STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

KATE WRIGHT, JOETTE HILL, and JIMMY WALKER,	)	
Petitioners,	)	
vs.	)	**OGC CASE NO. 08-2253**
	)	**DOAH CASE NO. 08-4546**
MIAMI-DADE COUNTY DEPARTMENT OF ENVIRONMENTAL RESOURCES MANAGEMENT, and TLA-CAMBRIDGE, LLC,	)	
Respondents.	)	

FINAL ORDER

On April 1, 2009, an Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH") submitted to the Department of Environmental Protection ("DEP" or "Department") a Recommended Order ("RO") in the above captioned administrative proceeding. A copy of the RO is attached hereto as Exhibit A. The RO indicated that copies were sent to counsel for all the parties. On April 16, 2009, the Petitioners, Kate Wright, Joette Hill, and Jimmy Walker ("Petitioners") filed their Exceptions to the RO. On April 24, 2009, the Respondents, Miami-Dade County Department of Environmental Resource Management ("DERM") and TLA-Cambridge, LLC ("Cambridge"), filed their Joint Response to Petitioners' Exceptions. This matter is now before me for final agency action.

BACKGROUND

On January 4, 2008, Cambridge filed an application with DERM under Florida Administrative Code Rule 62-701.710, for a permit to authorize the construction and

operation of a waste processing facility ("proposed facility"). Cambridge's application was reviewed by DERM under an agreement ("Operating Agreement") that delegates certain authority from the DEP to Miami-Dade County. The Operating Agreement requires DERM to follow DEP's rules and procedures when determining whether to issue a permit for a waste processing facility. On August 18, 2008, DERM issued its Intent to Issue and Draft Permit to Cambridge.

Cambridge intends to construct and operate the facility on a site that is approximately 5.7 acres in size and located at 3250 N.W. 65th Street, in unincorporated Miami-Dade County, Florida. The site is owned by Florida East Coast Railway L.L.C. ("FEC"). Cambridge entered into a 20-year lease agreement with FEC that authorizes Cambridge to use the site for the proposed facility. The site is located in an industrial warehouse district. Warehouses are adjacent to the north, south, and west sides of the site. The warehouses are served by trucks and railcars. Other warehouses, rail yards, and railroad tracks are located west of the site. The industrial district extends north, south, and west of the site. The eastern side of the site is bounded by N.W. 32nd Avenue, a four-lane road that runs in a north-south direction. Across the street from the site, on the east side of N.W. 32nd Avenue, is a business district. Even farther to the east is a residential area where the Petitioners reside.

Cambridge proposes to construct: (a) a one-story building ("transfer station") that will be used to receive and process construction and demolition ("C&D") debris; (b) a one-story office building; (c) a weigh station for weighing trucks; (d) extensions of the existing railroad tracks; and (d) a new railroad track that will pass through the transfer station. Cambridge will renovate the gatehouse and the existing pavement on the site

will remain intact. A chain-link fence will be retained and enhanced to restrict access to the site. In addition, trees and shrubs will be planted along N.W. 65th Street and N.W. 32nd Avenue to screen the public's view of the facility and to help alleviate airborne dust. The transfer station will be approximately 30,000 square feet in size. It will have a roof, 4 walls, and a concrete floor that is 10 inches thick. The north side of the transfer station will have 10 bay doors to allow access for trucks and one smaller utility door. There also will be one door on the southeast side and one door on the west side of the transfer station to allow railcars to move through the building. C&D debris is the material that is generated when a building is constructed, renovated, or demolished. C&D debris includes concrete, lumber, wallboard, asphalt shingles, metal pipes, glass, plastic, and similar materials. Other types of solid waste cannot be accepted by the facility since they are prohibited by the Draft Permit.

On September 4, 2008, 18 Petitioners filed a petition challenging DERM's proposed agency action. Subsequently, 15 Petitioners voluntarily dismissed their claims and were dismissed from this proceeding. Only three Petitioners remained as parties. The Petition was transmitted to the DOAH, and on September 29, 2008, Cambridge filed a motion to strike certain immaterial and irrelevant allegations in the Petition. On October 14, 2008, the ALJ issued an order granting the motion and striking allegations concerning: land use and zoning issues; whether the facility required an air general permit; truck traffic; and noise. On December 2, 2008, Cambridge filed a Motion in Limine concerning the Petitioners' allegations about the public interest. On January 7, 2009, the ALJ issued an order granting Cambridge's Motion in Limine. The

ALJ conducted a formal hearing on January 21 and 22, 2009, and issued the RO on April 1, 2009.

RECOMMENDED ORDER

In the RO, the ALJ recommended that the Department enter a Final Order granting Cambridge's application, including the conditions in the Draft Permit and three additional conditions in his findings and conclusions. (RO ¶¶ 21, 45, 64, and page 45). After considering the evidence of record, the candor and demeanor of the witnesses, and the pleadings and arguments of the parties; the ALJ concluded that Cambridge demonstrated that it will construct and operate the facility in compliance with all applicable DEP requirements in Florida Administrative Code Chapter 62-701, for a waste processing facility. (RO ¶¶ 83 and 92). Cambridge also provided reasonable assurances that it will comply with all of the conditions contained in the Draft Permit. (RO ¶ 83).

