STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

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| **EARTHMARK SOUTHWEST FLORIDA MITIGATION, LLC,** | ) | |
| **Petitioner,** | ) | |
| **vs.** | ) | **OGC CASE NO. 08-2608** |
| | ) | **DOAH CASE NO. 08-5950** |
| **RESOURCE CONSERVATION HOLDING, INC., and DEPARTMENT OF ENVIRONMENTAL PROTECTION,** | ) | |
| **Respondents.** | ) | |

## FINAL ORDER

On December 29, 2008, an Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH") submitted a Recommended Order of Dismissal ("ROD") in the above referenced proceeding to the Department of Environmental Protection ("DEP" or "Department"). A copy of the ROD is attached hereto as Exhibit A. The ROD indicates that copies were served to counsel for to counsel for Petitioner, Earthmark Southwest Florida, LLC, ("Earthmark") and to counsel for Co-Respondents, Resource Conservation Holding, Inc., ("RCH") and DEP. Petitioner Earthmark filed Exceptions to the ROD on January 12, 2009. Respondents RCH and DEP separately filed Responses to Earthmark's Exceptions, on January 21, 2009, and January 22, 2009, respectively. This matter is now before me for final agency action.

## BACKGROUND

Earthmark operates the Corkscrew Regional Mitigation Bank located in Lee County, Florida, under contract with the South Florida Water Management District

("SFWMD"). RCH is a company in the business of sand and limestone mining and is the applicant for Environmental Resource Permit No. 0266397-001. On August 20, 2008, the Department issued a Notice of Intent to Issue Environmental Resource Permit No. 0266397-001 ("Corkscrew Road Excavation" or "the mining permit") to RCH to extract sand and limestone from a 1,365.5-acre tract of land owned by RCH in Lee County. On August 22, 2008, the Notice of Intent was published in the Fort Myers News-Press, a daily newspaper of general circulation in Lee County and nearby counties in the region. The newspaper notice included a statement that a person desiring to challenge the proposed action of the Department must file a petition for hearing with the Department within 21 days. No petition to challenge the proposed action was received by the Department within 21 days of publication of the newspaper notice.

On November 25, 2008, Earthmark filed its Petition for Formal Administrative Hearing with the Department. On December 1, 2008, the Department referred the petition to DOAH. RCH filed an Emergency Motion to Dismiss, Request for Attorneys Fees, and Alternative Motion to Strike. On December 4, 2008, the ALJ held a case management conference by telephone to address the nature of the emergency and to determine whether evidence was required to resolve the untimeliness issue that appeared on the face of the Petition for Formal Administrative Hearing. Following the telephone conference, the ALJ issued an Order which set forth expedited discovery instructions and identified three subjects upon which evidence could be offered at an expedited hearing: (1) The facts surrounding the request for notice of agency

action; (2) the practice of the Department with regard to Florida Administrative Code Rule 62-343.090(2)(h); and (3) the facts relevant to whether the permitted project qualifies for the summary hearing proceeding described in Section 337.0261(4), Florida Statutes (2008).

The hearing was held on December 23, 2008, in Tallahassee, Florida. At the conclusion of the presentation of evidence, the parties were allowed to make closing arguments. The ALJ informed the parties that a ruling on the motion to dismiss would be issued without post-hearing written submittals and without a transcript of the hearing.[1] The ALJ issued the ROD on December 29, 2008.

## THE RECOMMENDED ORDER OF DISMISSAL

The ALJ ultimately recommended that Earthmark's Petition for Formal Administrative Hearing be dismissed as untimely. He concluded that Florida Administrative Code Rule 62-343.090(2)(h) regarding requests for notice refers to a request for notice of the "intended agency action for a specific application." He found that Earthmark's consultant ("Erwin") did not clearly ask the Department's program administrator ("Hayes") to be notified specifically about the Corkscrew Road Excavation. (ROD ¶¶ 17, 19, 22, 26, 29, 32, 33). Erwin is the Qualified Mitigation Supervisor for Corkscrew Regional Mitigation Bank. (ROD ¶ 13). Erwin has had a long career in environmental consulting and is knowledgeable about the Department's environmental permitting procedures. (ROD ¶ 11).

