at page 24. Based on the foregoing, this exception is denied. *See also* § 120.57(1)(k), Fla. Stat. (2009).

Exception No. 39: Lane takes exception to Conclusion of Law 87 in the RO on the basis that the "factual issue of whether IP's effluent would adversely affect the biological community of the effluent distribution system had already been fully litigated ... ." *See* Lane's Exceptions at page 24. Based on the foregoing, this exception is denied.

Exception No. 40: Lane takes exception to Conclusion of Law 88 in the RO. Lane contends that the "ALJ abused his discretion by allowing these issues to be re-litigated and then accepting respondents facts and discounting Petitioners facts as collateral estoppel." *See* Lane's Exceptions at page 25. Based on the foregoing, this exception is denied.

Exception No. 41: Lane takes exception to Conclusion of Law 89 in the RO. Lane argues that it is not based on "facts in evidence and this conclusion of law should be rejected" since a final decision has already been made on this issue." *See* Lane's Exceptions at page 25. Contrary to the Petitioner's assertion, Conclusion of Law 89, including its characterization of IP's proof as "new evidence" on the biological community in the wetlands, is supported by competent substantial record evidence. (Bays T. VI pp. 832-843; Pruitt T. IV pp. 576-578, 614-617; Livingston T. II pp. 184-188 and 220; Nutter T. III pp. 403-404; IP Ex. 30).

Therefore, this exception is denied. To the extent this exception also relates to the ALJ's application of the legal doctrine of *collateral estoppel*, it is denied.

Exception No. 43: Lane takes exception to Conclusion of Law 92 in the RO on the basis that "it is not based on the weight of the evidence or facts presented at the hearing." *See* Lane's Exceptions at page 26. Conclusion of Law 92 is a reasonable inference based on the ALJ's underlying factual findings in Findings of Fact 41, 61-71 and 74. The findings are supported by competent substantial record evidence and under the standard of review the weight given this evidence by the ALJ is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. *See e.g., Peace River/Manasota Regional Water Supply Authority v. IMC Phosphates Co.,* 18 So.3d 1079, 1088 (Fla. 2d DCA 2009). [Hickman T. V pp. 748, 757-758, 770 and Joint Trial Exhibit 8; Frydenborg T. VII pp. 926-989, 960-965 and 997-999; Pruitt T. IV pp. 399, 614, 639, 633-635, 634-638 and T. XII pp. 1561-1566; Livingston T. II pp. 276 and 273-

277; Nutter T. III pp. 445-450; Simpson T. II p. 205-206; Steltenkamp T. XII pp. 1637-1638, 1658-1660; Bays T. VI p. 868].

Therefore, based on the foregoing, this exception is denied. To the extent this exception also relates to the ALJ's application of the legal doctrine of *collateral estoppel*, it is denied.

Exception No. 47: Lane takes exception to Conclusion of Law 100 on the basis that "this issue has been litigated previously and a final decision issued." *See* Lane's Exceptions at page 28. Based on the foregoing, this exception is denied.

Exception Nos. 48 and 49: In these exceptions titled "Procedural Errors," the Petitioner Lane again contends that "all issues in the hearing had already been litigated" and "the ALJ committed substantial and procedural error." *See* Lane's Exceptions at page 28. Based on the foregoing, these exceptions are denied.

Second Legal Issue - Under what authority is IP relieved from meeting state standards for specific conductance, pH, turbidity and dissolved oxygen for nine years? (Lane Exception Nos. 2 .B., 15, 20, 29, 33, 44, 45, 46).

In Exception No. 2. B., the Petitioner Lane argues that the Department does not have the authority to issue the permit and consent order containing interim effluent limits under Section 403.088(2)(d), (e) and (f), Florida Statutes. Lane contends that "[w]hile Chapter 403.088 (2)(e) and (f) may authorize an issuance of a Consent Order and interim permit conditions, this statute does not authorize waivers, variances or exemptions from meeting water quality criteria." *See* Lane's Exceptions at page 9.

As the Department points out in its response to Lane's Exceptions, the water quality based effluent limitations ("WQBELs") in IP's proposed NPDES permit are based on the Class III default water quality criteria in Florida Administrative Code Rule 62-

302.530. Pending the implementation and completion of the corrective actions required by the consent order, IP will not be able to meet all of the WQBELs in the proposed NPDES permit. The consent order does not exempt IP's discharge into the wetlands from compliance with the applicable Class III default water quality criteria. Rather, the consent order establishes interim effluent limits with respect to the proposed discharge to the wetland ecosystem. IP's wastewater discharge must comply with the interim effluent limits set forth in Tables 2 and 3, paragraphs 17 and 18 of the consent order. (Joint Ex. 4).

