SOUTH FLORIDA WATER MANAGEMENT DISTRICT

February 10, 2011

Claudia Llado, Clerk of the Division
State of Florida, Division of
Administrative Hearings
1230 Apalachee Parkway
Tallahassee, FL 32399-3060

Dear Ms. Llado:

Subject: ***Citizens for Smart Growth, Inc., Kathie Smith, and Odias Smith vs. Department of Transportation, Martin County, and South Florida Water Management District; DOAH Case Nos. 10-3316, 10-3317, 10-3318***

Pursuant to subsection 120.57(1)(m), Florida Statutes, enclosed is a copy of the South Florida Water Management District's Final Order in the above referenced matter. The exceptions to the recommended order and responses to those exceptions filed by the parties are also enclosed.

If you have any questions, please call me at 561.682.6319.

Sincerely,

Robin L. Clemons
Lead Paralegal

RLC
Enclosure

BEFORE THE SOUTH FLORIDA WATER MANAGEMENT DISTRICT

CITIZENS FOR SMART GROWTH, INC., KATHIE SMITH, and ODIAS SMITH,
Petitioners,

vs.

DEPARTMENT OF TRANSPORTATION, MARTIN COUNTY, and SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
Respondents.

SFWMD Order No. 2011-012 FOF-ERP
DOAH Case Nos. 10-3316, 3317,3318

FINAL ORDER

On December 28, 2010, D.R. Alexander, the Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH"), issued a Recommended Order ("RO") to the South Florida Water Management District ("District") in these consolidated cases. A copy of the RO is attached hereto as Exhibit A. After review of the RO, exceptions and corrections thereto, and the record of the proceeding before DOAH, this matter is now before the Executive Director of the District for final agency action.

STANDARD OF REVIEW FOR RECOMMENDED ORDERS

Section 120.57(1)(l), Fla. Stat., 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). 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 So. Fla. Cargo Carriers Ass'n, Inc. v. Dept. of Bus. Kand Prof'l Regulation*, 738 So. 2d 391 (Fla. 3d DCA 1999); *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.

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 Reg'l Water Supply Auth. v. IMC Phosphates Co.,* 18 So. 3d 1079, 1088 (Fla. 2d DCA 2009); *Collier Med. Ctr. v. State, Dep't of HRS*, 462 So. 2d 83, 85 (Fla. 1st DCA 1985); *Fla. Chapter of Sierra Club v. Orlando Utils. Comm'n*, 436 So. 2d 383, 389 (Fla. 5th DCA 1983). An agency has no authority to make independent or supplemental findings of fact. *See, e.g., N. Port, Fla. v. Consol. Minerals*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994).

Section 120.57(1)(l), Fla. Stat., 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); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140 (Fla. 2d DCA 2001). 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).

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 Props. v. Fla. Land and Water Adjudicatory Comm'n*, 629 So.

2d 161, 168 (Fla. 5th DCA 1993). 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 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., Collier County Bd. of County Comm'rs v. Fish & Wildlife Conservation Comm'n*, 993 So. 2d 69 (Fla. 2d DCA 2008); *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).

Based on Chapter 373, Fla. Stat., and Title 40E of the Fla. Admin. Code, the Executive Director of the District has the administrative authority and substantive expertise to exercise regulatory jurisdiction over the administration and enforcement of Environmental Resource Permit ("ERP") Criteria. Therefore, the Executive Director has

substantive jurisdiction over the ALJ's conclusions of law and interpretations of administrative rules, and is authorized to reject or modify the ALJ's conclusions or interpretations if he or she determines that its conclusions or interpretations are "as or more reasonable" than the conclusions or interpretations made by the ALJ.

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, 81 (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. Coal. 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).

