BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND
OF THE STATE OF FLORIDA

TETRA TECH EC, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	OGC CASE NO. 09-0762
	)	DOAH CASE NO. 09-3817
MITIGATION SERVICES PBC, LLC, and BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND,	)	
	)	
Respondents.	)	
	)	

FINAL ORDER

This matter comes before the Governor and Cabinet sitting as the Board of Trustees of the Internal Improvement Trust Fund ("Board"), upon entry of a Recommended Order ("RO") in the above captioned proceedings by an Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH"), on October 8, 2010. A copy of the RO is attached hereto as Exhibit A. The RO indicates that copies were sent to counsel for the Petitioner Tetra Tech EC, Inc., ("Tetra Tech") and counsel for the co-Respondents Mitigation Services PBC, LLC, ("Mitigation Services") and the Board. On October 22, 2010, the Respondent Mitigation Services filed its Exceptions to the RO. The Petitioner Tetra Tech and the Respondent Board filed Exceptions to the RO on October 25, 2010. The parties filed Responses to Exceptions on November 4, 2010.

BACKGROUND

On March 10, 2009, the Board authorized the Department of Environmental Protection ("Department")[1] to negotiate a contract pursuant to which Mitigation Services would operate a mitigation bank on approximately 263 acres of state lands located in Palm Beach County known as the Lemon Grove property. The Lemon Grove property is included in 2,020 acres that the Board, in November 2002, approved an option to purchase from Palm Beach County. The County had acquired these lands from the John D. and Catherine T. MacArthur Foundation ("Foundation"). The County and the Foundation had a Mitigation Agreement which allowed the Foundation to use certain lands, including the Lemon Grove property, for mitigation activities. On September 3, 2003, the Foundation assigned its rights under a Mitigation Agreement to Mitigation Services. Mitigation Services is engaged in the business of mitigation banking in Florida. In May 2004, the Board acquired title to the lands that included the Lemon Grove property.

Mitigation Services submitted an application to the South Florida Water Management District ("SFWMD") for a permit to operate a mitigation bank on the Lemon Grove property. SFWMD required Mitigation Services to provide evidence that the Board agreed to the proposed use of the property for mitigation banking. Mitigation Services asked the Department to provide evidence that the Board approved the

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[1] Subsection 253.002(1), Florida Statutes, provides that "[t]he Department of Environmental Protection shall perform all staff duties and functions related to the acquisition, administration, and disposition of state lands, title to which is or will be vested in the Board of Trustees of the Internal Improvement Trust Fund. . . . Unless expressly prohibited by law, the board of trustees may delegate to the department any statutory duty or obligation relating to the acquisition, administration, or disposition of lands, title to which is or will be vested in the board of trustees."

intended use of the Lemon Grove property, but the Department declined to do so. The Department did not believe that the Mitigation Agreement allowed Mitigation Services to operate a mitigation bank on the Lemon Grove property, despite the fact that there were letters from Palm Beach County and the Foundation acknowledging that a mitigation bank was one of the uses contemplated by both parties to the Mitigation Agreement. Mitigation Services and the Department were unable to resolve their disagreement and Mitigation Services requested that the matter be agendaed for review by the Board. The matter came before the Board on October 28, 2008, and after discussion it was deferred, "with some guidance for the Department to negotiate and come back to us at the December meeting with their proposal." (RO ¶ 16). The matter was placed on the December 9, 2008, agenda of the Board, but was withdrawn and rescheduled for the March 10, 2009, meeting of the Board. The agenda item was moved, seconded, and adopted by the Board on March 10, 2009. Part of the Board's action was to delegate to the Department the authority to produce a contract with Mitigation Services that incorporated the terms presented to the Board in the staff report. The contract was being finalized when Tetra Tech filed its petition. The process was stopped, pending the outcome of the instant administrative proceeding.

Tetra Tech filed with the Board its petition for hearing, on April 30, 2009, claiming that the Board acted improperly when it authorized a "sole-source" contract for the use of state lands without determining that it was in the public interest to do so, which Tetra Tech claimed was required by a Board rule. The Board dismissed the petition on the ground that its action was a settlement of a legal dispute involving contracts rights and real property and, therefore, was not subject to administrative review. Tetra Tech was

granted leave to amend its petition and filed an amended petition on July 2, 2009. The Board referred the amended petition to DOAH.

The Board then filed a motion to dismiss the amended petition for lack of subject matter jurisdiction. Mitigation Services filed similar motions. DOAH denied the motions and conducted the final hearing on August 25, 2010, in Tallahassee, Florida. The one-volume Transcript of the final hearing was filed with DOAH, the parties filed post hearing submittals and the ALJ subsequently issued his RO on October 8, 2010.

RECOMMENDED ORDER

In the RO the ALJ identified the issues in this proceeding as "[w]hether the action of the Board in authorizing the Department to enter into a contract with Mitigation Services to operate a mitigation bank on state lands is subject to review under Chapter 120, Florida Statutes, and, if so, whether the Board's action complies with the requirements of applicable law." (RO page 2). The ALJ ultimately concluded that "the Board's action was subject to review under Chapter 120, Florida Statutes" (RO ¶37); and that the Board's action on March 10, 2009, complied with the requirements of Rule 18-2.018(2)(i), Florida Administrative Code ("F.A.C."). (RO ¶ 52). Therefore, the ALJ recommended that the Board "enter a Final Order which authorized the use of the Lemon Grove property by Mitigation Services under the terms identified in the Board's action taken on March 10, 2009." (RO page 23).

The ALJ found that it was Mitigation Services' contention that the Board, upon its purchase of the lands that were the subject of the Mitigation Agreement, took title subject to the terms of the agreement, including the right of Mitigation Services to operate a mitigation bank on the Lemon Grove property. (RO ¶ 8). Mitigation Services

had applied to SFWMD for a permit to operate a mitigation bank on the Lemon Grove property and SFWMD required Mitigation Services to provide evidence that the Board agreed to the proposed use of the property for mitigation banking. (RO ¶ 9). Mitigation Services asked the Department to provide evidence that the Board approved the intended use of the Lemon Grove property, but the Department declined to do so, because the Department did not believe that the Mitigation Agreement allowed Mitigation Services to operate a mitigation bank on the Lemon Grove property. (RO ¶¶ 9 and 10). The ALJ found that when Mitigation Services and the Department were unable to resolve their disagreement, Mitigation Services requested that the matter be placed on the agenda for review by the Board at the Board's public meeting. (RO ¶ 10). The ALJ found that the matter came before the Board on October 28, 2008, and after discussion it was deferred, "with some guidance for the Department to negotiate and come back to us at the December meeting with their proposal." (RO ¶¶ 11-16).