Sections 403.088(2)(d), (e) and (f), Florida Statutes, authorize the Department to establish the interim effluent limits applicable to IP's wastewater discharge. Sections 403.088(2)(d) and (e), provide in pertinent part, as follows:

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

4. The granting of an operation permit will be in the public interest;

5. The discharge will not be unreasonably destructive to the quality of the receiving waters; or

6. A water quality credit trade that meets the requirements of s. 403.067.

The Department may issue an operation permit for a discharge that will not comply with all applicable statutes and rules if the applicant is able to meet one of the special conditions of Section 403.088(2)(e), Florida Statutes. (RO ¶ 91) *See also Lane v. Dep't of Envtl. Protection*, OGC Case No. 04-1202, 29 F.A.L.R. 4063, 4080 (Fla. DEP 2007)("Only one factor needs to be met in order to apply the provision."). IP demonstrated that it qualifies for an operation permit under Section 403.088(2)(e)1. through 5., Florida Statutes. (RO ¶ 92). Section 403.088(2)(f), Florida Statutes, requires that a permit issued pursuant to Section 403.088(2)(e) must be accompanied by an order which establishes a schedule for achieving compliance with all permit conditions. The proposed consent order achieves the requirements of the statute. (RO ¶ 93). Sections 403.088(2) (e) and (f), constitute a limited statutory exception to the "reasonable assurance" permitting requirement in the Department's rules. *See e.g. Valencic v. Miami-Dade Cty. Water and Sewer Dep't*, 23 F.A.L.R. 1966, 1969 (Fla. DEP 2001), *aff.* 803 So.2d 719 (Fla. 1st DCA 2001); *Putnam Cty. Envtl. Council v. Georgia Pacific Corp.*, 24 F.A.L.R. 4674, 4712-4713, 4715 (Fla. DEP 2002); *Lane v. Dep't of Envtl. Protection*, 29 F.A.L.R. 4063, 4080-4081 (Fla. DEP 2007).

The Department has consistently interpreted Section 403.088(2)(e) and (f), Florida Statutes, as authorizing the type of operation permit and order evidenced by IP's proposed NPDES permit and the proposed consent order. *Id.* I conclude that the

Department's construction of its governing statute in these proceedings is not "implausible," "unreasonable," or "clearly erroneous." *Atlantis at Perdido Assoc., Inc., v. Warner*, 932 So.2d 1206, 1213 (Fla. 1st DCA 2006). Therefore, Lane's Exception No. 2. B. is denied.

In Lane Exception Nos. 15, 20, 29, 33, 44, 45, and 46, she reiterates her arguments regarding the interpretation and application of Section 403.088(2)(e) and (f), Florida Statutes. As I've explained above the Department's interpretation and application of those statutory provisions are reasonable, permissible and consistent. *See e.g. Lane v. Dep't of Envtl. Protection*, 29 F.A.L.R. 4063, 4080-4081 (Fla. DEP 2007); *Valencic v. Miami-Dade Cty. Water and Sewer Dep't*, 23 F.A.L.R. 1966, 1969 (Fla. DEP 2001), *aff.* 803 So.2d 719 (Fla. 1st DCA 2001); *Putnam Cty. Envtl. Council v. Georgia Pacific Corp.*, 24 F.A.L.R. 4674, 4712-4713, 4715 (Fla. DEP 2002). Lane's Exceptions also object to specific findings in the RO, challenging the sufficiency of evidence to support those findings, arguing the weight of the evidence, and requesting that I make alternative findings in this Final Order. It is the ALJ's function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence. *See e.g., Greseth v. Dep't of Health and Rehabilitative Services*, 573 So.2d1004, 1006-1007 (Fla. 4th DCA 1991); *Tedder v. Florida Parole Comm.,* 842 So.2d 1022 (Fla. 1st DCA 2003). It is a gross abuse of discretion for an agency to disregard findings of fact where findings are based upon competent and substantial evidence. *See Southpointe Pharmacy v. Dep't of Health and Rehabilitative Services*, 596 So.2d 106 (Fla. 1st DCA 1992). If there is evidence to sustain the ALJ's

findings, I am not authorized to reject such findings and adopt alternative findings, even if there is competent substantial evidence to the contrary. *See Kibler v. Dep't of Prof. Regulation*, 418 So.2d 1081 (Fla. 4th DCA 1982).

Exception No. 15: Lane takes exception to Finding of Fact 44 in the RO on the basis that it is not supported by competent substantial evidence. *See* Lane's Exceptions at page 14. Contrary to the Petitioner's argument, competent substantial record evidence supports the ALJ's finding that IP proposed to achieve compliance with all proposed water quality standards and permit limits by the end of the schedule established in the consent order, including the water quality standards for specific conductance, pH, turbidity, and DO (dissolved oxygen). The testimony of IP's expert included IP's plans, as well as the effect of process changes and other improvements that will be implemented during the term of the consent order. [Steltenkamp T. I pp. 50-51, 55-57, 59-60, 61, 63-65, 77, 96-97, T. XII pp. 1623, 1626-1632].