The ALJ determined that it was the Department's practice to accept both written and oral requests for notification of proposed agency action. When such a request is

[1] The hearing transcript was subsequently prepared and filed with DOAH on January 5, 2009.

made, a note is placed in the Department's permit application file as a reminder to send the person who made the request a copy of the Notice of Intent. No note was placed in the permit application file for the Corkscrew Road Excavation. (ROD ¶ 21). The ALJ also found that Hayes has a practice of taking notes at meetings and workshops and to include in his notes any request that he receives from a person to be notified of proposed agency action. The ALJ found that Hayes took notes during a March 28, 2007, meeting in Fort Myers with SFWMD and Lee County employees, and other interested persons to discuss, among other topics, mining activity in Lee County. (ROD ¶ 20). Erwin testified at the hearing that it was at this meeting that he asked Hayes to "keep us posted" about meetings, permit applications, and proposed agency actions regarding any mining proposals in Lee County. The ALJ found that Erwin did not specifically request to be informed about the Corkscrew Road Excavation. Furthermore, although Erwin said that Hayes knew that Erwin was associated with the Corkscrew Regional Mitigation Bank, Erwin did not refer specifically to the mitigation bank when he asked Hayes to "keep us posted." (ROD ¶¶ 17 and 33). The ALJ also found that Hayes made no note that Erwin (or anyone else) had requested notice of mining permit applications or proposed Department actions on mining permits. (ROD ¶ 20).

The ALJ found that Hayes remembered seeing and talking to Erwin at the meeting in Fort Myers. Hayes testified that Erwin was one of several people that stood around him after Hayes's presentation to ask questions or to discuss mining issues. The ALJ determined that Hayes did not recall being asked by Erwin to give him notice of

mining permit applications or proposed Department actions on mining permits, in general, or the Corkscrew Road Excavation, in particular. (ROD ¶ 19).

The ALJ reasoned that because the Department had no memory or record of an oral request from Erwin to be notified of proposed action on the Corkscrew Road Excavation, the timeliness of Earthmark's petition must also be analyzed under the doctrine of equitable tolling. (ROD ¶ 29). The ALJ then concluded that Earthmark failed to show by a preponderance of the evidence that it was misled or lulled into inaction by the Department, or that other considerations of equity require that the deadline for filing the petition be tolled. He found that under the circumstances shown by the more persuasive evidence, it was unreasonable for Erwin to rely on his general remarks to Hayes and Hayes' response to those remarks as the sole means by which Erwin would protect the potential interest of a client associated with the Corkscrew Regional Mitigation Bank in filing a petition for hearing to challenge a proposed mining permit that might adversely affect the mitigation bank. (ROD ¶¶ 35 and 36). The ALJ concluded that when equitable tolling is premised on the content of an oral conversation, as it is in this case, it is essential to know the words that were exchanged with some precision. The ALJ found that Erwin's testimony did not describe his oral request made to Hayes with precision or consistency. (ROD ¶ 32).

Finally, the ALJ also concluded that although Earthmark's petition for hearing was untimely, the record evidence was sufficient to demonstrate a plausible claim of timeliness by Earthmark and a reasonable concern about the operation of a limestone mine adjacent to the Corkscrew Regional Mitigation Bank. Therefore, Earthmark did not

participate in the proceeding for an improper purpose and should not be required to pay the attorney's fees and costs incurred by RCH in this proceeding. (ROD ¶ 37).

## STANDARDS OF REVIEW

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); *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). 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." 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., 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 PETITIONER EARTHMARK

**Exception No. 1**

Earthmark takes exception to Finding of Fact No. 4 where the ALJ finds that the Department issued the Notice of Intent to RCH on August 20, 2008. (Petitioner's Ex. 7). The ALJ's finding is clearly based on Petitioner's Ex. 7, which is a copy of the Department's Notice of Intent issued to RCH. Therefore, the finding is based on competent substantial record evidence. Earthmark contends that the Notice was defective. However, Earthmark does not provide any legal citations to support its contentions. *See* § 120.57(1)(k), Fla. Stat. (2008). In addition, the ALJ's December 4, 2008, Order did not identify a disputed issue for the evidentiary hearing relating to a "defective notice" argument.