The ALJ found that since the transfer station is fully enclosed on four sides, Cambridge can effectively control any dust that is generated by the activities conducted inside the transfer station. (RO ¶ 24). In order to minimize the potential for dust to escape from the transfer station, Cambridge will: (a) keep all of the transfer station's doors closed at night and when the facility is not operating; (b) minimize the number of doors open during operations; and (c) require its staff to be judicious when deciding whether to open doors, and to give due regard to wind direction and velocity. (RO ¶ 24). Cambridge will use two "DustBoss" machines to eliminate dust generated inside the transfer station. The "DustBoss" machines will spray a fine mist (fog) of water, which will physically impact and knock-down the dust in the air. (RO ¶ 25). The ALJ also found

that Cambridge will minimize the potential for dust outside the transfer station by requiring a hauler to keep its load of C&D debris covered with a tarp until the hauler's truck is completely inside the transfer station. To further minimize the potential for dust, Cambridge will use a piece of mobile equipment to collect and remove dust from the pavement outside of the building. (RO ¶¶ 26 and 27).

The ALJ concluded that Cambridge will take reasonable precautions to control fugitive emissions of particulate matter, such as the dust generated by truck traffic on the site. These will include: (a) having pavement on the site in areas where there will be truck traffic; (b) using mobile equipment and a moist broom to remove dust from the paved areas of the site; (c) planting vegetative buffers on the site; (d) placing mesh tarps on the railcars before the railcars are taken outside the transfer station; (d) limiting the height of the C&D debris in the railcars; and (e) keeping tarps on the delivery trucks when the trucks are outside the transfer station during windy conditions. (RO ¶¶ 26, 27, 29, 33). In addition, the ALJ found that the prevailing winds in Miami-Dade County are from the east and southeast most of the year. When the wind is from the east or southeast, the wind at the site will blow away from the Petitioners' residences, which are located east-northeast of the site. For these reasons, it will be physically impossible for any dust or odor from the site to reach the Petitioners' residences approximately 90% of the time. (RO ¶ 42).

The ALJ determined that the facility will not cause objectionable odors in any off-site areas because the C&D debris, recyclable materials, and non-recyclable materials received at the facility will not generate objectionable odors. Incidental garbage could be a potential source of objectionable odors, but garbage is prohibited at the facility, the

facility will receive very little garbage, and Cambridge's plan to segregate and quickly remove garbage will ensure that objectionable odors are not created inside the transfer station. (RO ¶ 21). The ALJ further found that in the unlikely event that objectionable odors occur outside of the transfer station, Cambridge will use a deodorizing or odor-neutralizing agent to treat any odorous portions of the tipping floor. If necessary, Cambridge also will use the "DustBoss," water-misting machines to spray odor control agents throughout the transfer station. The ALJ concluded that this odor control plan should be required as a permit condition. (RO ¶ 21).

The ALJ noted that water that comes in contact with C&D debris is deemed to be "leachate." Since C&D debris is generally non-hazardous and not water soluble, C&D debris is not expected to produce leachate that is harmful to groundwater. (RO ¶ 47). However, the transfer station is designed with a roof and four walls, which will minimize the potential for generating leachate and minimize the potential for standing water inside the facility. (RO ¶ 48). The ALJ found that the transfer station is well-designed and has a generally satisfactory leachate control system. The leachate will be controlled and contained inside the transfer station by using an enclosed building, a concrete floor, a sump, a good operating plan, and diligent employees. (RO ¶58). However, due to the Petitioners' concern about standing water on the tipping floor and other evidence, the ALJ found that reasonable assurances can best be established by a slight design alteration to provide for a lip or berm around the tipping floor. He concluded that the permit should contain a condition requiring a design alteration to provide for a slight lip or berm around the tipping floor. (RO ¶ 64 and page 45).

The ALJ found that the Petitioners' allegation that water dripping off of delivery trucks will violate the DEP rule that requires facilities to be designed with a leachate control system to prevent discharge, was an unreasonable interpretation of the rule's requirements. (RO ¶¶ 93 and 94; Fla. Admin. Code R. 62-701.710(3)(b)). He concluded that the Petitioners' allegations about water dripping off trucks do not relate to the design of the facility or any discharges from the facility itself. (RO ¶ 94). In addition, the ALJ found that the Petitioners did not present any empirical data that showed that release of leachate from a tipping floor, water dripping from a delivery truck, or water that may accumulate on the tipping floor from use of the "DustBoss" machines, was a source of groundwater or stormwater contamination at any transfer station. (RO ¶¶ 65 – 71, 92).

The ALJ noted that the Petitioners also contended that the tipping floor must be washed weekly to comply with Florida Administrative Code Rule 62-701.710(4)(b). However, the ALJ concluded that this provision applies to facilities that receive putrescible waste, and not to facilities that receive C&D debris only. (RO ¶ 95). The ALJ also concluded that based on the evidence presented in the *de novo* hearing, the design of the transfer station will be better than the design initially proposed in Cambridge's application to DERM. The sump will be bigger, the concrete in the tipping floor will be thicker, and the strength of the concrete will be greater than originally proposed. (RO ¶¶ 72, 73, 80, 98).

STANDARDS OF REVIEW OF DOAH RECOMMENDED ORDERS

Section 120.57(1)(l), Florida Statutes, prescribes that an agency reviewing a recommended order may not reject or modify the findings of fact of an ALJ, "unless the

agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2008); *Charlotte County v. IMC Phosphates Co.*, -- So.2d --, 34 Fla. L. Weekly D357, 2009 WL 331661 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So.2d 61 (Fla. 1st DCA 2007). The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value or weight of the evidence. Rather, "competent substantial evidence" refers to the existence of some evidence (quantity) as to each essential element and as to its admissibility under legal rules of evidence. *See e.g., Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm'n*, 671 So.2d 287, 289 n.3 (Fla. 5th DCA 1996).