Therefore, based on the foregoing, this exception is denied.

Exception No. 20: Lane takes exception to Finding of Fact 53 in the RO where the ALJ found that "Dr. Pruitt's testimony about oxygen dynamics in a wetland showed that IP's effluent should not cause a measurable decrease in DO levels within the effluent distribution system, including Tee and Wicker Lakes." (RO ¶ 53). Lane contends that this finding is "vague" and "not supported by competent substantial evidence." *See* Lane Exceptions at page 16. The Petitioner Lane argues that the testimony of the Petitioner's witness, Dr. White, constitutes the "greater weight of the evidence." However, under the applicable standard of review it is the ALJ's function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses,

draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence. *See e.g., Greseth v. Dep't of Health and Rehabilitative Services*, 573 So.2d1004, 1006-1007 (Fla. 4th DCA 1991). If there is evidence to sustain the ALJ's findings, I am not authorized to reject such findings and adopt alternative findings, even if there is competent substantial evidence to the contrary. *See Kibler v. Dep't of Prof. Regulation*, 418 So.2d 1081 (Fla. 4th DCA 1982).

The ALJ's Finding of Fact 53 is supported by competent substantial record evidence, including the extensive and detailed testimony of Dr. Bruce Pruitt [Pruitt T. IV pp. 589-609, T. XII pp. 1567-1574]. Therefore, based on the foregoing, this exception is denied.

Exception No. 29: Lane takes exception to Finding of Fact 69 in the RO on the basis that it is not supported by competent substantial evidence. *See* Lane's Exceptions at page 20. In Finding of Fact 69 the ALJ determined that:

> 69. IP's discharge, including its discharges subject to the interim limits established in the Consent Order, would not interfere with the designated uses of the Class III receiving waters, which are the propagation and maintenance of a healthy, well-balanced population of fish and wildlife.

This finding is supported by competent substantial evidence, including the testimony of Jim Bays and Russ Frydenborg, admitted into the record without objection. [Bays T. VI p. 865; Frydenborg T. VII pp. 963-965].

Therefore, based on the foregoing, this exception is denied.

Exception No. 33: Lane takes exception to Finding of Fact 73 in the RO where the ALJ found that:

> 73. IP has demonstrated a need to meet interim limits for a period of time necessary to complete the construction of its

> alternative waste disposal system. The interim limits and schedule for coming into full compliance with all water quality standards, established in the proposed Consent Order, are reasonable.

Lane objects to the language "coming into full compliance with all water quality standards," on the same basis as in Exception No. 29. Lane argues that "IP is most likely not going to meet state limits for Class III waters, unless site specific alternative criteria are given in the wetlands." *See* Lane's Exceptions at page 22. The record contains competent substantial evidence to support the finding that IP will meet all water quality standards within the schedule adopted in the consent order. [Steltenkamp T. I pp. 77, 96-98].

Based on the foregoing, this exception is denied. To the extent this exception also relates to the ALJ's application of the legal doctrine of *collateral estoppel*, it is denied.

Exception No. 44: Lane takes exception to Conclusion of Law 93 in the RO where the ALJ concluded that:

> 93. A permit issued pursuant to Section 403.088(2)(e), Florida Statutes, must be accompanied by an order which establishes a schedule for achieving compliance with all permit conditions. See § 403.088(2)(f), Fla. State. That requirement would be achieved by the proposed Consent Order.

Lane contends that this conclusion is not supported by "facts in evidence or the Findings of Fact." *See* Lane's Exceptions at page 26. However, this conclusion is supported by competent substantial record evidence, including Finding of Fact 44 (see my ruling on Exception No. 15 above). [Steltenkamp T. I pp. 50-51, 55-57, 59-60, 61, 63-65, 77, 96-97, T. XII pp. 1623, 1626-1632].

Therefore, based on the foregoing, this exception is denied. To the extent this exception also relates to the ALJ's application of the legal doctrine of *collateral estoppel*, it is denied.

Exception No. 45: Lane takes exception to Conclusion of Law 95 in the RO where the ALJ concluded that:

> 95. FOPB and James Lane also contend that IP's effluent would permanently change the hydroperiod of the wetlands within the effluent distribution system, but they cite no law that prohibits such a change. Pollutant discharges made in compliance with all applicable regulations usually change the receiving waters. The relevant permitting question, therefore, is not whether the receiving waters are changed, but whether the changes are permissible under the law. Based on the Findings of Fact and Conclusions of Law stated herein, the changes to the receiving waters that would result from IP's proposed project are permissible.