The ALJ further found that the matter was placed on the December 9, 2008, agenda of the Board, but was withdrawn and rescheduled for the March 10, 2009, meeting of the Board. (RO ¶ 17). The agenda item was moved, seconded, and adopted by the Board on March 10, 2009. The ALJ found that the agenda item was identified as:

> Consideration of a request to (1) allow Mitigation Services PBC, LLC to operate a mitigation bank, or other mitigation project, on approximately 263.05 acres of state-owned land known as the Lemon Grove property within the Pal-Mar Florida Forever Project for one ten-year term followed by one five-year renewal term; (2) authorize negotiation of a contract pursuant to the terms outlined below to allow Mitigation Services PBC, LLC to establish a mitigation bank, or other mitigation project, on the Lemon Grove property and delegate authority to the Secretary of the Department of Environmental Protection, or designee, to approve and consent to the contract between the Board of Trustees,

> Mitigation services PBC, LLC and Florida Fish and Wildlife Conservation Commission; (3) determine that, pursuant to paragraph 18-2.018(1)(a), F.A.C., the proposed contract is not contrary to the public interest; (4) determine it is in the public interest to waive the competitive bid requirements of paragraph 18-2.018(2)(i), F.A.C.; and (5) authorize Florida Fish and Wildlife Conservation Commission to be the long-term operation and maintenance entity pursuant to the South Florida Water Management District permit.

(RO ¶¶ 17, 18). The ALJ found that since the agenda item included a request to "determine it is in the public interest to waive the competitive bid requirements of [Rule] 18-2.018(2)(i)," the affirmative vote of the Board was to make this determination. (RO ¶¶ 21, 36). Thus, the ALJ concluded that the Board's action determined the substantial interests of Mitigation Services by authorizing Mitigation Services' use of state lands for private gain pursuant to negotiation rather than by competitive bidding. This action of the Board was subject to review under Chapter 120, Florida Statutes, on the timely filing of a petition for hearing by a person whose substantial interests were affected by the Board's action. (RO ¶ 37). The ALJ then determined that Tetra Tech's substantial interests were determined by the Board's action, in that, Tetra Tech demonstrated standing under the *Agrico* standing test. *See Agrico Chem. Co. v. Dep't of Envtl. Reg.*, 406 So. 2d 478 (Fla. 2d DCA 1981). (RO ¶¶ 38 and 44).

The ALJ also found that supporting reasons for waiving the competitive bid requirement were presented to the Board and reflected in the staff reports, the official minutes of the Board meeting, and the comments of individual Trustees. (RO ¶¶ 22, 23, 24). The ALJ found that an important reason that is reflected in the comments of individual Trustees, in the staff reports, and in the official minutes of the Board meetings was that there existed a colorable legal claim that Mitigation Services had the right to

operate a mitigation bank on the Lemon Grove property, subject to its obtaining a regulatory permit to do so. He concluded that the colorable legal claim and the perceived equities were integral to the Board's stated belief that it was in the public interest to avoid litigation. (RO ¶¶ 23, 31, 36, 48, 50). The ALJ also concluded that other public interest factors that were evaluated by the Board include, the restoration of the Lemon Grove property, the ability of Mitigation Services to accomplish the restoration, the compatibility of the use of the property with the management plan of the Fish and Wildlife Conservation Commission, the establishment of a permanent endowment for the maintenance of the property, and the equitable compensation that the State would derive from the operation of the mitigation bank. (RO ¶¶ 24, 47, 48).

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. (2010); *Charlotte County v. IMC Phosphates Co.*, 18 So.3d 1089 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So.2d 61 (Fla. 1st DCA 2007). The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value or weight of the evidence. Rather, "competent substantial evidence" refers to the existence of some evidence (quantity) as to each essential element and as to its admissibility under legal rules of evidence. *See e.g., Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm'n*, 671 So.2d 287, 289 n.3 (Fla. 5th DCA 1996).

A reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See e.g., Rogers v. Dep't of Health,* 920 So.2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep't of Envtl. Prot.,* 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands County Sch. Bd.,* 652 So.2d 894 (Fla. 2d. DCA 1995). These evidentiary-related matters are within the province of the ALJ, as the "fact-finder" in these administrative proceedings. *See e.g., Tedder v. Fla. Parole Comm'n,* 842 So.2d 1022, 1025 (Fla. 1st DCA 2003); *Heifetz v. Dep't of Bus. Regulation,* 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Also, the ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. *See e.g., Peace River/Manasota Regional Water Supply Authority v. IMC Phosphates Co., 18 So.3d 1079, 1088 (Fla. 2d DCA 2009); Collier Med. Ctr. v. State, Dep't of HRS*, 462 So.2d 83, 85 (Fla. 1st DCA 1985); *Fla. Chapter of Sierra Club v. Orlando Utils. Comm'n*, 436 So.2d 383, 389 (Fla. 5th DCA 1983).

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

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

jurisdiction, and such agency interpretations should not be overturned unless "clearly erroneous." *See, e.g., Falk v. Beard*, 614 So.2d 1086, 1089 (Fla. 1993); *Dep't of Envtl. Regulation v. Goldring*, 477 So.2d 532, 534 (Fla. 1985). Furthermore, agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be the only reasonable interpretations. It is enough if such agency interpretations are "permissible" ones. *See, e.g., Suddath Van Lines, Inc. v. Dep't of Envtl. Prot.*, 668 So.2d 209, 212 (Fla. 1st DCA 1996).