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.*

Petitioners' Exceptions

The Petitioners' exceptions and corrections to the RO were not received during normal business hours on the final day for their filing to be considered timely under Section 120.57(1)(i), Fla. Stat. However, statutes and administrative rules establishing timeframes for filing exceptions to the RO and responses are directory and not mandatory. *See Hamilton County Comm'rs v. Dep't of Envtl. Regulation, 587 So. 2d 1378, 1390 (Fla. 1st DCA 1991).* The District has the discretion to review untimely exceptions to the RO absent any evidence that a party will be prejudiced by its review. Therefore, the District reviewed and ruled as follows on the Petitioners' exceptions and corrections:

Petitioners' Exception No. 1 to Conclusions of Law Nos. 58-61

Petitioners take exception to Conclusions Law Nos. 58-60, which concludes that Petitioner, Citizens for Smart Growth ("CSG") did not prove the elements of associational standing; specifically, that CSG failed to prove, that a substantial number of its members will be affected by the Project. Petitioners' Exception 1 also takes exception to Conclusion of Law No. 61, which characterizes the evidence presented by Petitioners, Kathie and Odias Smith ("Smiths") as "albeit minimal" concerning the standing issue.

Conclusions of Law Nos. 58-60 are supported by Finding of Fact No. 1 of the RO. Petitioners' did not take exception to Finding of Fact No., which found that there was insufficient evidence to substantiate the number of members of CSG who could be considered substantially affected by the project. Instead, the Petitioners argue that the

ALJ erred in interpreting the law of associational standing with respect to the number of members needing to be affected by the Project in order for an organization to have standing.

Conclusion of Law No. 61 is supported by Finding of Fact No. 2 of the RO. Petitioners' did not take exception to Finding of Fact No. 2 where the ALJ found that there was no credible evidence that would prevent the Petitioners from engaging in their current activities after the bridge and other improvements are constructed. The ALJ also found in Finding of Fact No. 2 that there was no evidence showing that the ERP modifications will cause the Petitioners to suffer any adverse impacts.

Having filed no exceptions to Findings of Fact Nos. 1 or 2, the Petitioners have expressed agreement with, or at least waived, any objection thereto. Where there is competent substantial evidence to support a finding of fact, the District may not disturb that finding. The District is without authority to modify or reject conclusions of law where there is support by underlying findings of fact.

In addition, the District may only reject or modify an ALJ's conclusion of law if it has substantive jurisdiction over the law. In some instances, the District may have authority to reject conclusions of law regarding standing; for instance, when standing turns on an interpretation of the District's regulatory jurisdiction. However, in this case the substantial numbers criteria for determining associational standing is not related to any environmental or policy matter on which the District has a special knowledge or expertise; therefore, the District does not have substantive jurisdiction that would allow modification or rejection of the ALJ's Conclusions of Law Nos. 58-61.

Therefore, Petitioners' Exception No. 1 is rejected.

Petitioners' Exception No. 2 to Conclusions of Law Nos. 57, 62, 63

Petitioners Exception No. 2 takes exception to the ALJ's Conclusion of Law No. 57 wherein the ALJ stated the applicable burden of proof standard and concluded that Applicants, Florida Department of Transportation ("DOT") and Martin County ("County"), had to meet that burden.

Petitioners argue that the Applicants failed to perform an analysis and evaluation as required by the District's Basis of Review for Environmental Resource Permit Applications within the South Florida Water Management District ("BOR"); specifically, for impacts to fish and wildlife; whether the Project is in the public interest; secondary impacts, including recreational use and fishery and marine productivity; cumulative impacts; and the "submerged sovereign land process." However, each of the areas in the District's BOR were addressed by the ALJ in his Findings of Fact; but, in the context of the applicable provision of Rule 40E-4.01 and 40E-4.302, Fla. Admin. Code. In, Finding of Fact No. 12, the ALJ stated that "Besides these rules [40E-4.301 and 40E-4.302], certain related BOR provisions which implement the rules must also be considered." All of the provisions of the corresponding provisions of the BOR, cumulative impacts and the submerge sovereign land process, were addressed in Findings of Fact Nos. 17-20, 38-44, 29-31, 45-46 and 51-53. Petitioners did not take exception to Findings of Fact Nos. 12, 13, 17, 29, 31, 38-39, 51-52. Having filed no exceptions, the Petitioners have expressed agreement with, or at least waived, any objection thereto. With respect to the remaining Findings of Fact, there is evidence to

support these findings. *See T. 57, 78, 142, 174-175, 273-274, 276 296-297,424-425, 601-602, 607,610,642,673-675, 733-736, 743-746, 759.* As noted above, where there is competent substantial evidence to support a finding of fact, the District may not disturb that finding. The District is without authority to modify or reject conclusions of law where there is support by underlying findings of fact.