Lane contends that "[t]here is no evidence presented at the hearing or in the Findings of Fact to suggest that IP is not going to 'cause and contribute' to violations in water quality standards in the wetlands." *See* Lane's Exceptions at page 26. Conclusion of Law 93 is a reasonable inference based on the ALJ's underlying factual findings in Findings of Fact 41, 61-71 and 74 (see also my ruling on Exception No. 43 above). The findings are supported by competent substantial record evidence and under the standard of review the weight given this evidence by the ALJ is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. *See e.g., Peace River/Manasota Regional Water Supply Authority v. IMC Phosphates Co.,* 18 So.3d 1079, 1088 (Fla. 2d DCA 2009). [Hickman T. V pp. 748, 757-758, 770 and Joint Trial Exhibit 8; Frydenborg T. VII pp. 926-989, 960-965 and 997-999; Pruitt T. IV pp. 399, 614, 639, 633-635, 634-

638 and T. XII pp. 1561-1566; Livingston T. II pp. 276 and 273-277; Nutter T. III pp. 445-450; Simpson T. II p. 205-206; Steltenkamp T. XII pp. 1637-1638, 1658-1660; Bays T. VI p. 868].

I also conclude that the ALJ's interpretation of "the relevant permitting question" in these proceedings is not "implausible," "unreasonable," or "clearly erroneous." *Atlantis at Perdido Assoc., Inc., v. Warner*, 932 So.2d 1206, 1213 (Fla. 1st DCA 2006). Therefore, based on the foregoing, this exception is denied. To the extent this exception also relates to the ALJ's application of the legal doctrine of *collateral estoppel*, it is denied.

Exception No. 46: Lane takes exception to that portion of Conclusion of Law 96 in the RO where the ALJ concluded that:

> This proceeding involves a Chapter 403 industrial wastewater discharge, which IP showed would meet all state water quality standards at the end of the compliance period and qualifies to temporarily exceed some standards under the special conditions established in Section 403.088(2)(e), Florida Statutes, including the condition that the discharge not be unreasonably destructive to the quality of the receiving waters. The Department's functional assessment demonstrated that the discharge would not be unreasonably destructive to the quality of the receiving waters.

Lane again argues (see Exception No. 44) that "IP will not meet all state water quality Class III unless the standards are change[d] at the end of the compliance period." *See* Lane's Exceptions at page 27. As I ruled in Exception No. 44 above, the ALJ's conclusion is supported by competent substantial record evidence, including Finding of Fact 44 (see also my ruling on Exception No. 15 above). [Steltenkamp T. I pp. 50-51, 55-57, 59-60, 61, 63-65, 77, 96-97, T. XII pp. 1623, 1626-1632].

Lane also argues that the Department's "functional assessment did not demonstrate that the discharge would not be unreasonably destructive to the environment." *See* Lane's Exceptions at page 27. However, the ALJ's findings on the outcome of the functional assessment are supported by competent substantial record evidence, including the testimony of Eric Hickman. [Hickman T. V pp. 748, 757-758, 770; and Joint Trial Exhibit 8]. The findings are supported by competent substantial record evidence and under the standard of review the weight given this evidence by the ALJ is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. *See e.g., Peace River/Manasota Regional Water Supply Authority v. IMC Phosphates Co.,* 18 So.3d 1079, 1088 (Fla. 2d DCA 2009).

Therefore, based on the foregoing, this exception is denied.

Exceptions to Preliminary Statement in the RO

Exception No. 3: Lane takes exception to the ALJ's description in the RO's Preliminary Statement (RO pp. 3-4), of the procedural history of certain rule challenge proceedings, some of which were concluded prior to his issuing the RO now under administrative review. Lane does not argue that those findings are unsupported by competent substantial evidence. Therefore, based on the authority of Section 120.57(1)(k), Florida Statutes, I decline to rule on this exception. *See* § 120.57(1)(k), Fla. Stat. (2009)(the agency need not rule on an exception that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.").

Exception No. 4: Lane takes exception to page 6 of the RO's Preliminary Statement where the ALJ states that "Petitioner Dr. Jacqueline Lane, who was accepted as an expert in the fields of biology and stream ecology." Lane requests that I substitute the ALJ's statement with the following: "Dr. Lane was accepted as an expert in marine biology with a concentration in the ecological physiology of invertebrates." However, in this exception Lane does not argue that the statement is not supported by competent substantial record evidence; nor does she provide a record citation for her alternative statement. Therefore, based on the authority of Section 120.57(1)(k), Florida Statutes, I decline to rule on this exception. *See* § 120.57(1)(k), Fla. Stat. (2009)(the agency need not rule on an exception that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.").