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

RULINGS ON EXCEPTIONS

The case law of Florida holds that parties to formal administrative proceedings must alert reviewing agencies to any perceived defects in DOAH hearing procedures or in the findings of fact of ALJs by filing exceptions to DOAH recommended orders. *See,*

e.g., Comm'n on Ethics v. Barker, 677 So.2d 254, 256 (Fla. 1996); *Henderson v. Dep't of Health, Bd. of Nursing,* 954 So.2d 77 (Fla. 5th DCA 2007); *Fla. Dep't of Corrs. v. Bradley*, 510 So.2d 1122, 1124 (Fla. 1st DCA 1987). Having filed no exceptions to certain findings of fact the party "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Envtl. Coalition of Fla., Inc. v. Broward County*, 586 So.2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Medical Ctr., Inc. v. State of Fla., Agency for Health Care Admin.,* 847 So.2d 540, 542 (Fla. 4th DCA 2003). However, even when exceptions are not filed, an agency head reviewing a recommended order is free to modify or reject any erroneous conclusions of law over which the agency has substantive jurisdiction. *See* § 120.57(1)(l), Fla. Stat. (2010); *Barfield v. Dep't of Health,* 805 So.2d 1008 (Fla. 1st DCA 2001); *Fla. Public Employee Council, 79 v. Daniels*, 646 So.2d 813, 816 (Fla. 1st DCA 1994).

Finally, in reviewing a recommended order and any written exceptions, the agency's final order "shall include an explicit ruling on each exception." *See* § 120.57(1)(k), Fla. Stat. (2010). 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.*

PETITIONER'S EXCEPTIONS

Exception No. 1

The Petitioner Tetra Tech takes exception to Finding of Fact 22 in the RO where the ALJ found that:

> 22. Tetra Tech contends that the Board did not make findings regarding the public interest factors described in

> Florida Administrative Code Rule 18-2.018, such as general environmental concerns, land use, recreation, aesthetics, economics, and public health and safety, but based its decision solely on the potential adverse impacts on Mitigation Services. However, it must be assumed that the decision of the Board was based on all of the supporting reasons presented to the Board.

Tetra Tech focuses on the last sentence in this finding of fact and argues that "[t]here is no presumption in any applicable law that would support this finding nor does the administrative law judge cite to any such presumption." *See* Petitioner's Exceptions ¶ 1. Finding of Fact 22 is located in the section of the RO titled "Public Interest" and is preceded by the following unchallenged factual findings[2]:

> Public Interest
>
> 19. The staff report which accompanied this agenda item contained the following statements (bold type in original):
>
> **Public Interest Determination**
> Pursuant to paragraph 18-2.018(1)(a), F.A.C., the decision to authorize the use of the Board of Trustees-owned land requires a determination that such use is not contrary to the public interest. DEP is recommending the Board of Trustees make such a determination in this case because the Board of Trustees purchased the Lemon Grove property subject to the mitigation agreement. While DEP and Mitigation Services disagree as to whether the original mitigation agreement authorized a mitigation bank, this recommendation is an effort to resolve the disagreement over what

[2] Factual findings of the ALJ that arrive on administrative review 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 Corr. 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).

rights existed under the mitigation agreement at the time the Board of Trustees purchased the property. In addition, the activity will help in the restoration of the property and is a compatible use within FWC's management plan.

Request to Waive Competitive Bid Requirement

Pursuant to paragraph 18-2.018(2)(i), F.A.C., the Board of Trustees may waive the requirement for competitive bids if determined to be in the public interest. Mitigation Services has been working towards a mitigation bank permit under its existing mitigation agreement with the County on the Lemon Grove property prior to the Board of Trustees purchasing the property. Mitigation Services claims they have a significant amount of time invested with the SWFWMD staff in preparing for the mitigation bank permit and also a financial investment for expenditures for the completed surveys and site assessments on the parcel. These investments of time and money were made to receive the SFWMD permit approval necessary to start the mitigation/restoration work and will enable Mitigation Services to begin the restoration in a timely manner. Mitigation Services has seven years experience in mitigation banking at a separate site and according to SFWMD has been found to be in compliance with its current permit. DEP is recommending the Board of Trustees waive the competitive bid process because of these factors.

* * * *

21. Because the agenda item included a request to "determine it is in the public interest to waive the competitive bid requirements of [Rule] 18-2.018(2)(i)," the affirmative vote of the Board was to make this determination.

As a factual finding, the last sentence of paragraph 22 indicates that the ALJ "assumed" or "took for granted"[3] that the supporting reasons presented to the Board formed the basis for its action. This is a reasonable conclusion drawn by the ALJ from the record evidence. It appears that the Petitioner seeks to have the agency draw a different conclusion from the evidence than did the ALJ. The agency is not authorized to reweigh the evidence and draw different inferences than those drawn by the ALJ. *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)(agency is not authorized to interpret the evidence to fit its desired ultimate conclusion). Competent substantial evidence in the record supports the ALJ's finding (RO ¶¶ 19, 21; Joint Ex. 1 pp. 74, 77, 80-81, 103; Joint Ex. 2 pp. 55-58; Joint Ex. 3 pp. 1-5; T. 74-75, 89, 105-106).

As a legal conclusion, the ALJ's finding is supported by long standing case law that there is a presumption "that trustees of internal improvement fund, being public officials of the state, comply with their duty under the law, and that they directly ascertain facts warranting their action." *See Pembroke v. Peninsular Terminal Co.,* 108 Fla. 46, 73-74; 146 So. 249, 258 (Fla. 1933); *Morgan v. Canaveral Port Authority,* 202 So.2d 884, 886 (Fla. 4th DCA 1967). It is also well established that the best evidence of the Board's official acts is the record of the information presented to the Board in a lawful meeting where the Board is vested with the power to act, including making decisions based upon properly promulgated rule. *See, e.g., Kirkland v. State,* 86 Fla. 64, 97 So. 502, 509 (Fla. 1923) *citing Adams v. Bd. Of Trustees of Internal Improvement Fund,* 37 Fla. 266, 20 So. 266 (Fla. 1896); *Bd. Of County Comm. Of*

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[3] *See* The American Heritage College Dictionary, 3d Ed. (1993); Webster's New College Dictionary (2005).

Brevard Cty. v. Snyder, 627 So.2d 469 (Fla. 1993); *see also Marrone v. City of Key West,* 814 So.2d 478, 480 (Fla. 3d DCA 2002). As found by the ALJ (RO ¶¶ 14, 15, 16, 17, 19, 20, 21, 23, 24) the record of the Board's meetings consisted of "the comments of individual Trustees," "the staff reports, and . . .the official minutes of the Board meetings." These findings are supported by competent substantial record evidence (Joint Exs. 1, 2, 3).

