

**STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

GIBBY FAMILY TRUST,)	
)	
Petitioner,)	
)	
vs.)	OGC CASE NO. 10-1574
)	DOAH CASE NO. 10-9292
BLUEPRINT 2000 AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,)	
)	
Respondents.)	
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FINAL ORDER

An Administrative Law Judge (“ALJ”) with the Division of Administrative Hearings (“DOAH”) submitted a Recommended Order (“RO”) on April 11, 2011, to the Department of Environmental Protection (“DEP” or “Department”), in the above captioned proceeding. The RO is attached hereto as Exhibit A. The RO indicates that copies were sent to counsel for all parties. On April 26, 2011, Exceptions to the RO were filed by the Petitioner, Gibby Family Trust, and the Respondent, Blueprint 2000¹ (“Blueprint”). The Petitioner responded to Blueprint’s Exceptions on May 2, 2011, and Blueprint responded to the Petitioner’s Exceptions on May 6, 2011. The Department responded to the Petitioner’s and Blueprint’s Exceptions on May 6, 2011. This matter is now before the Secretary for final agency action.

¹ Blueprint 2000 is an intergovernmental agency created by Leon County and the City of Tallahassee under Part 1 of chapter 163 of the Florida Statutes.

BACKGROUND

Blueprint has undertaken a project to widen, from two to six travel lanes, a segment of Capital Circle in Tallahassee between Interstate 10 and the Tallahassee Regional Airport. The project extends from just south of Orange Avenue to just south of Tennessee Street. Gum Swamp, near the north end of Blueprint's proposed project, is divided by Capital Circle, with most of the swamp located east of the road. On April 29, 2010, DEP gave notice of its intent to issue a Wetland Resource Permit (WRP 37-0281978-002-DF) to Blueprint, and the Petitioner filed a challenge to the Department's notice of intent.

The Petitioner owns property in the smaller part of Gum Swamp west of Capital Circle, specifically in the southwest corner of the intersection of Capital Circle and Gum Road. The Petitioner also owns a larger parcel of property northwest of Gum Swamp, north of Gum Road, which has frontage on the south side of Tennessee Street. The Petitioner's primary concerns about the project were potential flooding and water quality impacts in the part of Gum Swamp where the Petitioner owns property, and its opposition to Blueprint's proposed wetland impact mitigation at a site just north of Gum Road. On December 14, 2010, the Petitioner moved to amend its challenge to include the issue of whether Blueprint provided evidence of financial resources necessary to conduct mitigation activities, monitoring, and corrective action, as required by Florida Administrative Code Rule 62-312.390(1)(a). The motion was denied on the ground that, as an intergovernmental agency of Leon County and the City of Tallahassee, Blueprint was exempt from the requirement of that rule under the authority of section 163.01(9)(c), Florida Statutes.

In response to comments from Leon County during the permit application review process, Blueprint added two stormwater ponds to the project--the Gum Road pond, which is just north of Gum Road near the Gum Road floodplain compensation area, and the Swamp Fox pond at the intersection of Capital Circle and Swamp Fox Road, which is south of Gum Swamp--to meet Leon County's stormwater permitting requirements.

In response to the Petitioner's opposition to the Gum Road mitigation site, Blueprint informed DEP on September 15, 2010, that Blueprint would provide wetland impact mitigation at the Broadmoor mitigation area in lieu of the Gum Road mitigation area. Blueprint's WRP application, as amended, indicated that the project would directly impact 6.22 acres of jurisdictional wetlands in six different locations--0.58 from dredging, 0.02 acres from shading, and 5.62 acres from filling. These impacts were to be offset by mitigation in the same drainage basin--the Lake Munson basin. The mitigation proposed by Blueprint would include the creation of approximately 25.42 acres of forested and transitional wetland habitat at the Broadmoor and Delta mitigation areas. Further, to compensate for impacts to a 1.1-acre conservation area adjacent to the roadway in the western Gum Swamp (the Zenz mitigation area), Blueprint will record a conservation easement over an 8.6-acre tract of forested wetlands adjacent to the roadway. In all, the mitigation plan will provide 6.79 functional units of gain within the Lake Munson drainage basin and would more than offset the 4.53 units of functional loss in the same drainage basin, calculated using the Uniform Mitigation Assessment Methodology ("UMAM").

On February 22, 2011, the parties filed a Pre-Hearing Stipulation with the ALJ. The ALJ conducted the final hearing on March 1 and 2, 2011, in Tallahassee. After the

hearing a transcript was filed, the parties filed proposed recommended orders, and the ALJ subsequently issued his RO.

RECOMMENDED ORDER

In the RO the ALJ recommended that the Department grant Blueprint's WRP application (37-0281978-002-DF), with the additional condition that all new stormwater facilities approved by Blueprint's SWGP, together with the additional Gum Road and Swamp Fox stormwater ponds and the stormceptors in the Gum Swamp 22 segment directing runoff away from the Petitioner's property, are constructed simultaneously with the rest of the project. (RO page 21-22).