Therefore, Earthmark's Exception No. 1 is denied.

**Exception No. 2**

Earthmark takes exception to the third sentence of Finding of Fact No. 15 where the ALJ found that "[i]t was not made clear in Hayes' testimony whether he included details sufficient to identify the location of the proposed Corkscrew Road Excavation." Earthmark argues that there is no competent substantial evidence in the record to support this finding because Hayes testified that the Corkscrew Road Excavation project was mentioned in his presentation. Earthmark's argument ignores the second sentence of Finding of Fact No. 15 where the ALJ finds that Hayes mentioned the Corkscrew Road Excavation permit application during his presentation. (T. 101, line 21; T. 113 lines 10 - 19). The ALJ's finding in the third sentence is supported by competent substantial record evidence and is a reasonable inference from Hayes testimony. Hayes testified that during his presentation he provided a graphic that showed mines in the watershed area. However, the graphic is not a part of this record and his testimony does not describe the graphic in great detail. (T. 101 lines 21-25).

Therefore, Earthmark's Exception No. 2 is denied.

**Exception Nos. 3, 4, 5, 6.**

Earthmark takes exception to four sentences in Finding of Fact No. 17 on the basis that these findings are not supported by competent substantial evidence in the record. The ALJ found that:

> 17. The clarity and specificity of Erwin's request for notice, as described in his affidavit statements, with respect to the permit application of interest to Erwin and the identity of the mitigation bank as the entity for whom Erwin was making the request, was not borne out in Erwin's testimony at the hearing. Erwin testified at the hearing that he does not recall hearing Hayes mention the proposed Corkscrew Road Excavation. Erwin testified that he asked Hayes to "keep us

> posted" about meetings, permit applications, and proposed agency actions regarding any mining proposals in Lee County. Erwin did not specifically request to be informed about the Corkscrew Road Excavation. Furthermore, although Erwin said that Hayes knew that Erwin was associated with the Corkscrew Regional Mitigation Bank, Erwin did not refer specifically to the mitigation bank when he asked Hayes to "keep us posted." (Emphasis added).

Contrary to Earthmark's contentions, the record is replete with evidentiary support for the ALJ's findings. Competent substantial evidence in the form of Erwin's testimony shows that his request was not as clear and specific as described in his affidavits (RCH Exs. 2 and 3). (T. 43 line 13 to 44 line 17; T. 63 line 17 to 64 line 16; T. 103 lines 13 – 22; T. 105 line 14 to 106, line 2). Competent substantial evidence supports the ALJ's reasonable inference that Erwin did not remember Hayes mentioning the Corkscrew Road Excavation. (T. 43 lines 13 – 19: ". . . And I don't believe Mr. Hayes was able to be too specific, . . . ."). Erwin's testimony was that he was doing work for many clients simultaneously, and he made a general request for any information and did not single out one particular mine. (T. 44 lines 4 – 17; T. 63 line 17 to T. 64 line 8).

Therefore, Earthmark's Exception Nos. 3, 4, 5, and 6, to Finding of Fact No. 17 are denied.

**Exception No. 7**

Earthmark takes exception to the first sentence in Finding of Fact No. 18 where the ALJ found that "Erwin did not describe Hayes' response to his oral request for notice about mining permits, except that Hayes' response was understood by Erwin to be in the affirmative." Earthmark contends that this finding is not supported by the competent substantial record evidence. However, a complete review of the record supports the ALJ's finding regarding an absence of testimony from Erwin specifically describing

Hayes' response. This finding is further supported by the remainder of Finding of Fact No. 18 where the ALJ goes on to describe examples of affirmative responses that would have indicated that Erwin's request was clearly conveyed to, and understood by, Hayes. These reasonable inferences from the evidence (or lack of evidence) are judgments wholly within the authority of the ALJ as fact finder. I have no authority to reweigh the evidence, 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); *Tedder v. Fla. Parole Comm'n,* 842 So.2d 1022, 1025 (Fla. 1st DCA 2003).