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

DCA 1985); *Fla. Chapter of Sierra Club v. Orlando Utils. Comm'n*, 436 So.2d 383, 389 (Fla. 5th DCA 1983).

A reviewing agency thus has no authority to evaluate the quantity and quality of the evidence presented at a DOAH formal hearing, beyond making a determination that the evidence is competent and substantial. *See, e.g., Brogan v. Carter*, 671 So.2d 822, 823 (Fla. 1st DCA 1996). Therefore, if the DOAH record discloses any competent substantial evidence supporting a challenged factual finding of the ALJ, I am bound by such factual finding in preparing this Final Order. *See, e.g., Walker v. Bd. of Prof. Eng'rs,* 946 So.2d 604 (Fla. 1st DCA 2006); *Fla. Dep't of Corr. v. Bradley*, 510 So.2d 1122, 1123 (Fla. 1st DCA 1987). In addition, an agency has no authority to make independent or supplemental findings of fact. *See, e.g., North Port, Fla. v. Consol. Minerals*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994).

Section 120.57(1)(l), Florida Statutes, authorizes an agency to reject or modify an ALJ's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." If an ALJ improperly labels a conclusion of law as a finding of fact, the label should be disregarded and the item treated as though it were actually a conclusion of law. *See, e.g., Battaglia Properties v. Fla. Land and Water Adjudicatory Comm'n*, 629 So.2d 161, 168 (Fla. 5th DCA 1994). However, neither should the agency label what is essentially an ultimate factual determination as a "conclusion of law" in order to modify or overturn what it may view as an unfavorable finding of fact. *See, e.g., Stokes v. State, Bd. of Prof'l Eng'rs*, 952 So.2d 1224 (Fla. 1st DCA 2007).

An agency's review of legal conclusions in a recommended order, are restricted to those that concern matters within the agency's field of expertise. *See, e.g., Charlotte*

County v. IMC Phosphates Co., -- So.2d --, 34 Fla. L. Weekly D357, 2009 WL 331661 (Fla. 2d DCA 2009); *G.E.L. Corp. v. Dep't of Envtl. Prot.*, 875 So. 2d 1257, 1264 (Fla. 5th DCA 2004). An agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction and expertise. *See, e.g., Pub. Employees Relations Comm'n v. Dade County Police Benevolent Ass'n*, 467 So.2d 987, 989 (Fla. 1985); *Fla. Public Employee Council, 79 v. Daniels*, 646 So.2d 813, 816 (Fla. 1st DCA 1994). Considerable deference should be accorded to these agency interpretations of statutes and rules within their regulatory jurisdiction, and such agency interpretations should not be overturned unless "clearly erroneous." *See, e.g., Falk v. Beard*, 614 So.2d 1086, 1089 (Fla. 1993); *Dep't of Envtl. Regulation v. Goldring*, 477 So.2d 532, 534 (Fla. 1985). Furthermore, agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be the only reasonable interpretations. It is enough if such agency interpretations are "permissible" ones. *See, e.g., Suddath Van Lines, Inc. v. Dep't of Envtl. Prot.*, 668 So.2d 209, 212 (Fla. 1st DCA 1996).

However, agencies do not have jurisdiction to modify or reject rulings on the admissibility of evidence. Evidentiary rulings of the ALJ that deal with "factual issues susceptible to ordinary methods of proof that are not infused with [agency] policy considerations," are not matters over which the agency has "substantive jurisdiction." *See Martuccio v. Dep't of Prof'l Regulation*, 622 So.2d 607, 609 (Fla. 1st DCA 1993); *Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985); *Fla. Power & Light Co. v. Fla. Siting Bd.*, 693 So.2d 1025, 1028 (Fla. 1st DCA 1997). Evidentiary rulings are matters within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. *See Martuccio*, 622 So.2d at 609.

Agencies do not have the authority to modify or reject conclusions of law that apply general legal concepts typically resolved by judicial or quasi-judicial officers. *See, e.g., Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140, 1142 (Fla. 2d DCA 2001).

Finally, in reviewing a recommended order and any written exceptions, the agency's final order "shall include an explicit ruling on each exception." *See* § 120.57(1)(k), Fla. Stat. (2008). However, the agency need not rule on an exception that "does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." *Id.*

RULINGS ON EXCEPTIONS

The case law of Florida holds that parties to formal administrative proceedings must alert reviewing agencies to any perceived defects in DOAH hearing procedures or in the findings of fact of ALJs by filing exceptions to DOAH recommended orders. *See, e.g., Comm'n on Ethics v. Barker,* 677 So.2d 254, 256 (Fla. 1996); *Henderson v. Dep't of Health, Bd. of Nursing,* 954 So.2d 77 (Fla. 5th DCA 2007); *Fla. Dep't of Corrs. v. Bradley*, 510 So.2d 1122, 1124 (Fla. 1st DCA 1987). Having filed no exceptions to certain findings of fact the party "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Envtl. Coalition of Fla., Inc. v. Broward County*, 586 So.2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Medical Ctr., Inc. v. State of Fla., Agency for Health Care Admin.*, 847 So.2d 540, 542 (Fla. 4th DCA 2003).