Petitioners take exception to Conclusion of Law Nos. 62 and 63 where the ALJ stated the applicable principles of law, which requires that the evidence presented by the Applicants must provide reasonable assurances, not an absolute guarantee. In addition, the ALJ concluded that the Applicants have provided such reasonable assurances, thereby establishing their entitlement to the requested new ERP and modifications of existing ERPs. Petitioner argues that the ALJ conclusions are not supported by the evidence, groundless and erroneous. The ALJ made specific Findings of Fact that support these Conclusions of Law. *See* Findings of Fact Nos. 16, 20, 24, 28, 31-33, 37-43. As noted above, the District may not modify or reject Conclusions of Law unless it finds that the substituted conclusion is "as or more reasonable than that which was rejected or modified." The District is without authority to modify or reject conclusions of law where there is support by underlying findings of fact.

Based on the foregoing, Petitioners' Exception No. 2 to Conclusions of Law Nos. 57, 62 and 63 is rejected.

Petitioners' Exception to Findings of Fact Nos. 18, 19, and 20

Petitioners take exception to Findings of Fact 18, 19 and 20 wherein the ALJ makes findings regarding whether the Applicants have provided reasonable assurances

that the Project will not adversely impact the value of functions provided to fish, wildlife, and species by wetlands. Petitioners contend that the record does not contain competent substantial evidence in support of the ALJ's Finding of Fact No. 18 and the evidence presented in support of Findings of Fact Nos. 19 and 20 does not constitute competent substantial evidence.

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. The District has no authority to reweigh the evidence where the ALJ's findings are reasonable interpretations of and/or inferences drawn by the ALJ. In addition, the ALJ's evaluation of the evidence on this matter is reflected in Finding of Fact No. 28 where the ALJ found that the preponderance of the evidence supports a finding that the Applicants provided reasonable assurances that the Project will not cause adverse impacts to fish, wildlife, or listed species and Finding of Fact No. 35 wherein the ALJ found that the Applicants took extensive efforts to eliminate and reduce wetland and other surface water impacts of the Project. Petitioners have not taken exception to Findings of Fact Nos. 28 or 35.

Petitioners' exceptions to Findings of Fact Nos. 18-20 are rejected.

Petitioners' Exception to Findings of Fact Nos. 23 and 24

Petitioners take exception to Findings of Fact Nos. 23 and 24 wherein the ALJ found that the Applicants have provided reasonable assurances that the Project will not adversely affect water quality standards. The Petitioners do not contend that the

evidence does not exist in the record to support the ALJ's finding, but that the evidence is not competent substantial evidence. This argument would require the District to re-evaluate the evidence considered by the ALJ. As noted above, the District is without authority to do so.

Petitioners' Exception to Findings of Fact Nos. 23 and 24 are rejected.

Petitioners' Exception to Finding of Fact No. 27

Petitioners take exception to Finding of Fact No. 27 wherein the ALJ made findings concerning the assessments made of the impacts to wetlands caused by the Project. The Petitioners in this exception contend that there is no evidence in the record to support ALJ's findings. However, the ALJ in Finding of Fact No. 26 found that each of the delineated wetlands depicted in the District's staff report had a detailed UMAM assessment of its values and condition. Petitioners did not take exception to Finding of Fact No. 26. Much of Petitioners' argument asks the District to re-evaluate the evidence presented to the ALJ. Therefore, it appears that Petitioners are asking the District to re-weigh the evidence presented to the ALJ or make additional findings of fact in order to accept their argument, neither of which the District is permitted to do.

Petitioners' Exception to Finding of Fact No. 27 is rejected.

Petitioners' Exception to Findings of Fact Nos. 30-31

Petitioners take exception to Findings of Fact Nos. 30 and 31 wherein the ALJ found that the requirement of Rule 40E-4.301(1)(f) and BOR Sections 4.1.1(f) and 4.2.7 concerning "secondary impacts to water resources will not be violated by the Project."

Much of Petitioners' argument asks the District to re-evaluate the evidence presented to the ALJ. Therefore, it appears that Petitioners are asking the District to re-weigh the evidence presented to the ALJ or make additional findings of fact in order to accept their argument, neither of which the District is permitted to do.