Therefore, based on the reasons outlined in the above ruling, Tetra Tech's Exception No. 1 is denied.

Exception No. 2

The Petitioner Tetra Tech takes exception to Finding of Fact 24, where the ALJ found that:

> 24. Other public interest factors reflected in the comments of individual Trustees, in the staff reports, and in the official minutes of the Board meetings are the restoration of the Lemon Grove property, the ability of Mitigation Services to accomplish the restoration, the compatibility of the use of the property with the management plan of the Fish and Wildlife Conservation Commission, the establishment of a permanent endowment for the maintenance of the property, and the equitable compensation that the State would derive from the operation of the mitigation bank.

Tetra Tech contends that "[n]one of those factors are cited in either the transcripts of the Board of Trustees meetings or the Certificate prepared by the Department to reflect the basis for the action of the Trustees." *See* Petitioner's Exceptions ¶ 2. Contrary to Tetra Tech's assertion the ALJ's findings are supported by competent substantial record evidence (Joint Ex. 1 pp. 74, 77, 80-81, 103; Joint Ex. 2 pp. 55-58; Joint Ex. 3 pp. 1-5; T. 74-75, 89, 105-106). Therefore, Tetra Tech's Exception No. 2 is denied.

Exception No. 3

The Petitioner Tetra Tech takes exception to paragraph 47 in the RO where the ALJ concluded:

> 47. Rule 18-2.018(2)(i) states that the public interest factors to be considered when determining whether to waive competitive bidding shall include those specified in Rule 18-2.018(1). The words "include", "includes," and "including" are generally words of enlargement rather than limitation. See McLaughlin v. State, 698 So. 2d 296, 298 (Fla. 3d DCA 1997); Yon v. Fleming, 595 So. 2d 573, 577 (Fla. 4th DCA 1992). Moreover, in the full context of Rule 18-2.018, it does not appear that the Board intended to [ ] limit itself to the public interest factors identified in Rule 18-2.018(1) when making the public interest determination required by Rule 18-2.018(2)(i).

Tetra Tech argues that "[n]o where within [the 18-2.018(1)] list is reference to any factor that would allow the Board to make a public interest determination on the basis of its own desire to avoid potential litigation." *See* Petitioner's Exceptions ¶ 3. Tetra Tech essentially disagrees with the ALJ's conclusion that "in the full context of rule 18-2.018, it does not appear that the Board intended to [ ] limit itself to the public interest factors identified in Rule 18-2.018(1) when making the public interest determination required by Rule 18-2.018(2)(i)." *See* Petitioner's Exceptions ¶ 3.

In general the words "include," "includes," and "including," are terms of enlargement, and not of limitation. *See* 2A N. Singer & J. Singer, Sutherland Statutory Construction § 47.7, p. 305 (7th ed. 2007); *Burgess v. United States,* 128 S.Ct. 1572, 1578 (2008). Based on the context, the word "include" is a "term of enlargement" and "the reference to certain . . . categories is not intended to exclude all others." *Nelson v. United States,* 2010 WL 3191762 at *2 (11th Cir. 2010); *see also Samantar v. Yousuf,*

130 S.Ct. 2278, 2287 (2010). The full context of rule 18-2.018 must be seen as rule chapter 18-2, F.A.C., which includes a broad definition of "public interest" in Rule 18-2.017(49). "'Public interest' means demonstrable environmental, social, historical and economic benefits which would accrue to the public in general as a result of a proposed activity and which would clearly exceed all demonstrable environmental, social, historical and economic costs of the proposed activity." Fla. Admin. Code R. 18-2.017(49). In this context, the factors enumerated in Rule 18-2.018(1) is a list meant to be illustrative rather than exhaustive. *See Samantar v. Yousuf*, 130 S.Ct. 2278, 2287 (2010); *Argosy Ltd. v. Hennigan*, 404 F.2d 14, 20 (5th Cir. 1968)("the word 'includes' therefore conveys the conclusion that there are other items includable, though not specifically enumerated"). Thus, the interpretation adopted by the ALJ in paragraph 47 is correct, reasonable, and is a permissible 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).

Therefore, based on the foregoing reasons, Tetra Tech's Exception No. 3 is denied.

Exception No. 4

Tetra Tech takes exception to paragraph 48 in the RO where the ALJ concluded that the Board made the public interest determination required by Rule 18-2.018(2)(i) based on the public interest factors discussed in Findings of Fact 23 and 24. (RO ¶ 48). Tetra Tech's stated basis for this exception are the same reasons set forth in Exception No. 2. *See* Petitioner's Exceptions ¶ 4.

Therefore, based on the rulings set forth in Exception No. 2 above, Tetra Tech's Exception No. 4 is denied.

Exception No. 5

The Petitioner Tetra Tech takes exception to paragraph 50 in the RO on the basis that "there is no citation to the record for this conclusion, it appears that the administrative law judge believed the claim to be colorable based on comments of the Board," and "[t]here is no citation to any statute, rule or case that would support a conclusion that Mitigation Services had a colorable claim against the Board of Trustees." *See* Petitioner's Exceptions ¶ 5. In paragraph 50 the ALJ's actual conclusion is "that the Board's determination that Mitigation Services had a colorable claim was a reasonable determination. Therefore, avoiding a lawsuit with Mitigation Services was a reasonable public interest consideration." (RO ¶ 50). The ALJ's ultimate conclusion that the Board's determination was reasonable is based on competent substantial record evidence including the unchallenged Findings of Fact 14, 15, 16 and 23[4]:

> 14. Agriculture Commissioner Bronson indicated that "it sounds to me like these are legal issues that are going to probably have to go to court somewhere else." Attorney General McCollum said that he had looked at the Mitigation Agreement and the letters from the County and the Foundation about the intended uses of the Lemon Grove property. He stated:

[4] Factual findings of the ALJ that arrive on administrative review 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 Corr. 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).