The ALJ ultimately determined that Blueprint provided reasonable assurances that its project would comply with water quality standards, would improve water quality, and would not be contrary to the public interest. In addition, wetland impacts would be offset by mitigation. (RO ¶¶ 10 through 21, 44, 49). Specifically, the ALJ found that the Gum Road and Swamp Fox stormwater treatment ponds would add to the water quality treatment provided and already approved in the SWGP. In addition, the WRP provides for four "stormceptors" in the segment of the project in Gum Swamp. The existing roadway does not have stormceptors, and they were not included in Blueprint's SWGP application, which was approved without them. (RO ¶¶ 11, 49).

The Petitioner contended that the project would flood and adversely affect water quality on its property because runoff from Capital Circle would be directed to the west of the roadway into Gum Swamp. (RO ¶ 22). However, the ALJ found that runoff from the northernmost stormceptor would be directed to the east of Capital Circle. Runoff from the other three stormceptors would discharge to the west of Capital Circle but

would enter Gum Swamp to the south and down-gradient of the Petitioner's property and will flow away from the Petitioner's property. (RO ¶¶ 11, 22, 49). The ALJ further found that Blueprint proposed culverts/wildlife crossings that would allow water from both sides of the road to mix and equalize. (RO ¶¶ 16, 22, 24, 49). He concluded that Blueprint proved that water quality in the vicinity of the Petitioner's property will not worsen but, rather, would improve. (RO ¶¶ 11, 22, 44).

In its proposed recommended order, the Petitioner requested the addition of a condition to Blueprint's WRP providing essentially that all construction approved by both the SWGP and the WRP must be performed "simultaneously, concurrently and not in phases or segments." (RO ¶ 28). The ALJ concluded that Blueprint's WRP did not approve a phased or segmented project and that Blueprint must comply with its WRP. He further determined that it was appropriate to add a condition to the WRP to make it clear that all new stormwater facilities approved by Blueprint's SWGP, together with the additional Gum Road and Swamp Fox stormwater ponds, and the stormceptors in the Gum Swamp segment directing runoff away from the Petitioner's property, must be constructed simultaneously with the rest of the project. (RO ¶ 28).

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); *Nunez v. Nunez*, 29 So.3d 1191, 1192 (Fla. 5th DCA 2010).

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 Env’tl. 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).

Therefore, if the DOAH record discloses any competent substantial evidence supporting a challenged factual finding of the ALJ, the agency is 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 Env'tl. 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 Env’tl. 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 Env’tl. 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." *Env'tl. 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.*

RESPONDENT'S EXCEPTIONS

The Respondent Blueprint takes exception to Findings of Fact paragraphs 4, 9, 30, and Conclusions of Law paragraphs 33 and 34, where the ALJ determined that the Petitioner had standing to initiate this administrative proceeding. Blueprint asserts that the "Petitioner offered no evidence to prove the elements of its standing allegations, including the nature of the Trust, the extent of any real or personal property making up the corpus of the Trust. . . ." See Blueprint's Exceptions at page 2. Blueprint essentially argues, without citing to any authority, that the quality and character of the evidence relied on by the ALJ to make his factual findings "is not sufficient evidence that a petitioner is required to provide to prove [its] standing." See Blueprint's Exceptions at page 2.

Under the standard of review this agency may not reject the ALJ's findings of fact as long as they are based on competent substantial evidence. See § 120.57(1)(l), Fla. Stat. (2010). The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value or weight of the evidence. See, e.g., *Nunez v. Nunez*, 29 So.3d 1191, 1192 (Fla. 5th DCA 2010). The Florida Supreme Court has stated that "competent substantial evidence" is "such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. . ." *De Groot v. Sheffield*, 95 So.2d 912, 916 (Fla. 1957). In paragraphs 4, 9, and 30 of the RO the ALJ found that:

4. Petitioner, the Gibby Family Trust, owns property in the smaller part of Gum Swamp west of Capital Circle, specifically in the southwest corner of the intersection of Capital Circle and Gum Road. Petitioner also owns a larger parcel of property a little farther west and north of Gum Swamp, north of Gum Road, that has frontage on the south

side of Tennessee Street. Petitioner's primary concern about the project is that it will cause flooding and worsen water quality in the part of Gum Swamp where Petitioner owns property.

9. On April 29, 2010, DEP issued its notice of intent to approve Blueprint's WRP application. Petitioner requested a hearing, to include consideration of Petitioner's opposition to proposed wetland impact mitigation at a site just north of Gum Road, near Petitioner's larger parcel of property north of Gum Road and south of Tennessee Street, because the proposed mitigation would require the imposition of a conservation easement, which would not allow the use of the area for floodplain compensation for development on Petitioner's larger parcel. In response to Petitioner's opposition to the Gum Road mitigation site, Blueprint informed DEP on September 15, 2010, that Blueprint would provide wetland impact mitigation at the Broadmoor mitigation area in lieu of the Gum Road mitigation area.