EXCEPTIONS OF THE PETITIONERS

Exception 1

The Petitioners take exception to the first sentence of paragraph 4 of the RO on the basis that it is not supported by competent substantial evidence. Specifically, the Petitioners object to the finding that "[t]he site is located in an industrial warehouse district." The Petitioners do not take exception to the remainder of paragraph 4 where the ALJ specifically found that adjacent to the site are warehouses, rail yards, and railroad tracks. This industrial district extends north, south, and west of the site. (RO ¶ 4). In addition, the Petitioners do not dispute the ALJ's finding in paragraph 5 of the RO that the residential area is located "[e]ven farther to the east" of the site. (RO ¶ 5). However, as pointed out in the Respondents' joint response the finding is supported by the testimony of Petitioners' expert (T. 437-438), and Cambridge's experts (T. 48-54). (*See also* Cambridge Exs. 2 at page 22, 39, 40, 41, and 56B). The competent substantial record evidence supports the ALJ's findings.

Therefore, based on the standard of review outlined above, this exception is denied.

Exception 2

The Petitioners take exception to paragraphs 11 and 12 where the ALJ described the facility's operating protocol for trucks entering the site. However, contrary to the Petitioners' assertion these findings do not contain any statement that "de-tarping of the dump trucks will rarely, if ever, occur outside" of the transfer station. Neither do the findings contain a statement that "de-tarping will likely occur outside [the transfer

station] on a regular basis at the site." The Petitioners' objection may be to paragraph 26 (and possibly paragraph 33), which state the ALJ's findings regarding de-tarping of trucks outside the transfer station as an activity that will only be allowed "if there are trucks waiting to enter and the winds are calm." (Emphasis added). The ALJ also found that tarp removal "will not release a significant amount of dust because any dust that may have been on the tarp at a job site will be blown off while the truck is driving to the facility." (RO ¶ 26). The ALJ's findings in paragraph 26 are based on competent substantial record evidence. (T. 92-94, 265).

The Petitioners contend that the evidence established that de-tarping will occur outside during a number of different scenarios, including "when the bay doors of the facility are closed due to high winds." However, the ALJ found that de-tarping of trucks will not occur during high winds. (RO ¶¶ 26 and 33; T. 92-94). Clearly, the ALJ's finding resolved conflicting evidence. I may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See e.g., Rogers v. Dep't of Health,* 920 So.2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep't of Envtl. Prot.,* 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands County Sch. Bd.,* 652 So.2d 894 (Fla. 2d. DCA 1995). These evidentiary-related matters are within the province of the ALJ, as the "fact-finder" in these administrative proceedings. *See e.g., Tedder v. Fla. Parole Comm'n,* 842 So.2d 1022, 1025 (Fla. 1st DCA 2003); *Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Also, the ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that I cannot alter, absent a complete lack of any competent substantial evidence of record supporting his decision. *See e.g., Collier*

Med. Ctr. v. State, Dep't of HRS, 462 So.2d 83, 85 (Fla. 1st DCA 1985); *Fla. Chapter of Sierra Club v. Orlando Utils. Comm'n*, 436 So.2d 383, 389 (Fla. 5th DCA 1983).

Therefore, based on the foregoing, the Petitioners' Exception 2 is denied.

Exception 3

The Petitioners take exception to paragraph 16 of the RO where the ALJ found that "[t]he facility has the capacity to process all of the C&D debris on the same day that it is delivered to the facility." The Petitioners assert that this finding is not supported by competent substantial evidence and is premised on an improper assumption by the ALJ. Contrary to the Petitioners' assertion competent substantial record evidence supports the ALJ's finding. (T. 73-74; RO ¶ 15). In addition, making "assumptions", i.e. drawing reasonable inferences from the evidence, is an evidentiary-related matter wholly within the province of the ALJ, as the "fact-finder" in this administrative proceeding. *See e.g., Tedder v. Fla. Parole Comm'n,* 842 So.2d 1022, 1025 (Fla. 1st DCA 2003). I am not authorized to reweigh the evidence and draw inferences that are different from those drawn by the ALJ. *See, e.g., Heifetz v. Dep't of Bus. Regulation,* 475 So.2d 1277, 1281-82 (Fla. 1st DCA 1985); *Greseth v. Dep't of Health and Rehabilitative Services,* 573 So.2d 1004 (Fla. 4th DCA 1991).

In addition, the ALJ found that the "Draft Permit requires Cambridge to process all of the C&D debris within 48 hours after it is delivered to the facility." (RO ¶ 16; Cambridge Ex. 21B, Specific Condition 3). Thus the evidence demonstrated that Cambridge will be able to comply with this requirement of the Draft Permit. (RO ¶ 83). Therefore, based on the foregoing, the Petitioners' Exception 3 is denied.

Exception 4

The Petitioners take exception to the portion of paragraph 21 where the ALJ found that "the facility will receive very little garbage." The Petitioners assert that this finding is not supported by competent substantial evidence and is premised on an improper assumption by the ALJ. Contrary to the Petitioners' assertion competent substantial record evidence supports the ALJ's finding, including critical factual findings to which the Petitioners did not take exception. (T. 76, 184; Cambridge Ex. 21B, Specific Conditions 2, 5, 6; Cambridge Ex. 64, Attachment A, p. 2; RO ¶¶ 20 and 21). The critical factual findings in paragraphs 20 and 21 that are unchallenged, are presumed to be correct. *See Couch v. Comm'n on Ethics*, 617 So.2d 1119, 1124 (Fla. 5th DCA 1993); *Dep't of Corrs. v. Bradley*, 510 So.2d. 1122, 1124 (Fla. 1st DCA 1987) (concluding that a party must alert a reviewing agency to any perceived defects in the findings of fact in a DOAH recommended order; and the failure to file exceptions with the agency precludes the party from arguing on appeal that the agency erred in accepting the facts in its final order).

