ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

SJR 2012-16

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

FINAL ORDER

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

APPEARANCES

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

PRELIMINARY STATEMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ALJ'S RECOMMENDATION

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

STATEMENT OF THE ISSUES

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

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

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

EXCEPTIONS AND RESPONSES: AN OVERVIEW

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

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

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

STANDARD OF REVIEW

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

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

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

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

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

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

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

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

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

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

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

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

RULINGS ON RESPONDENTS' EXCEPTIONS[4]

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

RULINGS ON EXCEPTIONS TO THE INITIAL RECOMMENDED ORDER

Exception No. 1: Amendment of the Corrective Action

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

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

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

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

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

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

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

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

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

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

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

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

Exceptions to Findings of Fact

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

Exception 2: The Direction of Water Flow

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

Exception 3: Respondents' Dredging and Filling on Their Property

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

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

Exception 4: Impact on Wetlands on Respondents' Property

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

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

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

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

Exception 6: County's Code Enforcement Action Against Respondents

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

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

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

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

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

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

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

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

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

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

Exception 9: Presence of Wetland Vegetation

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

Exception 10: Hydrologic Indicators

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

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

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

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

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

<u>Exception 12: Agricultural Avocation, Not Occupation</u>

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

Exception 13: Inconsistency with the Practice of Agriculture

The ALJ found in paragraph 22 that

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

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

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

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

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

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

Exception 15: Reasonableness of the Revised Corrective Action

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

Exception 16: Construction of a Surface Water Management System

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

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

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

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

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

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

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

<u>Exception 17 to "[a]ll of paragraph 28"</u>

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

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

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

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

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

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

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

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

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

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

Exception 20 "to all of the recommendation"

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

Exception 21: Lack of a Prehearing Order

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

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

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

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

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

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

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

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

Exception 22: Failure to Allow Closing Argument

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

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

Exception 23: Repetition of Exception 14

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

Exception 24: Failure to Rule on the Closed System Exemption

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

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

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

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

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

Exception 2: Post-SRO Motion for New Trial

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT

BY: ______________________
Lad Daniels
Chairman

RENDERED this day of July 2012.

BY: ______________________
SANDY BERTRAM
DISTRICT CLERK

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Notice of Rights

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

2. Under section 120.68 of the Florida Statutes, a party who is adversely affected by final District action may seek review of the action in the district court of appeal by filing a notice of appeal under rule 9.110 of the Florida Rules of Appellate Procedure within 30 days of the rendering of the final District action.

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

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

CERTIFICATE OF SERVICE

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

Via U. S. Mail:

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