Petitioners' Exception to Findings of Fact Nos. 30-31 is rejected.

Petitioners' Exception to Findings of Fact Nos. 40-44

Petitioners take exception to Findings of Fact Nos. 40-44 wherein the ALJ found that the Applicants had provided reasonable assurances that the Project satisfied the contested factors among the seven that comprise the so-called "public interest test." Petitioners' argument essentially criticizes the ALJ's use of the evidence presented by the Applicants. It appears that Petitioners are asking the District to re-weigh the evidence presented to the ALJ or make additional findings of fact in order to accept their argument, neither of which the District is permitted to do. Furthermore, there is evidence in the record to support the challenged findings. *See,* Transcript at 731-738; Exh. J-10. The weight to be given to evidence and the credibility of witnesses is a matter solely within the purview of the ALJ.

Petitioners' Exception to Findings of Fact Nos. 40-44 is rejected.

Petitioners' Exception to Findings of Fact Nos. 45-46

Petitioners take exception to Findings of Fact Nos. 45 and 46 wherein the ALJ explicitly rejects Petitioners contention that Basis of Review Figure 4.4.1 is inaccurate or not representative of the basin in which the Project is located and that the Basin Map

prepared by the District was unacceptable. Again, Petitioners are asking the District to re-weigh the evidence presented to the ALJ or make additional findings of fact in order to accept their argument, neither of which the District is permitted to do. The weight to be given to evidence and the credibility of witnesses is a matter solely within the purview of the ALJ.

Petitioners' Exception to Findings of Fact Nos. 45-46 is rejected.

Petitioners' Exception to Finding of Fact No. 49

Petitioners take exception to Finding of Fact No. 49 wherein the ALJ found that off-site mitigation of the adverse impacts to wetlands caused by the Project will offset the majority of such impacts and that both sites selected for mitigation projects meet the District's criteria for offsetting impacts caused by the Project. Much of Petitioners' argument asks the District to re-evaluate the evidence presented to the ALJ. Therefore, it appears that Petitioners are asking the District to re-weigh the evidence presented to the ALJ or make additional findings of fact in order to accept their argument, neither of which the District is permitted to do.

Petitioners Exception to Finding of Fact No. 49 is rejected.

Petitioners Exception to Findings of Fact Nos. 51 and 53

Petitioners take exception to Findings of Fact Nos. 51 and 53 wherein the ALJ made findings concerning issues raised by Petitioners regarding the use of sovereign submerged lands and whether the application should have been treated as one of "heightened public concern." Again, much of Petitioners' argument asks the District to re-evaluate the evidence presented to the ALJ. Therefore, it appears that the

Petitioners are asking the District to re-weigh the evidence presented to the ALJ or make additional findings of fact in order to accept their argument, neither of which the District is permitted to do.

Petitioners Exception to Findings of Fact Nos. 51 and 53 is rejected.

Rulings on DOT's Exceptions and Corrections to the Recommended Order

DOT's Exception No. 1

DOT's Exception 1 argues that on page 3 of the RO, the last sentence of the first paragraph incorrectly states that the "Revised Staff Report" made minor changes to the "first application". DOT does not identify the legal basis for the exception or include appropriate and specific citations to the record in support of its exception. Therefore, DOT's Exception 1 must be rejected.

However, the District's "Notice of Corrections to ERP Staff Report" clearly reflects that the changes made were to the staff report issued by the District on May 18, 2010, covering the Applicants initial Application No. 091021/Permit 43-002393-P. See Exhibits J10 and D4. DOT's Exception No. 1 is essentially of a scrivener's error and the minor correction shall be incorporated in the Final Order as follows: "A Revised Staff Report containing minor changes to the staff report issued by the District on May 18, 2010 covering the Applicants initial Application No. 091021/Permit 43-002393 was issued on October 2010."

DOT's Exception No. 2

DOT's Exception No. 2 argues that on page 3 of the RO, the first sentence of the second paragraph should be amended to include the date "June 4, 2010." DOT does not identify the legal basis for the exception or include appropriate and specific citations to the record in support of its exception. Therefore, DOT's Exception 1 must be rejected.