Therefore, Earthmark's Exception No. 7 is denied.

**Exception No. 8**

Earthmark takes exception to the second sentence of Finding of Fact 21 where the ALJ found that "[w]hen such a request is made, a note is placed in the Department's permit application file as a reminder to send the person who made the request a copy of the Notice of Intent." Earthmark argues that no competent substantial evidence in the record supports the ALJ's finding "that a note is always placed in the application file." *See* Earthmark's Exceptions page 5. However, the ALJ's finding does not contain the word "always." Competent substantial record evidence supports the ALJ's finding. (T. 90 line 22 to T. 91 line 11; T. 100 lines 18 – 21).

Therefore, Earthmark's Exception No. 8 is denied.

**Exception Nos. 9 and 10**

Earthmark takes exception to the ALJ's findings in Finding of Fact No. 22 where he concludes:

> 22. The preponderance of the evidence, taking into account the credibility of the witnesses, supports a finding that,

> whatever Erwin said to Hayes on March 28, 2007, his words were not effective to cause Hayes to understand that Erwin was making a formal request for notice of the Corkscrew Road Excavation that required Hayes to place a note in the permit application file and to send Erwin a copy of the Notice of Intent when it was issued.

Earthmark contends that the testimony of Mr. Erwin was "clear and unequivocal," that Mr. Hayes "just does not recall," and the ALJ's conclusion is "erroneous." As discussed in my rulings on Exception Nos. 3, 4, 5, and 6, above, the ALJ's findings are supported by competent substantial record evidence. (T. 105 line 25 to T. 106 line 2). Earthmark essentially objects to the fact that the tribunal (the ALJ) found by a preponderance of the evidence that Mr. Erwin did not make a formal request for notice.

Preponderance of the evidence is the standard of proof in an administrative hearing. Section 120.57(1)(j), Florida Statutes, requires that an ALJ's findings of fact must be based on a preponderance of the record evidence. A preponderance of the evidence means the probative weight, influence, force, or power of the evidence adduced, considered separately and collectively, with reference to the issue involved. It does not mean that the proponent must establish a case by the greater number of witnesses, but rather by the greater weight of the evidence. *See, e.g., Hack v. Janes*, 878 So. 2d 440 (Fla. 5th DCA 2004). Such matters are within the province of the ALJ as the trier-of-fact and I have no authority to reweigh the evidence, 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); *Tedder v. Fla. Parole Comm'n,* 842 So.2d 1022, 1025 (Fla. 1st DCA 2003).

Therefore, Earthmark's Exception Nos. 9 and 10 are denied.

**Exception Nos. 12 and 13.**

Earthmark takes exception to the second and third sentence in Conclusion of Law paragraph 32 and the second sentence of paragraph 33 on the basis that they are not supported by competent substantial evidence in the record. In paragraph 33 the ALJ found that "Erwin did not describe his oral request made to Hayes with precision or consistency." As discussed in my prior rulings on Exceptions 3, 4, 5, and 6, the record is replete with evidentiary support for the ALJ's findings regarding Erwin's oral request.

In the second sentence of Conclusion of Law paragraph 33 the ALJ found that "[i]t was not made clear that Erwin asked Hayes to be notified specifically about the Corkscrew Road Excavation." As discussed in my prior rulings on Exceptions 3, 4, 5, and 6, there is competent substantial record evidence to support the ALJ's findings regarding Erwin's request. It is in this paragraph that the ALJ concludes that the record evidence does not support a finding that Erwin's request complied with Florida Administrative Code Rule 62-343.090(2)(h) which prescribes that "[w]here a person has requested notice of the intended agency action for a specific application, the Department shall provide such person with notice of such intended agency action on that specific application." (Emphasis added). This provision is included in the rule chapter implementing the Department's Environmental Resource Permit Procedures under Part IV of Chapter 373, Florida Statutes. *See* Fla. Admin. Code R. 62-343.010.