Therefore, based on the foregoing, the Petitioners' Exception 4 is denied.

Exception 5

The Petitioners take exception to the portion of paragraph 21 where the ALJ found that Cambridge also will use the "DustBoss" water-misting machines to spray odor control agents throughout the transfer station. The Petitioners contend that this finding is not supported by competent substantial evidence because "Cambridge refused to confirm that the odor control agents would, in fact, be used at the Facility." *See* Petitioners' Exceptions at page 6. However, a close reading of paragraph 21

shows that the ALJ's finding was a qualified finding that stated: "[if] necessary, Cambridge will also use the 'DustBoss,' water-misting machines to spray odor control agents throughout the transfer station." This finding is supported by competent substantial record evidence. (T. 79, 189, 514). In addition, as pointed out by Cambridge in the joint response, the ALJ required that Cambridge's odor control plan be implemented as a permit condition, including the use of the DustBoss machines for odor control purposes, if necessary. Cambridge did not take exception or otherwise object to the ALJ's proposed permit condition. In fact, Cambridge states that the proposed permit condition "is consistent with Cambridge's plan to implement the odor control measures described by Mr. Enriquez." (Joint Response at page 17; T. 189 and 514).

Therefore, based on the applicable standard of review outlined above, the Petitioners' Exception 5 is denied.

Exception 6

The Petitioners take exception to the portions of paragraphs 24 and 58 where the ALJ found that the facility will be "fully enclosed," on the basis that the finding is not supported by competent substantial evidence. Contrary to the Petitioners' assertion, competent substantial record evidence supports the ALJ's finding. (Cambridge Ex. 2 at page 23; Cambridge Exs. 28, 29, 30; T. 61-63; 83). Therefore, this exception is denied.

Exception 7

The Petitioners take exception to paragraphs 36 and 41 on the basis that the ALJ found the required dust control analysis to be premised on a "per minute basis," and that this is an incorrect legal interpretation/conclusion of law. However, paragraphs 36 and 41 do not contain any such analysis or premise that purports to be a legal

of the dust control standard in Florida Administrative Code Rule 62-204.240. In addition, as pointed out by Respondents, the ambient air quality standards in the rule are not applicable to Cambridge's proposed facility. The ALJ determined that the emissions from the facility will be so small that Cambridge is exempted from obtaining an air permit and is not required to prepare an impact analysis. (RO¶¶ 19, 20, 37, 38, 39). These findings are supported by competent substantial record evidence. (T. 256-261, 267-270; Cambridge Ex. 64, Attachment A at pages 12 and 13).

In addition, contrary to the Petitioners' assertion, the ALJ's findings did consider the facility's cumulative annual emissions. The ALJ determined that the maximum annual emissions under worst-case conditions of 6 tons per year ('TPY') were under the threshold of 10 TPY that triggers the requirement for obtaining a DEP air permit. (RO ¶¶ 35, 36, 37). The ALJ's findings of fact in paragraphs 36 and 41 are supported by competent substantial record evidence. (T. 272-273, 282-283). Therefore, based on the applicable standard of review, the Petitioners' Exception 7 is denied.

Exception 8

The Petitioners take exception to that portion of paragraph 37 where the ALJ found that "Cambridge will not need a DEP air permit for the facility," on the basis that it is not supported by competent substantial evidence. However, as explained in my ruling on Exception 7 above, the record evidence established that the emissions from the facility are below the threshold that triggers the requirement for obtaining a DEP air permit. (T. 260-261; Cambridge Ex. 64, page 12). Therefore, the Petitioners' Exception 8 is denied.

Exception 9

The Petitioners take exception to paragraph 44 of the RO on the basis that it assumed the "fully enclosed" nature of the transfer station to which the Petitioners' Exception 6 was directed. The Petitioners specifically object to the ALJ's finding in paragraph 44 that "the enclosed design of the building prevents the wind from blowing through the transfer station." Contrary to the Petitioners' assertion, this finding is supported by competent substantial record evidence. (T. 81, 82, 85, 279-280). Therefore, based on the foregoing and my ruling in Exception 6 above, the Petitioners' Exception 9 is denied.

Exception 10

The Petitioners take exception to the portion of paragraph 51 where the ALJ found that "[t]he C&D debris will absorb any mist that lands on it." The Petitioners contend that Cambridge did not present any evidence to support a finding that the C&D debris can absorb 30,000 gallons per day of water spray. However, this contention was addressed by the ALJ in paragraphs 62, 63, and 64, to which the Petitioners did not file any exceptions. The unchallenged findings in paragraphs 62-64 state that a lot of the mist will evaporate before reaching the tipping floor and then will be absorbed by the C&D debris. The ALJ also found that "[t]he DustBoss machines presumably will not need to run continuously at maximum capacity," i.e. 30,000 gallons per day of water spray. (RO ¶ 63). These critical factual findings that are unchallenged, are presumed to be correct. *See Couch v. Comm'n on Ethics*, 617 So.2d 1119, 1124 (Fla. 5th DCA 1993); *Dep't of Corrs. v. Bradley*, 510 So.2d. 1122, 1124 (Fla. 1st DCA 1987).