However, the Parties' Pre-hearing Stipulation filed in this case reflects that the June 4, 2010 date should be inserted. DOT's Exception No. 2 is essentially a scrivener's error and the minor correction shall be incorporated into the Final Order as set forth in the response herein to the County's Corrections A-G.

DOT's Exception No. 3 to Finding of Fact No. 2

DOT's Exception No. 3 takes exception to Finding of Fact No. 2. DOT does not identify the legal basis for the exception or include appropriate and specific citations to the record in support of its exception. Therefore, DOT's Exception 1 must be rejected.

However, DOT's exception is essentially a scrivener's error and the minor error shall be incorporated into the Final Order as set forth in the response herein to the County's Corrections A-G.

DOT's Exceptions No. 4 to Finding of Fact No. 30

DOT's Exception No. 4 takes exception to Findings of Fact No. 30 wherein the ALJ found that the Applicants have established extensive secondary impact zones and "buffers." DOT suggests that second sentence of Finding of Fact Nos. 30 be changed to delete "established extensive" to "fully mitigated" and to delete the term "buffer" and

add the following: ". . . extending 250 feet to the north and south edge of the right of way." However, DOT does not identify the legal basis for the exception or include appropriate and specific citations to the record in support of its exception. With respect to the use of the term "buffers," this has been addressed in the response herein to the District's Exceptions Nos. 1 and 2.

DOT's Exception No. 4 is rejected.

DOT'S Exception No. 5 to Finding of Fact No. 49

DOT's Exception No. 5 takes exception to Finding of Fact No. 49 (last line on page 26). However, DOT does not identify the legal basis for the exception or include appropriate and specific citations to the record in support of its exception. Therefore, DOT's Exception 1 must be rejected. Nevertheless, the County also takes exception to Finding of Fact 49; therefore this exception is addressed in the response in herein to the County's Exception No. 2.

DOT's Exception No. 5 is rejected accepted.

DOT's Exception No. 6 to Finding of Fact No. 53

DOT's Exception No. 6 takes exception to the ALJ's Finding of Fact No. 53. However, DOT does not identify the legal basis for the exception or include appropriate and specific citations to the record in support of its exception.

DOT's Exception No. 6 is rejected.

Rulings on the County's Exceptions and Corrections to the Recommended Order

County's Exceptions Nos. 1 and 3 to Findings of Fact Nos. 3, 4, and Conclusion of Law No. 63.

The County's Exceptions Nos. 1 and 3 take exception to Findings of Fact Nos. 3, 4 and Conclusion of Law No. 63 and states that the findings should be amended to reflect that the County "was a joint-applicant for a new permit and filed one of the applications for a permit modification" and that "DOT and the County have established their entitlement to modification of two existing ERPs . . ." Exhibits J-10, J-11, and J-14 support this proposed change. The County's Exceptions Nos. 1 and 3 are essentially scrivener's errors and the minor corrections shall be incorporated in the Final Order as follows:

> 3. The County is a political subdivision of the State. It was a co-applicant for the new permit and filed one of the applications for a permit modification at issue in this proceeding.
>
> 4. DOT is an agency of the State and ~~filed the three applications being contested~~. It was a co-applicant for the new permit and filed one of the applications for a permit modification at issue in this proceeding.
>
> 63. For the reasons stated in the Findings of Fact, by a preponderance of the evidence, DOT and the County have established their entitlement to the requested new ERP, and DOT ~~has~~ and the County have established ~~its~~ their entitlement to modification of two existing ERPs. . . . .
>
> County's Exceptions. Nos. 1 and 3 are accepted.

County's Exception No. 2 to Finding of Fact No. 49

The County's Exception No. 2 takes exception to Finding of Fact No. 49 and states that this finding incorrectly ascribes management responsibility for the Dupuis State Reserve to the County whereas the Reserve is managed by the District. The

District's Staff Report (Exhibit J10) and hearing testimony (T. 179) support the proposed change. Therefore, the following change to Finding of Fact No. 49 shall be incorporated in the Final Order as follows:

> Because no single on-site or off-site location within the basin was available to provide mitigation necessary to offset all of the Project's impacts, DOT proposed off-site mitigation at two established and functioning mitigation areas known as Dupuis State Reserve (Dupuis), which is managed by the ~~County~~ District and for which DOT has available mitigation credits, and the County's Estuarine Mitigation Site, a/k/a Florida Oceanographic Society (FOS) located on Hutchinson Island."