Therefore, Earthmark's Exception Nos. 12 and 13 are denied.

**Exception Nos. 11, 14, and 15.**

Earthmark takes exception to Conclusions of Law paragraphs 29, 35 and 36. Earthmark contends that the ALJ incorrectly applied the doctrine of equitable tolling, or if

correctly applied, that Earthmark did establish that it was misled and lulled into inaction contrary to the ALJ's conclusions. First, in Exception No. 11 to paragraph 29 Earthmark argues that the ALJ's finding that "the Department has no memory or record of an oral request from Erwin to be notified of proposed action on the Corkscrew Road Excavation," is not supported by the evidence. In fact, Earthmark argues that their evidence established that Erwin made a verbal request for notice and that the Department accepts such verbal requests. However, the ALJ found to the contrary that "Mr. Erwin did not specifically request to be informed about the Corkscrew Road Excavation," and "it was not made clear that Erwin asked Hayes to be notified specifically about the Corkscrew Road Excavation." (ROD ¶¶ 17 and 33). These findings are supported by competent substantial record evidence as discussed in my prior rulings on Exception Nos. 3, 4, 5, 6, and Exception Nos. 12 and 13.

Second, Earthmark's Exception Nos. 14 and 15 to paragraphs 35 and 36, respectively, disagree that the ALJ should apply the doctrine of equitable tolling to the factual findings, or if applied, the conclusion should be different from that of the ALJ. The ALJ concluded that "it was unreasonable for Erwin to rely on his oral request to Hayes and Hayes' response to that request as the sole means by which Erwin would protect the potential interest of a client," and that the evidence failed to show that Earthmark "was misle[d] or lulled into inaction by the Department." (ROD ¶¶ 35 and 36). The ALJ concluded that Earthmark failed to carry its burden of proving the applicability of the doctrine of equitable tolling (ROD ¶¶ 31 and 36). Thus, Earthmark failed to demonstrate "reasonable reliance upon a clear and affirmative representation" made by the Department in order to uphold a claim of equitable tolling. *See Nicks v. Dep't of Bus.*

*and Prof'l Regulation*, 957 So. 2d 65, 68 (Fla. 5th DCA 2007). Nevertheless, the ALJ's conclusions of law regarding the doctrine of equitable tolling and underlying factual findings concern a general legal doctrine that I am not authorized to reject or modify for want of "substantive jurisdiction" over the issue. *See* § 120.57(1)(l), Fla. Stat. (2008); *see also Save the Manatee Club, Inc. v. Whitley*, 24 F.A.L.R. 1271 (Fla. DEP 2001).

Therefore, Earthmark's Exception Nos. 11, 14 and 15 are denied.

## CONCLUSION

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

It is therefore ORDERED:

A. The ALJ's Recommended Order of Dismissal (Exhibit A) is adopted in its entirety and incorporated by reference herein.

B. Petitioner Earthmark Southwest Florida Mitigation, LLC's Amended Petition for Administrative Hearing is dismissed with prejudice.[2]

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

[2] The DOAH docket shows that an Amended Petition was filed on December 9, 2008, pursuant to the ALJ's December 4, 2008, Order.

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 12th day of February, 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

2/12/09
DATE

## CERTIFICATE OF SERVICE

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

Frank E. Matthews
Hopping, Green & Sams, P.A.
123 South Calhoun Street
Post Office Box 6526
Tallahassee, FL 32314-6526

Anthony J. Cotter, Esquire
Gray Robinson, P.A.
301 East Pine Street
Suite 1400
Post Office Box 3068
Orlando, FL 32802

Claudia Llado, Clerk and
Bram D. E. Canter, Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

and by hand delivery to:

Ronald W. Hoenstine, III, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this 12th day of February, 2009.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

FRANCINE M. FFOLKES
Administrative Law Counsel

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