Lane's exceptions to Findings of Fact in the RO

In this section, Lane makes a series of exceptions to specific findings in the RO. In general, Lane challenges the sufficiency of evidence to support findings, argues the weight of the evidence, or requests alternative findings in the final order. However, under the applicable standards of review, the ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. *See e.g., Peace River/Manasota Regional Water Supply Authority v. IMC Phosphates Co.,* 18 So.3d 1079, 1088 (Fla. 2d DCA 2009); *Collier Med. Ctr. v. State, Dep't of HRS*, 462 So.2d 83, 85 (Fla. 1st DCA 1985); *Fla. Chapter of Sierra Club v. Orlando Utils. Comm'n*, 436 So.2d 383, 389 (Fla. 5th DCA 1983). Also, I am not authorized to reweigh the evidence, resolve the conflicts therein,

or judge the credibility of witnesses, as those are evidentiary matters within the province of the ALJ as the "trier-of-fact." *See Heifetz v. Dept. of Business Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985).

In addition, Lane also reiterates prior arguments on the collateral estoppel effect of the Final Order in OGC Case No. 04-1202 (see my ruling and discussion on Exception No. 1.A. above).

Lane's Exception Nos. 5, 7, and 8 are denied for two reasons. First, the ALJ noted in Endnote 1 to the RO that the findings of fact in paragraphs 1 through 32 are derived from findings made previously in the Recommended Order issued in DOAH Case No. 05-1609, which were subsequently adopted in the Department's Final Order issued on August 8, 2007 (OGC Case No. 04-1202). The Endnote provides in part "These are not the only findings from DOAH Case No. 05-1609 that are relevant in this proceeding, but they were selected for the purpose of providing background information." (e.g., Finding of Fact 26 appears to be identical to the findings in Finding of Fact 64 of the Recommended Order in DOAH Case No. 05-1609).

Second, the findings are supported by competent substantial record evidence. [FOF 5 – Steltenkamp T.I pp. 38-40; FOF 15 – Steltenkamp T. I pp. 44-45; and IP Ex. 17; FOF 26 – Nutter T. III p. 414 (velocity); p. 468 (depth); pp. 477-478 (travel time); p. 509 (nutrient uptake); and the Recommended Order in OGC Case No. 04-1202 at p. 13 ¶ 26 (nutrient uptake, BOD removal)].

Exception No. 6: Lane takes exception to Finding of Fact 5 on the basis that the reference to "U.S. Highway 90" should correctly be "U.S. Highway 98." This technical exception is granted.[4]

Exception No. 9: Lane takes exception to Finding of Fact 33 in the RO where the ALJ found:

> 33. After the issuance of the Final Order in 05-1609, IP modified its manufacturing process to eliminate the production of white paper. IP now produces brown paper for packaging material and "fluff" pulp used in such products as filters and diapers. IP's new manufacturing processes uses substantially smaller amounts of bleach and other chemicals that must be treated and discharged.

Lane contends that this finding "is not based on evidence presented at trial," and that the finding refers to a "barred issue." *See* Lane's Exceptions at page 12. Contrary to Lane's assertion the finding is supported by competent substantial evidence, including the testimony of Dr. Mike Steltenkamp. [Steltenkamp T. I pp. 35, 38-39, 40-41].

Therefore, based on the foregoing, this exception is denied. To the extent this exception also relates to the ALJ's application of the legal doctrine of *collateral estoppel*, it is denied.

Exception No. 10: Lane takes exception to Finding of Fact 34 in the RO where the ALJ found:

> 34. IP reduced its discharge of BOD components, salts that increase the specific conductance of the effluent, adsorbable organic halides, and ammonia. IP also reduced the odor associated with its discharge.

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[4] This technical exception was also granted in the Final Order in OGC Case No. 04-1202. *See Lane v. Dep't of Envtl. Protection,* 29 F.A.L.R. 4063, 4090 (Fla. DEP 2007).

Lane contends that there is no evidence in the record supporting this finding and it should also be struck as a "barred topic." *See* Lane's Exceptions at page 12. Paragraph 34 is supported by competent, substantial evidence, including the testimony of Dr. Mike Steltenkamp, admitted without objection. [Steltenkamp T. I pp. 29, 38-40].

Therefore, based on the foregoing, this exception is denied. To the extent this exception also relates to the ALJ's application of the legal doctrine of *collateral estoppel*, it is denied.

Exception No. 11: Lane takes exception to Finding of Fact 36 in the RO on the basis that it is not supported by competent substantial evidence. The ALJ found that:

> 36. Most of the existing ditches, sloughs, and depressions in the effluent distribution system are ephemeral, holding water only after heavy rainfall or during the wet season. Even the more frequently wetted features, other than Tee and Wicker Lakes, intermittently dry out. There is currently little connectivity among the small water bodies that would allow fish and other organisms to move across the site.

Paragraph 36 is supported by competent, substantial evidence, including the testimony of Dr. Bruce Pruitt. [Pruitt T. IV pp. 579-584 and T. IV pp. 610-611(dry conditions in slough systems); T. XI pp. 1421-1422]. Therefore, based on the foregoing, this exception is denied. To the extent this exception also relates to the ALJ's application of the legal doctrine of *collateral estoppel*, it is denied.