County's Corrections A-G

The Executive Director takes note (with the exception of paragraph B, see Joint Pre-hearing Stipulation, Page 2) of the corrections set forth in paragraphs A-G of the County's Exceptions and Corrections to the RO which are essentially scrivener's errors and the minor corrections shall be incorporated into the Final Order as follows:

> A. Under the heading "Statement of the Issues" on page 2 of the RO, the third issue should be corrected to read: "(c) issue DOT and the County a letter of modification of ERP 43-01229-P authorizing roadway and drainage modifications ... (etc.)."
>
> C. Under the heading "Background," on page 3 of the RO, the fourth sentence of the first paragraph should be corrected to read: "Finally, on the same date, it gave notice of intent to approve Application No. 100316-6 filed by DOT and the County to modify existing ERP No. 43-01229-P authorizing ... (etc.)."
>
> D. Under the heading "Background," on page 3 of the RO, the first sentence of the second paragraph should be corrected to read: "On June 1 and 4, 2010, Petitioners, Citizens for Smart Growth, Inc., Kathie Smith, and Odias Smith, filed three Petitions for Administrative Hearings (Petitions) with the District challenging each of the above proposed actions."

E. Under the heading "Findings of Fact," subheading "I. The Parties," the third sentence of Finding No. 1 (on page 6) should be corrected to read: "The original directors were Kathie Smith, Odias Smith, and Craig Smith, who is ~~the Smiths~~' Mr. Smith's son."

F. Under the heading "Findings of Fact," subheading "I. The Parties," the first sentence of Finding No. 2 (on page 8) should be corrected to read: "Petitioners Odias Smith and Cathie Kathie Smith reside in Palm City ..."

G. Under the heading "Findings of Fact," subheading "III. The ERP Permitting Criteria," and the sub-subheading "D. Wetland Delineation and Impacts," the end of the second sentence of Finding No. 27 (on page 18) should be corrected to read: "However, they provide to fish, wildlife, and listed species." *See* Rule 40E-4.301(1)(d), quoted on page 13 of RO.

Rulings on the District's Exceptions and Corrections to the Recommended Order

District's Exceptions Nos. 1 and 2 to Findings of Fact 30 and 31.

The District's Exceptions Nos. 1 and 2 takes exception to Findings of Fact Nos. 30 and 31 wherein the ALJ found that the Applicants have established extensive secondary impact zones and "buffers." The District argues that the word "buffer" is utilized incorrectly by the ALJ. A buffer implies that a secondary impact will not occur; the correct language should be "secondary impact zones." There is evidence in the record to support these exceptions (See T. 749 -750; 964); therefore, the proposed corrections shall be incorporated into the Final Order as follows:

"30. . . . To address these secondary impacts, the Applicants have established extensive secondary impact zones ~~and buffers~~ along the Project alignment, which were based in part on District experience with other road projects and another nearby proposed bridge project in an area where a State Preserve is located."

"31. ... While Petitioners' expert contended that a 250-foot ~~buffer~~ secondary impact zone on both sides of the roadway's 200-foot right-of-way was insufficient to address secondary impacts to birds (who the expert opines may fly into the bridge or moving vehicles), the greater

weight of evidence shows that bird mortality can be avoided and mitigated through various measures incorporated into the Project. ..."

District's Exceptions 1 and 2 are accepted.

District's Exception No. 3 to Finding of Fact No. 34

The District's Exception No. 3 takes exception to Finding of Fact No. 34 wherein the ALJ found that there were unavoidable cumulative impacts of the Project. The District argues that the Rule 40E-4.301(3), Fla. Admin. Code, does not include or discuss cumulative impacts; however, the rule states that the standards and criteria shall determine whether the reasonable assurances required by Subsection 40E-4.301(1) and Rule 40E-4.302 Fla. Admin. Code, have been provided; wherein subsection 40E-4.302 (1)(b) provides that in addition to the conditions set forth in 40E-4.301, an applicant must provide reasonable assurances that the project will not cause unacceptable cumulative impacts upon wetlands and other surface waters as set forth in the BOR. (See Appendix 1 of District's Motion to Take Official Recognition granted by the ALJ)

District's Exception No. 3 is rejected.