As pointed out by the Respondents in their joint response, paragraph 51 is supported by competent substantial record evidence. (T. 100, 199, 200). Therefore, the Petitioners' Exception 10 is denied.

Exception 11

The Petitioners take exception to the portion of paragraph 58 where the ALJ found that "diligent employees" are part of Cambridge's proposed operating protocol for a satisfactory leachate control system at the transfer station. Cambridge's proposal includes "an enclosed building, a concrete floor, a sump, a good operating plan, and diligent employees." (RO ¶ 58). These findings are supported by competent substantial record evidence. (T. 41, 69, 84-85, 103 115-116). Since the transfer station will be built in the future, the evidence presented at the hearing explained that Cambridge will employ trained spotters and operators, and that Cambridge is committed to operating the transfer station in compliance with all applicable DEP requirements. (T. 41, 69, 84-85, 103 115-116).

Therefore, based on the foregoing, the Petitioners' Exception 11 is denied.

Exception 12

The Petitioners take exception to paragraphs 67 and 75 by asserting that in these paragraphs the ALJ "require the Petitioners to quantify the amount of leachate and other ground water contamination prior to Cambridge quantifying the same." *See* Petitioners' Exceptions at page 11. The Petitioners argue that this requirement and finding improperly shifts the burden to quantify the amount of leachate onto the Petitioners. The Petitioners assert that as a result, Cambridge failed to provide

reasonable assurance with regard to leachate control. *See* Petitioners' Exceptions at page 12.

Contrary to the Petitioners' assertion, the ALJ's findings in paragraphs 47 through 58 and paragraphs 68 through 71, describe Cambridge's *prima facie* evidence of reasonable assurance regarding leachate control and potential release of leachate to the environment. (*See also* RO ¶¶ 87 and 92). The Petitioners did not take exception to these critical factual findings regarding leachate control and potential release of leachate to the environment. Thus, these unchallenged critical factual findings are presumed to be correct. *See Couch v. Comm'n on Ethics*, 617 So.2d 1119, 1124 (Fla. 5th DCA 1993); *Dep't of Corrs. v. Bradley*, 510 So.2d. 1122, 1124 (Fla. 1st DCA 1987).

Consistent with the applicable case law, the burden of presenting evidence then shifted to the Petitioners to prove their allegations regarding leachate control and potential release of leachate to the environment. *See Dep't of Transp. v. J.W.C. Company, Inc.*, 396 So. 2d 778, 789 (Fla. 1st DCA 1981). The ALJ considered the Petitioners' evidence (RO ¶¶ 59 through 67), and ultimately found it unpersuasive. (RO ¶ 92). Thus, the ALJ did not improperly shift the burden of proof to the Petitioners. Therefore, based on the foregoing, the Petitioners' Exception 12 is denied.

Exception 13

The Petitioners take exception to those portions of paragraphs 69, 72, and 73, where the ALJ found that the evidence supported the existence of "eight (8) C&D debris transfer stations in Miami-Dade County," currently regulated by DERM. The Petitioners contend that Cambridge presented no evidence to support this finding of the ALJ. Contrary to the Petitioners' contention, the ALJ's findings are supported by the direct

testimony of Mr. Hardeep Anand, the Chief of DERM's Pollution Regulation and Enforcement Division, who was called as an expert witness by Cambridge. (RO page 4; T. 350-351, 357-361, 363-364, 369-370, 514). Additional supporting evidence came from Cambridge's employee and expert witness, Mr. Enriquez. (T. 89-90). Thus, competent substantial record evidence supports the ALJ's finding of fact. The other factual findings in paragraphs 69, 72, and 73 are also supported by competent substantial record evidence. (T. 81-82, 89-90, 190-193, 206, 216-217, 360-361, 364).

Therefore, based on the applicable standard of review, the Petitioners' Exception 13 is denied.

Exception 14

The Petitioners take exception to paragraphs 74, 81, and 97, on the basis that the ALJ misconstrued the law and improperly refused to allow testimony or receive evidence regarding Cambridge's: (a) leachate control plan/system; and (b) stormwater system. The Petitioners argue that these paragraphs are legal interpretations or conclusions of law that I should reject or modify.

In paragraph 74 of the RO, the ALJ found

> 74. DEP issued an Environmental Resource Permit for the construction and operation of a stormwater management system serving the facility. Miami-Dade County issued a Class VI Drainage Permit for the construction and operation of an exfiltration trench that will handle the stormwater from the facility. No one challenged or otherwise appealed the DEP Environmental Resource Permit or the Miami-Dade County Class VI permit.

These three sentences are factual findings that were undisputed and are supported by the evidence. (Joint Pre-hearing Stipulation 15 at E.10 and E.11; T. 108, 109; Cambridge Exs. 11 and 23). The Petitioners do not assert that these facts are not

supported by competent substantial evidence in the record of this proceeding. Therefore, the exception to paragraph 74 is denied.