> [U]nder law, of course, the State assumes the status of this property at the time and with this understanding there that Mr. McIntosh's company has. So I'm worried that we're here today with a point where we could get involved in a protracted bit of litigation for the State that might be unnecessary. There is certainly at the very least is a case -- what they call a case in controversy here, as to interpreting this, and with the two original parties to this saying there's a mitigation bank right.
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> Plus it looks to me like this has been before you for a long period of time. And it would have been fairer perhaps to Mr. McIntosh and his firm if this had gotten before us or you denied it or something had been resolved before now. And that disturbs me as well. So I would like to think we can work this out, Governor, in some way and let this banking operation exist, as it apparently was intended by the parties, whether or not the contract literally says that or not.

Id. at 88-89.

15. Chief Financial Officer Sink stated:

> General McCollum, like you, I went back and looked at the original mitigation agreement. And I could easily interpret it to say, it doesn't say that you can't operate a mitigation bank. Clearly, the applicant thought -- I mean, he's put a lot of money into this property thinking that he could operate a mitigation bank.

Id. at 92.

16. The final motion was to "defer, with some guidance for the Department to negotiate and come back to us at the December meeting with their proposal." Id. at 99.

* * *

> 23. An important reason that is reflected in the comments of individual Trustees, in the staff reports, and in the official minutes of the Board meetings is that there existed a colorable legal claim that Mitigation Services had the right to operate a mitigation bank on the Lemon Grove property, subject to its obtaining a regulatory permit to do so. The colorable legal claim and the perceived equities were integral to the Board's stated belief that it was in the public interest to avoid litigation.

Because the ALJ's factual findings in Findings of Fact 14, 15, 16, and 23 are supported by competent substantial evidence (Joint Ex. 1 pp. 71, 76, 77, 78-84, 86-89, 91-95, 99, 100-102; Joint Ex. 2 pp. 57-58; Joint Ex. 3 pp. 2, 4, Joint Ex. 4 and 5; T. 76-80, 95-98, 102, 104), and paragraph 50 contains his ultimate conclusion regarding the Board's determination[5], Tetra Tech's Exception No. 5 is denied.

RESPONDENTS EXCEPTIONS

Board of Trustees Exceptions

Exception No. 1

The Board takes exception to Finding of Fact 27 in the RO where the ALJ found: "Tetra Tech contends that, if the State solicited bids for the operation of a mitigation bank on the Lemon Grove property, it is likely that Tetra Tech would have submitted a bid." (RO ¶ 27). The Board argues that its basis for this exception is only related to the finding forming a factual basis for the ALJ's conclusions regarding Tetra Tech's standing to challenge the Board's action in an administrative proceeding. *See* Board Exceptions at pages 3-4. The finding was made by the ALJ based on the evidence adduced in an

[5] The agency is not authorized to reweigh the evidence and draw different inferences than those drawn by the ALJ. *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)(agency is not authorized to interpret the evidence to fit its desired ultimate conclusion).

evidentiary hearing that the Board requested under Section 120.57(1), Florida Statutes. As it provides in Section 120.57(1)(l), Florida Statutes, 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. (2010); *Charlotte County v. IMC Phosphates Co.*, 18 So.3d 1089 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So.2d 61 (Fla. 1st DCA 2007). The ALJ's finding of fact accurately states Tetra Tech's contention (T. pp. 38-39, 46-47, 59) and qualifies the finding with "if the State solicited bids," "Tetra Tech *would have* submitted a bid." (Emphasis added). To the extent that this clear factual finding could be interpreted to support a conclusion that the Board had an independent intention to solicit bids for mitigation banking services at the Lemon Grove property, such an interpretation is not adopted in this Final Order.

Because Finding of Fact 27 is supported by competent substantial record evidence, the Board's Exception No. 1 is denied.

Exception No. 2

The Board takes exception to Finding of Fact 28 in the RO where the ALJ found: "Tetra Tech showed that it is reasonably likely that the revenue that the State would receive from Mitigation Services from the operation of a mitigation bank on the Lemon Grove bank would be less than the amount the State would receive if the contract were competitively bid. The record does not contain sufficient evidence to determine the difference in revenue." (RO ¶ 28). The Board argues that its basis for this exception is only related to the finding forming a factual basis for the ALJ's conclusions regarding

Tetra Tech's standing to challenge the Board's action in an administrative proceeding. *See* Board Exceptions at page 4. The ALJ's finding of fact accurately states Tetra Tech's showing made at the hearing (T. pp. 26-27, 30-31, 35, 43-44, 53, 56). To the extent that this clear factual finding could be interpreted to support a conclusion that the Board had an independent intention to solicit bids for mitigation banking services at the Lemon Grove property, such an interpretation is not adopted in this Final Order.

Because Finding of Fact 28 is supported by competent substantial record evidence, the Board's Exception No. 2 is denied.

Exception No. 3

The Board takes exception to Finding of Fact 29 in the RO where the ALJ found:

> 29. Respondents contend that, based on prior Board policy not to allow mitigation banks on state lands, there would be no solicitation of bids for the operation of a mitigation bank on the Lemon Grove property. This allegation is given little weight because it is a matter of speculation. The Board has no written policy to prohibit the operation of mitigation banks on state lands, and no statute has been cited that prohibits the use of state lands for mitigation banking. The Board is apparently free to authorize such uses.

The Board does not contend that these factual findings are not supported by competent substantial record evidence, or do not represent reasonable inferences from and/or reasonable interpretations of the record evidence. Instead the Board argues that the finding is not legally sufficient to support Conclusion of Law 39 regarding Tetra Tech's standing. *See* Board Exceptions at page 5. The Board also contends that "the record is silent regarding whether or not the Board has a 'written policy to prohibit the operation of mitigation banks on state lands,' providing no support for the statement in FOF 29 that none exists." *See* Board Exceptions at page 5.

The agency has no authority to reject or modify these factual findings of the ALJ, who had the opportunity to hear the witness testimony, judge credibility, and resolve conflicts. *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 wholly 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). In addition the agency cannot reject the ALJ's findings that are supported by competent substantial evidence, even to make alternate findings that are also supported by competent substantial evidence. *See Kesnick v. Flagler Cty. School Bd.,* --- So.3d ---, 2010 WL 4257540 at *2 (Fla. 5th DCA 2010); *Gross v. Dep't of Health*, 819 So.2d 997, 1002 (Fla. 5th DCA 2002). An agency abuses its discretion when it improperly rejects an ALJ's findings. *See Strickland v. Fla. A & M Univ.,* 799 So.2d 276, 278-80 (Fla. 1st DCA 2001).