District's Exception No. 4 to Finding of Fact No. 40

District's Exception No. 4 takes exception to ALJ's Finding of Fact No. 40 wherein the ALJ stated mitigation project will "improve the abundance and diversity of fish and wildlife on Kiplinger Island. However, there is evidence in the record to support the challenged finding. (See T. 734) The weight to be given

to evidence and the credibility of witnesses is a matter solely within the purview of the ALJ.

District's Exception No. 4 is rejected.

District's Exception No. 5 to Finding of Fact No. 41

District's Exception No. 5 takes exception to ALJ's Finding of Fact No. 41 wherein the ALJ stated that the bridge is expected to be a destination for boating, kayaking, fishing, and bird watching. However, there is evidence in the record to support the challenged finding. (See T. 734) The weight to be given to evidence and the credibility of witnesses is a matter solely within the purview of the ALJ.

District's Exception No. 5 is rejected.

District's Exception No. 6 to Finding of Fact No. 43

District's Exception No. 6 takes exception to the ALJ's Finding of Fact No. 43 wherein the ALJ found that there was "no recreational use" on Kiplinger Island. However, there is evidence in the record to support the challenged findings. (See T. 1023-1024) The weight to be given to evidence and the credibility of witnesses is a matter solely within the purview of the ALJ.

District's Exception No. 6 is rejected.

District's Exception No. 7 to Finding of Fact No. 46

The District's Exception No. 7 takes exception to Finding of Fact No. 46 wherein the ALJ found that the District's analysis found that the wetlands to be mitigated were of

poor quality and provided minimal wildlife and water quality functions. The District argues that this finding should be clarified that a cumulative impact analysis is only done when wetlands will be mitigated outside of the basin. However, there is evidence in the record to support the challenged findings. (*See, Exhibit J10, BOR, 4.2.8.)* The weight to be given to evidence and the credibility of witnesses is a matter solely within the purview of the ALJ.

District's Exception No. 7 is rejected.

District Corrections Nos. 8 and 9

The Executive Director takes note of the corrections identified in the District's Exceptions and Corrections to RO. The corrections set forth in paragraphs 8 and 9 are essentially scrivener's errors and the minor corrections shall be incorporated in the Final Order as follows:

> Paragraph 8 shall be corrected as set forth in the response to the County's Exception No. 2.
>
> Under the heading "Conservation of Fish and Wildlife" on page 23, Finding of Fact No. 40 of the RO, the cited rule shall read: "See Fla. Admin. Code R. 40E-4.302(1)(a)2."

CONCLUSION

Having reviewed the Recommended Order, the exceptions and responses thereto, and considered the applicable law and being otherwise duly advised, it is ORDERED that for the reason as set forth herein:

A. Petitioner's exceptions are rejected.

B. DOT's Exceptions are rejected.

C. County's Exceptions and Corrections A, C-G are accepted and Correction B is rejected.

D. District's Exceptions Nos. 1, 2 and Corrections 8 and 9 are accepted. District's Exceptions 3-7 are rejected.

E. The Recommended Order (Exhibit A) is adopted as modified and incorporated herein by reference.

F. A Notice of Rights is attached as Exhibit B.

The District's Governing Board delegated the authority to the Executive Director to take final action on permit applications under part IV of Chapter 373, Florida Statutes. *District's Policies and Procedures, Subsection 101-41(a).*

DONE and SO ORDERED, this 10th day of February, 2011 in West Palm Beach, Florida.

GOVERNING BOARD OF SOUTH FLORIDA WATER MANAGEMENT DISTRICT • STATE OF FLORIDA SEAL Established 1949

SOUTH FLORIDA WATER
MANAGEMENT DISTRICT,
BY ITS EXECUTIVE DIRECTOR

Carol Ann Wehle

ATTEST:

BY: _____

DATE: 2/10/2011

LEGAL FORM APPROVED:

BY Sarah Null

DATE: 02/10/2011

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order has been furnished this 10th day of February, 2011, by U.S. Regular Mail to the following distribution list:

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