In paragraph 81 of the RO, the ALJ stated the following:

> 81. The Petitioners contend that DEP and DERM should have evaluated a variety of issues that are of interest to the Petitioners. However, it was undisputed that DEP does not consider the following issues when deciding whether to issue a permit for a solid waste processing facility: zoning and comprehensive plan designations; land use compatibility; traffic; noise; public benefits; aesthetics; geotechnical issues, such as differential settlement; structural design issues, such as the structural design of a tipping floor or push wall; the adequacy of a fire control system; the adequacy of a ventilation system; the economic or ethnic makeup of the areas near a proposed site; whether the proposed location is the best site; or whether there is a need for the proposed facility. In the instant case, many of these issues were addressed by other governmental entities, such as the Building Department for Miami-Dade County.

Nothing in paragraph 81 references a stormwater management system or a leachate control plan/system. Paragraph 81 is supported by competent substantial record evidence. (T. 350-352, 377-379, 495-496; T. 107-108, 214-215, 236).[1] Therefore, the exception to paragraph 81 is denied.

The Petitioners also contend that Cambridge did not provide reasonable assurances, and DERM and/or FDEP did not review and approve any permit relating to leachate control. In fact, in this *de novo* administrative proceeding regarding Cambridge's solid waste permit application under Florida Administrative Code chapter 62-701, the ALJ's RO reflects 25 findings of fact arising from the testimony and evidence about leachate control plans and potential release of leachate into the

[1] The issues raised by the Petitioners were also previously addressed by an Order Granting Motion to Strike entered on October 14, 2008; and an Order On Motion in Limine entered on January 7, 2009.

environment. (RO ¶¶ 47 through 71). After considering the evidence and making those 25 findings of fact, the ALJ then concluded that Cambridge carried its burden of proving entitlement to the requested permit. (RO ¶¶ 83, 92 and 97).

In paragraph 97 of the RO, the ALJ concluded

> 97. The Petitioners criticized the design and operation of the facility's stormwater management systems, including the exfiltration trench, but these systems are not subject to challenge in this proceeding. The DEP permit for the stormwater system and the DERM permit for the exfiltration trench were issued previously and they were not appealed. The final agency actions concerning these permits cannot be collaterally attacked in this case.

The ALJ's conclusions of law also pointed to the well established permitting case law that a permit application must be reviewed solely on the basis of the statutory and rule requirements that provide the parameters governing the type of permit program at issue. *See Council of the Lower Keys v. Charley Toppino and Sons, Inc., 429 So. 2d 67, 68 (Fla. 3d DCA 1983); Taylor v. Cedar Key Special Water and Sewerage Dist.,* 590 So. 2d 481 (Fla. 1st DCA 1991); *Save the St. Johns River v. St. Johns River Water Mgmt. Dist.,* 623 So. 2d 1193, 1198 (Fla. 1st DCA 1993). The ALJ's determination in paragraph 97 is based on established case law and is supported by competent substantial record evidence. (Joint Pre-hearing Stipulation 15 at E.10 and E.11; T. 108, 109; Cambridge Exs. 11 and 23).

The Petitioners complain that they should have been allowed to challenge the issuance of the stormwater management system permit at the final hearing. Florida Administrative Code Rule 62-701.710(8), provides that "[s]tormwater shall be controlled in accordance with Part IV of Chapter 373, F.S., and the rules promulgated thereunder." Thus the Part IV, Chapter 373, F.S., Environmental Resource Permit issued by the DEP

in 2008, which was not challenged, cannot now be collaterally attacked in this proceeding. The Petitioners do not cite to any legal authority that would authorize such a challenge.

Therefore, based on the foregoing the Petitioner's Exception 14 is denied.

Exception 15

The Petitioners take exception to paragraphs 93 and 94 where the ALJ found that the Petitioners' interpretation of the language and intent of Florida Administrative Code Rule 62-701.710(3)(b) was unreasonable. Specifically, Rule 62-701.710(3)(b) provides the minimum design requirements for waste processing facilities, as follows:

> (3) Design requirements. Minimum design requirements for waste processing facilities are as follows:
>
> * * *
>
> (b) The facility shall be designed with a leachate control system to prevent discharge of leachate and mixing of leachate with stormwater, and to minimize the presence of standing water.

The ALJ concluded that "[t]he Petitioners' allegations about water dripping off trucks do not relate to the design of the facility or any 'discharges' from the facility itself." (RO ¶ 94). Further, the competent substantial record evidence of agency practice established that DEP does not "evaluate the possibility that rainwater will drip from delivery trucks, or that delivery trucks will track liquids out of a transfer station," as part of evaluating a waste processing facility permit application under Chapter 62-701. (RO ¶ 68; T. 369).

I conclude that the interpretation adopted by the ALJ in paragraph 94 is not clearly erroneous, but is a reasonable and permissible rule interpretation that is adopted in this Final Order. *See, e.g., Falk v. Beard,* 614 So. 2d 1086, 1089 (Fla. 1993); *State*

Contracting v. Dep't of Transp., 709 So. 2d 607, 610 (Fla. 1st DCA 1998); *Lardas v. Dep't of Envtl. Prot.*, 28 F.A.L.R. 3844 (Dep't of Envtl. Prot. 2005). Therefore, the Petitioners' Exception 15 is denied.

Exception 16

The Petitioners take exception to paragraph 95 of the RO on the basis that it "states that Rule 62-701.710(4)(b), F.A.C. does not apply because Cambridge transfer facility will not receive putrescible waste." *See* Petitioners' Exceptions at page 17. The Petitioners contend that this finding is not supported by competent substantial evidence.