The ALJ's finding is based on record evidence and is clearly a reference to potential future action of the Board being a matter of speculation (T. 102, lines 6-11). It is well established that the Board retains its discretion to decide what action to take if a proposed award is found to be illegal. *See Moore v. State, Dep't of Health & Rehabilitative Serv.,* 596 So. 2d 759 (Fla. 1st DCA 1992)(declining to direct agency to reevaluate bids after award was reversed); *Procacci v. State, Dep't of Health and Rehabilitative Serv.,* 603 So. 2d 1299 (Fla. 1st DCA 1992)(leaving question of whether to rebid to agency). As the ALJ found "[t]he Board has no written policy to prohibit the

operation of mitigation banks on state lands, and no statute has been cited that prohibits the use of state lands for mitigation banking," so "[t]he Board is apparently free to authorize such uses." (RO ¶ 29). Conversely, the Board is free to appropriately exercise its discretion to not authorize such uses. *See generally Bd. of Trustees of the Internal Imp. Trust Fund v. Lost Tree Village Corp.*, 600 So. 2d 1240 (Fla. 1st DCA 1992).

Because Finding of Fact 29 is supported by competent substantial record evidence, the Board's Exception No. 3 is denied.

Exception No. 4

The Board takes exception to Conclusion of Law 30 in the RO where the ALJ concluded:

> 30. The Department and Mitigation Services assert that DOAH lacks subject matter jurisdiction over this dispute because the action of the Board was a settlement of a legal dispute involving the contractual rights of Mitigation Services under the Mitigation Agreement. Respondents assert that DOAH has no jurisdiction to adjudicate contract or real property claims. No adjudication of contract or real property claims is requested in Tetra Tech's petition for hearing, and no adjudication of such claims is attempted herein. Therefore, there is no need to address this particular jurisdictional argument.

The Board argues that the ALJ "narrowly" focused "on the vehicle used to effect the settlement of rights arising out [sic] the pre-existing contract" thereby presenting an "oversimplified" view of the nature of the Board's action. *See* Board Exceptions at page 7. A close reading of Conclusion of Law 30 shows it to be an accurate recitation by the ALJ of the "Respondents" ("The Department and Mitigation Services") assertions and the content of Tetra Tech's petition for hearing. The ALJ then states that "no

adjudication of such [contract or real property claims] is attempted [in this Recommended Order]." The Board's exception does not challenge the accuracy of the ALJ's descriptions in Conclusion of Law 30, therefore Board's Exception No. 4 is denied. To the extent that this exception may also address Conclusions of Law 31, 32, 33, 34, 36, and 40, as its heading suggests, the rulings on Exceptions 5, 6, and 10 below are incorporated by reference in this ruling.

Exception No. 5

The Board takes exception to Conclusions of Law 31 and 32 in the RO where the ALJ concluded:

> 31. Respondents repeatedly characterize the action of the Board as the settlement of a lawsuit and urge the importance of settling lawsuits. They cite Kruer v. Bd. of Trustees of the Internal Imp. Trust Fund, 647 So. 2d 129 (Fla. 1st DCA 1994), and other judicial decisions which involved settlements of lawsuits. However, *this matter does not involve the settlement of a lawsuit. There neither was, nor is, a lawsuit pending between Mitigation Services and the Board. This matter involves action taken by the Board which was justified in part by the public interest in avoiding a lawsuit with Mitigation Services.* (Emphasis added).
>
> 32. It is made clear in Kruer and many other Florida cases that settlement agreements are not shielded from scrutiny and can be challenged by affected third parties. If the action of the Board were the settlement of a lawsuit, then the court's opinion in Kruer suggests that the appropriate forum for review -- "the court in which the challenged settlement agreement and judgment is entered" -- would be the Board (and DOAH, via the Board's referral of this case to DOAH). *However, this case does not involve the settlement of a lawsuit.* (Emphasis added).

The Board argues that the ALJ's "conclusions" (emphasized above), "specifically reject the Board's own interpretation regarding its authority to validly enter into such settlements . . . as incident to and implied from its power to sue and be sued." *See*

Board Exceptions at page 8. The Board made this argument relying on the authority of *Kruer v. Bd. of Trustees of the Internal Improvement Trust Fund,* 647 So. 2d 129 (Fla. 1st DCA 1994), to assert that DOAH lacked subject matter jurisdiction over this dispute because the action of the Board was a settlement of a legal dispute involving the contractual rights of Mitigation Services under the Mitigation Agreement. *See Kruer,* 647 So. 2d at 133-134 (expressing the view that the appropriate forum in which to challenge an agency's litigation settlement "would be the court in which the challenged settlement agreement and judgment is entered, or about to be entered; or . . . by a separate action for injunctive relief"). The Board does not assert that the ALJ's "conclusions" that are actually factual findings, are not supported by competent substantial record evidence.[6] The ALJ found *Kruer* to be inapposite because it involved the appeal of the Board's final order denying Kruer's petition for administrative hearing wherein he sought to challenge the Board's action approving the settlement of a lawsuit and leases that were to be executed in accordance with the terms of the settlement agreement. *Id.* at 131. The subject lawsuit was between the Board and Charles River Laboratories in the circuit court of Monroe County. *Id.* at 132. The court in *Kruer* found that no authority supported Kruer's attempt to challenge the outcome of court litigation by means of a collateral attack in the administrative forum. *Id.* at 134. The *Kruer* court stated it's view that the appropriate forum in which to challenge an agency's litigation settlement "would be the court in which the challenged settlement agreement and judgment is entered, or about

[6] The agency should not 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).

to be entered; or . . . by a separate action for injunctive relief." *Id.* at 133-134. The court in *Kruer* noted:

> As a practical matter, it is noted that there was no ongoing lease proceeding under Chapter 253, Florida Statutes, pending before the Board in which the Board was exercising its discretion. Instead, as it clearly appears both from appellant's petition and the Board's order, as well as from the briefs and oral argument before this court, the Board's approval of the proposed leases constituted actions taken in the conduct of litigation before the Circuit Court of Monroe County, whose jurisdiction to resolve the litigation between the Board and the Lab has not been questioned.

Id. at 132.