Exception No. 12: Lane takes exception to the first sentence in Finding of Fact 37 in the RO where the ALJ found that "[f]ish and other organisms within these water bodies are exposed to wide fluctuations in specific conductivity, pH, and DO." Lane contends that no evidence was presented to show that "pH or specific conductivity fluctuated in the wetlands or that fish are exposed to wide fluctuations in DO, specific

conductivity or pH." *See* Lane's Exceptions at page 13. However, the first sentence of paragraph 37, challenged in this exception, is supported by competent, substantial evidence, including the testimony of Dr. Bruce Pruitt, admitted without objection. [Pruitt T. IV p. 580].

Therefore, based on the foregoing, this exception is denied. To the extent this exception also relates to the ALJ's application of the legal doctrine of *collateral estoppel*, it is denied.

Exception No. 13: Lane takes exception to third sentence in Finding of Fact 41 in the RO. Finding of Fact 41 states that:

> 41. A functional assessment of the existing and projected habitats in the effluent distribution system was performed. The Department concluded that IP's project would result in a six percent increase in overall wetland functional value within the system. That estimate accounts for the loss of some S-2 habitat, but does not include the benefits associated with IP's conservation of S-2 habitat and other land forms outside of the effluent distribution system.

Lane argues that the third sentence is not supported by the evidence and suggests an alternative findings. *See* Lane's Exceptions at page 13. Contrary to Lane's contention the ALJ's findings in the third sentence of paragraph 41 are supported by the testimony of Eric Hickman, the Environmental Administrator of the Department's Wetland Delineation and Evaluation Section, who was accepted as an expert in wetland evaluation and delineation [Hickman T. V pp. 770; Joint Trial Exhibit 8]. Therefore, based on the foregoing, this exception is denied.

Exception No. 14: Lane takes exception to Finding of Fact 42 in the RO where the ALJ found that:

> 42. IP proposes to place in protected conservation status 147 acres of wet prairie, 115 acres of seepage slope, and 72 acres of sand hill lands outside the effluent distribution system. The total area outside of the wetland distribution system that the Consent Order requires IP to perpetually protect and manage as conservation area is 1,188 acres.

Lane argues that any reference "to the conservation area should be barred" and "is irrelevant" since this is a "proceeding under Chapter 403(See conclusion of law 96)." *See* Lane's Exceptions at pages 13-14. The ALJ's findings in this paragraph factually describe IP's proposal and the consent order requirement. The findings are supported by competent substantial record evidence. [Joint Trial Exs. 4 and 8].

Lane provides no legal basis for her argument that this finding is irrelevant. I agree with the Department's response to Lane's Exceptions that the corrective action requiring the establishment of an off-site conservation area is relevant to the consideration of whether IP met the requirements of subsections 403.088(2)(b) and (e), Florida Statutes. (RO ¶¶ 74, 92). The corrective action requiring the establishment of an off-site conservation area is also relevant to the consideration of whether IP met the anti-degradation requirements of Florida Administrative Code Rule 62-4.242(1)(b). (RO ¶¶ 98, 99, 100). However, the weight given this fact by the ALJ in making his factual findings, such as Finding of Fact 74, is an evidentiary matter. *See e.g., Tedder v. Fla. Parole Comm'n,* 842 So.2d 1022, 1025 (Fla. 1st DCA 2003); *Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985).

Therefore, based on the foregoing, this exception is denied. To the extent this exception also relates to the ALJ's application of the legal doctrine of *collateral estoppel*, it is denied.

Exception No. 16: Lane takes exception to Finding of Fact 45 in the RO on the basis that the "ALJ's list of what IP failed to show at the previous hearing is slightly deficient." *See* Lane's Exceptions at page 14. Lane cites to certain conclusions of law in the Final Order in OGC Case No. 04-1202 and requests that I add these conclusions to the ALJ's Finding of Fact 45. I am not authorized to make supplement or additional factual findings. *See, e.g., North Port, Fla. v. Consol. Minerals*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994). However, it appears that the Petitioner Lane misapprehends the nature of the ALJ's summary of the matters at issue. The prior Final Order's conclusions of law cited by the Petitioner flow from the fact that "the evidence presented by IP was insufficient to demonstrate that IP's wastewater effluent would not cause significant adverse impact to the biological community of the wetland tract, including Tee and Wicker Lakes." (RO ¶ 45).

Therefore, based on the foregoing, this exception is denied. To the extent this exception also relates to the ALJ's application of the legal doctrine of *collateral estoppel*, it is denied.