In paragraph 95 the ALJ concluded:

> 95. The Petitioners contend that the tipping floor must be washed weekly pursuant to Florida Administrative Code Rule 62-701.710(4)(b), but this results from a mis-reading of the DEP rule. Florida Administrative Code Rule 62-701.710(4)(b), only applies to facilities that receive putrescible waste, as indicated in the first sentence of the rule. Mr. Cargill explained that the DEP rules do not require weekly washing of transfer stations that receive C&D debris only.

No finding was made in paragraph 95 that "Cambridge transfer facility will not receive putrescible waste." The ALJ found in paragraph 20 that the transfer station will receive " 'de minimis' amounts of garbage as essentially accidental, very minor contents of loads of C&D debris." As I outlined in my ruling on Exception 4 above, the Petitioners did not challenge this critical factual finding. The competent substantial record evidence established that the Cambridge transfer station will not receive garbage (putrescible waste) on a regular basis. (T. 187-188, 371).

Therefore, the Petitioners' Exception 16 is denied.

Exception 17

In this exception, the Petitioners assert that "[i]n the Recommended Order, the ALJ refused to apply any provisions of Chapter 62-4 or 62-296," and "any provisions of Chapter 62-701, outside of Rule 62-701.710." *See* Petitioners' Exceptions at page 18. However, under Section 120.57(1)(k), Florida Statutes, the reviewing agency need not rule on an exception that does not identify the disputed portion of the recommended order by page number and paragraph, or that does not "include appropriate and specific citations to the record," or that "does not identify the legal basis for the exception." *See* § 120.57(1)(k), Fla. Stat. (2008); Fla. Admin. Code R. 28-106.217(1). Since the Petitioners' Exception 17 does not comply with these requirements I do not need to rule on it.

CONCLUSION

The authority of this agency to issue permits containing additional conditions suggested in DOAH recommended orders is long established. *See, e.g., Hopwood v. Dep't of Envtl. Regulation*, 402 So.2d 1296 (Fla. 1st DCA 1981), and cases cited therein at page 1299; *Manasota-88 v. IMC Phosphates Co.,* 25 F.A.L.R. 868, 897 (Fla. DEP 2002), *aff'd per curiam* 865 So.2d 483 (Fla. 1st DCA 2004) (adopting the ALJ's recommendation that IMC submit the final version of the financial responsibility mechanism 30 days prior to commencing mining operations); *Ginnie*

Springs v. Watson, 21 F.A.L.R. 4072, 4085 (Fla. DEP 1999) (adopting six additional permit conditions recommended by the ALJ); *Manasota 88, Inc. v. Agrico Chemical Co.*, 12 F.A.L.R. 1319, 1331 (Fla. DER 1990), *aff'd*, 576 So.2d 781 (Fla. 2d DCA 1991) (adopting six changes to the phosphate company's mitigation plan recommended by the hearing officer).

In the RO the ALJ recommended that the permit should be issued with three additional conditions. The first additional condition requires that Cambridge implement the odor control plan as described by Mr. Enriquez in his testimony. (RO p. 13, ¶ 21). The second additional condition requires Cambridge to install air filters in the transfer station's ventilation system, if the operation of the ventilation system causes violations of any applicable air quality standard, as revealed by the monthly inspections. (RO p. 23, ¶ 45). The third additional condition requires that Cambridge provide a slight lip (raised edge) or berm around the tipping floor. (RO p. 29, ¶ 64, and p. 45).

Neither Cambridge nor DERM filed any exceptions to the ALJ's findings and conclusions supporting his recommended additional conditions. Consequently, the factual findings of the ALJ arrive on administrative review unchallenged and are presumed to be correct. *See Couch v. Commission on Ethics*, 617 So.2d 1119, 1124 (Fla. 5th DCA 1993); *Dep't of Corrs. v. Bradley*, 510 So.2d. 1122, 1124 (Fla. 1st DCA 1987) (concluding that a party must alert a reviewing agency to any perceived

defects in the findings of fact in a DOAH recommended order; and the failure to file exceptions with the agency precludes the party from arguing on appeal that the agency erred in accepting the facts in its final order).

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

A. The Recommended Order (Exhibit A) is adopted in its entirety and incorporated herein by reference.

B. Respondent TLA-Cambridge, LLC's, application for a Solid Waste Management Permit, FDEP File No. 0285283-001-SO (DERM File No. 24054/SW-1584) is GRANTED with the following modifications:

(1) A condition is added to the permit to require implementation of the odor control plan, as described by the Respondent TLA-Cambridge, LLC, during the final hearing;

(2) A condition is added to the permit to require the Respondent TLA-Cambridge, LLC, to install air filters in the transfer station's ventilation system, if the operation of the ventilation system causes violations of any applicable air quality standard, as revealed by the monthly inspections;

(3) A condition is added to the permit to require the Respondent TLA-Cambridge, LLC, to provide a slight lip (raised edge) or berm around the tipping floor.

JUDICIAL REVIEW

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal

pursuant to Rules 9.110 and 9.190, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the clerk of the Department.

DONE AND ORDERED this 18th day of May, 2009, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

MICHAEL W. SOLE
Secretary

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

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

Lea Crandall
CLERK

5/18/09
DATE

CERTIFICATE OF SERVICE

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

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Michelle D. Vos, Esquire
Weiss Serota Helfman Pastoriza
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and by electronic filing to:

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

this 19th day of May, 2009.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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