In this proceeding the ALJ determined "[i]t is undisputed that the Board was authorizing the negotiation of a new contract for the use of state lands by a private person for private gain." (RO ¶ 40; Joint Ex. 2; Joint Ex. 3; T. 89). Such a request for use is governed by the provisions of Rule 18-2.018, F.A.C. (RO ¶ 40). The public interest determination under Rule 18-2.018(2)(i), F.A.C., allowed the Board to negotiate rather than competitively bid. (RO ¶ 40). Tetra Tech's petition raised a factual dispute as to whether the Board made the public interest determination required by the rule (RO ¶ 22), and the ALJ concluded that "[t]he Board made the public interest determination required by Rule 18-2.018(2)(i), . . ." (RO ¶ 48).[7] *See, e.g., Keystone Peer Review Organization, Inc. v. State, Agency for Health Care Admin.,* 26 So. 3d 652 (Fla. 1st DCA 2010).

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[7] As noted previously, the Board retains its discretion to decide what action to take if a proposed award is found to be illegal. *See Moore v. State, Dep't of Health & Rehabilitative Serv.,* 596 So. 2d 759 (Fla. 1st DCA 1992)(declining to direct agency to reevaluate bids after award was reversed); *Procacci v. State, Dep't of Health and Rehabilitative Serv.,* 603 So. 2d 1299 (Fla. 1st DCA 1992)(leaving question of whether to rebid to agency).

Because competent substantial record evidence supports the ALJ's mixed factual and legal conclusion in Conclusion of Law 31, the Board's exception to Conclusion of Law 31 is denied.

However, the Board's exception to the second sentence in Conclusion of Law 32 is granted. The ALJ concludes that "[i]f the action of the Board *were the settlement of a lawsuit,* then the court's opinion in Kruer suggests that the appropriate forum for review – 'the court in which the challenged settlement agreement and judgment is entered' -- would be the Board (and DOAH, via the Board's referral of this case to DOAH)." (Emphasis added). This conclusion is inconsistent with the ALJ's conclusion in Conclusion of Law 31 and with the *Kruer* court's analysis. The court in *Kruer* found that no authority supported Kruer's attempt to challenge the outcome of court litigation by means of a collateral attack in the administrative forum. *Kruer v. Bd. of Trustees of the Internal Improvement Trust Fund,* 647 So. 2d 129, 134 (Fla. 1st DCA 1994). This modification or rejection of the ALJ's conclusion of law is within the substantive jurisdiction of the Board. The Board's authority to sue and be sued arises under the provisions of Chapter 253, Florida Statutes. *See, e.g.,* § 253.04, Fla. Stat. (2009).[8] The Kruer case arose out of a lawsuit filed by the Board under its authority in Chapter 253, and the interpretation of the *Kruer* case in this Final Order is more reasonable than that of the ALJ. *See* § 120.57(1)(l), Fla. Stat. (2009).

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[8] "The Board of Trustees of the Internal Improvement Trust Fund may police; protect; conserve; improve; and prevent trespass, damage, or depredation upon the lands and the products thereof, on or under the same, owned by the state as set forth in s. 253.03. The board may bring in the name of the board all suits in ejectment, suits for damage, and suits in trespass which in the judgment of the board may be necessary to the full protection and conservation of such lands, or it may take such other action or do such other things as may in its judgment be necessary for the full protection and conservation of such lands; ..." § 253.04(1), Fla. Stat. (2009)

Therefore, the Board's exception to the second sentence of Conclusion of Law 32, is granted.

Exception No. 6

The Board takes exception to Conclusions of Law 33, 34 and 36 in the RO on the basis that, "as a matter of law, its settlement actions were not governed by competitive bid requirements, but by the standards for valid agency dispute settlements set forth in Kruer." *See* Board Exceptions at pages 11-12. The Board's exception continues its overall objection to the ALJ's factual findings regarding the nature of the Board's action in this case. The Board asserts that the ALJ's finding in Conclusion of Law 36 that "Mitigation Services' request for Board authorization to use the Lemon Grove property to operate a mitigation bank was expressly presented to the Board as an action requiring the Board's determination, pursuant to Rule 18-2.018(2)(i), Fla. Admin. Code, that waiving the competitive bidding process was in the public interest;" was merely a staff recommendation, which the Board had the authority to accept or deny (Joint Exhibit 3, page 1). The agency is not authorized to reweigh the evidence and draw different conclusions from the evidence than those drawn by the ALJ. *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)(agency is not authorized to interpret the evidence to fit its desired ultimate conclusion). Competent substantial evidence in the record supports the ALJ's finding in Conclusion of Law 36 (RO ¶¶ 17, 18, 19, 21; Joint Ex. 1 pp. 74, 77, 80-81, 103; Joint Ex. 2 pp. 55-58; Joint Ex. 3 pp. 1-5; T. 74-75, 89, 105-106).

Based on the foregoing reasons and the ruling in Exception No. 5 above, the Board's Exception No. 6 is denied.

Exception No. 7

The Board takes exception to Conclusions of Law 35, 39 and 49 in the RO on the basis that "these stated principles and examples do not provide a legally sufficient basis for DOAH's exercise of jurisdiction in this case." *See* Board's Exceptions at pages 12-13. The ruling in Exception No. 5 above recognizes that the DOAH proceeding resolved a factual dispute raised by Tetra Tech as to whether the Board made the public interest determination required by Rule 18-2.018(2)(i), F.A.C. (RO ¶¶ 22, 48). *See, e.g., Keystone Peer Review Organization, Inc. v. State, Agency for Health Care Admin.*, 26 So. 3d 652 (Fla. 1st DCA 2010).

Based on the ruling in Exception No. 5, incorporated herein, the Board's Exception No. 7 is denied.