Exception No. 18: Lane takes exception to Finding of Fact 48 in the RO on the basis that the "ALJ's facts are speculative and not based on competent substantial evidence." *See* Lane's Exceptions at page 15. Finding of Fact 48 states:

> 48. Dr. Lane believes that IP's effluent would cause adverse impacts from high water temperatures resulting from color in IP's effluent. There is already color in the waters of the effluent distribution system under background conditions. The increased amount of shading from the trees that IP is planting in the effluent distribution system would tend to lower water temperatures. Peak summer water temperatures would probably be lowered by the effluent. Petitioners evidence was insufficient to show that the organisms that

comprise the biological community of the effluent distribution system cannot tolerate the expected range of temperatures.

Contrary to Lane's contention the ALJ's findings are supported by the expert testimony of Dr. Bruce Pruitt [Pruitt T. XII pp. 1570-1571, 1615]. The ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. *See e.g., Peace River/Manasota Regional Water Supply Authority v. IMC Phosphates Co.*, 18 So.3d 1079, 1088 (Fla. 2d DCA 2009); *Collier Med. Ctr. v. State, Dep't of HRS*, 462 So.2d 83, 85 (Fla. 1st DCA 1985); *Fla. Chapter of Sierra Club v. Orlando Utils. Comm'n*, 436 So.2d 383, 389 (Fla. 5th DCA 1983). Also, I am not authorized to reweigh the evidence, resolve the conflicts therein, or judge the credibility of witnesses, as those are evidentiary matters within the province of the ALJ as the "trier-of-fact." *See Heifetz v. Dept. of Business Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985).

Therefore, based on the foregoing, this exception is denied. To the extent this exception also relates to the ALJ's application of the legal doctrine of *collateral estoppel*, it is denied.

Exception No. 26: Lane takes exception to Finding of Fact 66 in the RO where the ALJ found that "[b]iological diversity and productivity is likely to be increased in the effluent distribution system." Lane contends that the "statement about biological diversity is not supported by the weight of the evidence." *See* Lane's Exceptions at page 19-20. Contrary to Lane's argument this finding is supported by competent substantial record evidence, including the expert testimony of Dr. Bruce Pruitt [Pruitt T. IV pp. 614,

639; *see also* Nutter T. III pp. 445-450; Simpson T. II p. 205]. Therefore, this exception is denied.

Exception No. 27: Lane takes exception to Finding of Fact 67 on the basis that it is not supported by evidence in the record. *See* Lane's Exceptions at page 20. The finding of fact is supported by the expert testimony of Dr. Bruce Pruitt and Dr. Wade Nutter. [Pruitt T. IV pp. 633-635; Nutter T. III p. 449]. Therefore, this exception is denied.

Exception No. 28: Lane takes exception to the last sentence in Finding of Fact 68 where the ALJ found that "[e]ven if public access were confined to Tee and Wicker Lakes, that would not be a reduction in public use as compared to the existing situation." Lake argues that this finding is speculative and not based on competent substantial evidence. *See* Lane's Exceptions at page 20. However, the finding of fact is supported by competent substantial evidence. [Pruitt T. IV pp. 634-638; Steltenkamp T. XII pp. 1637-1638, 1658-1660; Evans T. VII p. 1012]. Therefore, this exception is denied.

Exception No. 30: Lane takes exception to Finding of Fact 70 where the ALJ found that:

> 70. The wetlands of the effluent distribution system are the "receiving waters" for IP's discharge. The proposed project would not be unreasonably destructive to the receiving waters, which would involve a substantial alteration in community structure and function, including the loss of sensitive taxa and their replacement with pollution-tolerant taxa.

Lane contends that "[t]he different parts of this" finding "are contradictory," and contradicts findings in the prior Final Order in OGC Case No. 04-1202. *See* Lane's

Exceptions at page 21. Competent substantial evidence supports the finding of fact in the form of the expert testimony of Dr. Thomas Simpson, Russ Frydenborg, and Jim Bays on the effect of the effluent and (with respect to Mr. Frydenborg) agency practice regarding a determination of whether a discharge is "unreasonably destructive." [Simpson T. II pp. 205-206; Bays T. VI p. 868; Frydenborg T. VII pp. 997-999].

This finding of fact is not inconsistent with the prior Final Order in OGC Case 04-1202. In these proceedings the ALJ's finding of fact is based on the new information generated after the prior Final Order and provided by IP in support of a new application. (See, e.g., RO section titled "B. Project Changes" - ¶¶ 33-44). Also, in Conclusion of Law 89 the ALJ ultimately concluded that:

> 89. IP presented new evidence on the biological community of the wetlands in the effluent distribution system and provided reasonable assurance that IP's effluent would not adversely affect the biological community.

Therefore, based on the foregoing, this exception is denied. To the extent this exception also relates to the ALJ's application of the legal doctrines of *res judicata* and *collateral estoppel*, it is denied.

Exception No. 31: Lane takes exception to Finding of Fact 71 in the RO where the ALJ found that:

> 71. The proposed WQBELs would maintain the productivity in Tee and Wicker Lakes. There would be no loss of the habitat values or nursery functions of the lakes which are important to recreational and commercial fish species.