Exception No. 8

The Board takes exception to the second sentence in Conclusion of Law 37, which states in pertinent part, " . . . the action of the Board taken on March 10, 2009, authorized the use of state lands by a private person, as do many of the Board's actions which are regularly the subject of DOAH proceedings . . . ." To the extent this clause could be interpreted to support a conclusion that DOAH has jurisdiction to determine the propriety of Board determinations concerning use of the Board's lands by private persons other than in the circumstance put at issue here by Tetra Tech, such an interpretation is not adopted in this Final Order. The Board also takes exception to the third and fourth sentences of Conclusion of Law 37 in the RO. The ALJ concluded in

the third sentence that "[t]he Board's action determined the substantial interests of Mitigation Services by authorizing Mitigation Services' use of state lands for private gain pursuant to negotiation rather than by competitive bidding." The fourth sentence continued with "[t]herefore, the Board's action was subject to review under Chapter 120, Florida Statutes, upon the timely filing of a petition for hearing by a person whose substantial interests were affected." (RO ¶ 37). The Board's basis for this exception appears to be simply its position in prior exceptions that the Board's action was settlement of a dispute and that such settlement is not subject to a Chapter 120 challenge. *See* Board Exceptions at pages 14-15.

The ALJ's findings paragraphs 17, 18, 19, 31, 36, and 40 of the RO support his conclusion in the third sentence of Conclusion of Law 37 regarding the nature of the Board's action in this case. The prior rulings on this issue in Board Exception Nos. 5 and 6 above are incorporated herein. The ALJ's findings in paragraphs 22, 25-28, 38-40, 42-44 of the RO support his conclusion in the fourth sentence of Conclusion of Law 37 regarding Tetra Tech's standing. As noted in the rulings on the other Board exceptions, the ALJ's findings in the cited paragraphs are supported by competent substantial record evidence. Therefore, the Board's Exception No. 8 is denied.

Exception No. 9

The Board takes exception to Conclusions of Law 39 and 44 in the RO where the ALJ concludes that, "[a]s a potential bidder who was denied the opportunity to submit a bid when the Board decided to negotiate a contract with Mitigation Services, Tetra Tech's substantial interests were affected," and that "Tetra Tech has standing to challenge the action of the Board." (RO ¶¶ 39, 44). The Board asserts that the factual

predicate for the ALJ's conclusion in Conclusion of Law 39 is not supported by competent, substantial evidence. *See* Board Exceptions at page 15. The factual predicate for the ALJ's conclusion is Finding of Fact 27 (T. pp. 38-39, 46-47, 59).

The Board also argues that the case cited by the ALJ in Conclusion of law 39 is "inapposite to the circumstances of this case." *See* Board Exceptions at page 15. The Board's exception continues to assert its overall objection to the ALJ's findings regarding the nature of the Board's action in this case. The rulings on this issue in Board Exception Nos. 5 and 6 above are incorporated herein.

Based on the ruling in the Board's Exception No. 1 above that Finding of Fact 27 is supported by competent substantial record evidence, and the incorporated rulings in Board Exception Nos. 5 and 6 above, the Board's Exception No. 9 is also denied.

Exception No. 10

The Board takes exception to Conclusion of Law 40 in the RO on the same "bases stated more fully in Exception No. 5." *See* Board Exceptions at page 16. For the same reasons outlined in the ruling on the Board's Exception No. 5 above, incorporated herein by reference, the Board's Exception No. 10 is denied.

Exception No. 11

The Board takes exception to Conclusion of Law 41 in the RO where the ALJ concluded:

> 41. Respondents' argument that the Board would not have accepted bids because it had a policy not to allow mitigation banking on state lands is unpersuasive because it is based on an assumption that the current Board is bound by this non-rule policy. That assumption is given no weight. The Board has the authority to allow mitigation banking on state lands, and the Board acknowledged in this case that the

> public can benefit when a private entity is allowed to restore state lands as part of a mitigation banking operation.

The Board's exception cites the same basis as its Exception No. 3 to Finding of Fact 29 and asserts that the ALJ's conclusion has no factual predicate. *See* Board's Exceptions at pages 16-17. However, the ruling in the Board's Exception No. 3 above, that Finding of Fact 29 is supported by competent substantial record evidence, is incorporated herein.

The Board also asserts that Conclusion of Law 41 should be rejected "because it is undisputed that a section 120.56(4) non-rule policy challenge was never at issue in this case."[9] *See* Board's Exceptions at page 17. As Tetra Tech points out in its response, Tetra Tech did not challenge the Board policy as it was not relevant to the issues raised by Tetra Tech. *See* Tetra Tech's Response to Board Exceptions at page 12.

Therefore, based on the foregoing reasons, and the ruling on the Board's Exception No. 3 above, the Board's Exception No. 11 is denied.

Mitigation Services' Exception

Mitigation Services takes exception to Conclusions of Law 31 and 32 in the RO on the same basis as the Board's Exception No. 5 above. *See* Mitigation Services' Exceptions at pages 2-3. Based on the rulings on the Board's Exception No. 5 above, incorporated herein, Mitigation Services' Exception to Conclusion of Law 31 is denied. Mitigation Services' Exception to Conclusion of Law 32 is granted to same extent as the Board's Exception to Conclusion of Law 32 above.

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[9] *But see* § 120.57(1)(e), Fla. Stat. (2009).

CONCLUSION

Having reviewed the Recommended Order and other pertinent matters of record, having considered the applicable law in light of the rulings on the Exceptions, and being otherwise duly advised, it is

ORDERED that:

A. The Recommended Order (Exhibit A), as modified by the rulings above, is adopted and incorporated by reference herein.

B. The Department is authorized to negotiate a contract for the use of the Lemon Grove property by Mitigation Services under the terms identified in the Board's action taken on March 10, 2009.

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.

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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 13 day of December, 2010, in Tallahassee, Florida.

BOARD OF TRUSTEES OF THE
INTERNAL IMPROVEMENT TRUST
FUND OF THE STATE OF FLORIDA

Mimi A Drew

MIMI A. DREW, Secretary, Florida Department of Environmental Protection, as agent for and on behalf of the Board of Trustees of The Internal Improvement Trust Fund of the State of Florida.

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

Lea Crandall
CLERK

12/13/10
DATE

CERTIFICATE OF SERVICE

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

Mary Frey Smallwood, Esquire
GrayRobinson, P.A.
Post Office Box 11189
Tallahassee, FL 32302

John L. Wharton, Esquire
John J. Fumero, Esquire
Rose, Sundstrom & Bentley, LLP
2548 Blairstone Pines Drive
Tallahassee, FL 32301-1567

by electronic filing to:

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

and by hand delivery to:

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

this 14th day of December, 2010.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

FRANCINE M. FFOLKES
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