Lane asserts that the findings are not supported by competent substantial evidence. *See* Lane's Exceptions at page 21. Contrary to Lane's assertion these findings are

supported by the expert testimony of Dr. Bruce Pruitt and Dr. Robert Livingston [Livingston T. II pp. 273-277; Pruitt T. IV p. 399, T. XII pp. 1565-1566].

Therefore, based on the foregoing, this exception is denied. To the extent this exception also relates to the ALJ's application of the legal doctrine of *collateral estoppel*, it is denied.

Lane's objections to conclusions of law in the RO

Exception No. 42: Lane takes exception to Conclusion of Law 90 on the basis that it "is not supported by any findings of fact or facts in evidence." *See* Lane's Exceptions at page 25. In Conclusion of Law 90 the ALJ determined that the "Petitioners failed to prove that any new data in the December 2007 report of the Livingston team demonstrate that the proposed WQBELS are inadequate to prevent water quality violations in Perdido Bay." (RO ¶ 90). Paragraph 90 is a mixed factual finding and legal conclusion that the Petitioners failed to carry their burden of proof regarding one of the factual theories described in the ALJ's prehearing order of June 2, 2009, and in the parties' prehearing stipulation: namely, that new data would undermine prior findings on the adequacy of WQBELs to protect Perdido Bay. As the ALJ noted in Conclusion of Law 81 "[o]nce the applicant has made a preliminary showing of entitlement, the burden of presenting contrary evidence shifts to the petitioner to present evidence of equivalent quality to prove the facts alleged in the petition." *See Dep't of Transp. v. J.W.C. Co., Inc.*, 396 So. 2d 778, 789 (Fla. 1st DCA 1981). The question of whether the Petitioners carried their "burden of presenting contrary evidence" is an evidentiary matter wholly within the province of the ALJ as the finder of the facts. *See,*

e.g., Heifetz v. Dept. of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985).

Therefore, based on the foregoing, this exception is denied.

Exception No. 50: Lane takes exception to the ALJ recommendation that the Department's Final Order grant the proposed NPDES permit and approve the Consent Order. Lane requests that this Final Order dismiss these proceedings and restore the original denial of the proposed permit and Consent Order. For all of the foregoing reasons and based on my rulings on Lane's Exception Nos. 1 through 49 above, this exception is denied.

CONCLUSION

In the prior Final Order in OGC Case No. 04-1202, I concluded that:

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

Lane v. Dep't of Envtl. Protection, 29 F.A.L.R. 4063, 4093 (Fla. DEP 2007).

In these proceedings the ALJ determined that IP presented new evidence on the biological community of the wetlands in the effluent distribution system and Tee and Wicker Lakes, which demonstrates that its effluent would not adversely affect the biological community. (RO ¶¶ 89, 90, 92, 96, 100). I agree with and adopt in this Final Order the ALJ's ultimate conclusions that IP provided reasonable assurance that its effluent would not adversely affect the biological community (RO ¶ 89); that granting the permit will be in the public interest (RO ¶¶ 74 and 92); that the discharge would not be unreasonably destructive to the quality of the receiving waters (RO ¶ 96); that the

proposed project complies with the Department's antidegradation policy (RO ¶¶ 97-100); and that the consent order establishes reasonable terms and conditions to resolve the Department's enforcement action for past violations and is the order that establishes a schedule for achieving compliance with all permit conditions (RO ¶¶ 78 and 93).

Having considered the applicable law and standards of review in light of the findings and conclusions set forth in the RO, and being otherwise duly advised,

It is ORDERED:

A. The ALJ's Recommended Order (Exhibit A), as modified herein, is adopted and incorporated by reference.

B. The proposed NPDES permit no. FL0002526 is GRANTED.

C. The Consent Order No. 08-0358 is APPROVED.

JUDICIAL REVIEW

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rules 9.110 and 9.190, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal.

The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the clerk of the Department.

DONE AND ORDERED this 11th day of March, 2010, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

MICHAEL W. SOLE
Secretary

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

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

B. Reardon
CLERK

3/16/10
DATE

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing Final Order was mailed to:

Marcy LaHart, Esquire
Marcy I. LaHart, P.A.
4804 Southwest 45th Street
Gainesville, FL 32608

Jacqueline M. Lane
10738 Lillian Highway
Pensacola, FL 32506

Terry Cole, Esquire
Oertel, Fernandez, Cole & Bryant, P.A.
Post Office Box 1110
Tallahassee, FL 32302-1110

by electronic filing to:

Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

and by hand delivery to:

W. Douglas Beason, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this 10th day of March, 2010.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

FRANCINE M. FFOLKES
Administrative Law Counsel

3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000
Telephone 850/245-2242