30. Blueprint contends that Petitioner did not prove ownership of the property alleged to be affected by Blueprint's WRP and did not prove an injury-in-fact. Although ownership deeds were not introduced in evidence, witnesses for Blueprint and DEP conceded Petitioner's ownership interests. There also was ample evidence that Blueprint's WRP reasonably could be expected to affect Petitioner's substantial interests even if an adverse effect on them was not proven. (Emphasis added.)

The ALJ's findings are supported by the hearing testimony of the Petitioner's engineer (T. Vol. III pp. 339-342, p. 347 lines 5-9), Blueprint's witnesses (T. Vol. I p. 39 lines 11-13; T. Vol. II p. 139; Joint Ex. 1; T. Vol. II pp. 147-148), and the DEP's engineer (T. Vol. III p. 275). In addition, as pointed out by the Petitioner and by DEP in their responses, the documentary evidence in the record also supports the ALJ's findings (Petitioner's Ex. 123; Joint Ex. 2, sheet 11 of 27 and sheet 24 of 27). Thus, the ALJ's findings are supported by competent substantial record evidence.

Blueprint also contends that the Petitioner did not prove how "its interests could be substantially affected by DEP's proposed action." See Blueprint's Exceptions and fn. 1 at page 2. The ALJ found that "Petitioner's primary concern about the project is that it will cause flooding and worsen water quality in the part of Gum Swamp where Petitioner owns property." (RO ¶ 4). This finding is supported by competent substantial record evidence. (T. Vol. III pp. 344 - 346; Petitioner's Ex. 123; Joint Prehearing Stipulation pp. 8-9). The ALJ found in paragraph 23 that the "Petitioner presented the testimony of a stormwater engineer who questioned whether flooding of Petitioner's property will occur notwithstanding Blueprint's floodplain compensation." (RO ¶ 23). Blueprint did not take exception to this finding,² which is supported by competent substantial evidence in the record. (T. Vol. III pp. 344 - 346; Petitioner's Ex. 123). Specifically, the Petitioner's engineer testified that more likely than not the project would result in flooding to the Petitioner's property and wrote an engineering report detailing his findings. (T. Vol. III p. 346, lines 7 though 9; Petitioner's Ex. 123). Blueprint argues that these findings do not support the ALJ's standing conclusions in paragraphs 30, 33, and 34, because they are derived from third parties who did not represent the Gibby Family Trust. However, there is no requirement the facts necessary to prove the elements of standing must be established by testimony of a trust representative. In *Palm Beach Cty. Env'tl. Coalition v. Fla. Power & Light Co.*, 14 So.3d 1076 (Fla. 4th DCA 2009), the petitioner established its standing to challenge an underground injection well permit through the testimony of its expert geologist. The geologist testified that Florida Power & Light failed to establish

² 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." *Env'tl. Coalition of Fla., Inc. v. Broward County*, 586 So.2d 1212, 1213 (Fla. 1st DCA 1991).

that the injectate would not migrate vertically or laterally and impact the water in the wildlife refuge. The Court found that “[b]ased on the evidence offered during the hearing, petitioners clearly presented evidence—albeit evidence that was ultimately found not sufficient to carry the day on the merits—that they reasonably could be affected by the proposed activities.” *Id.* at 1078.

In this case the ALJ’s findings and conclusions are supported by the testimony of the Petitioner’s engineer, although that evidence did not “carry the day on the merits.” *See also Peace River/Manasota Regional Water Supply Authority v. IMC Phosphates Co.*, 18 So.3d 1079, 1083 (Fla. 2d DCA 2009)(standing - a forward-looking concept - cannot disappear based on the ultimate outcome of the proceeding); *St. Johns Riverkeeper, Inc., et. al. v. St. Johns River Water Mgmt. Dist.*, 54 So.3d 1051 (Fla. 5th DCA 2011). Therefore, based on the foregoing reasons, Blueprint’s Exceptions are denied.

PETITIONER’S EXCEPTIONS

Exceptions 1.a through 1.e.

The Petitioner takes exception to portions of the ALJ’s findings regarding flooding and flow in paragraphs 13, 16, 20, 22, and 24 of the RO. The Petitioner contends that these findings are “refuted by the testimony of Petitioner’s expert” and “Petitioner’s exhibit number 123.” *See* Petitioner’s Exceptions at paragraphs 1.a. through 1.e.

In these exceptions, the Petitioner invites this agency to consider and weigh the testimony of the Petitioner’s expert and the Respondents’ experts who testified that the project will not cause flooding or adversely affect the flow of water. (RO ¶¶ 12, 13, 16, 22, 24, 49). This agency has no authority to reject or modify the 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). 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 his 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). Also, this agency cannot reject the ALJ's findings that are supported by competent substantial evidence, even to make alternate findings that are also arguably supported by competent substantial evidence. See *Resnick v. Flagler Cty. School Bd.*, 46 So.3d 1110, 1112 (Fla. 5th DCA 2010); *Gross v. Dep't of Health*, 819 So.2d 997, 1002 (Fla. 5th DCA 2002); *Strickland v. Fla. A & M Univ.*, 799 So.2d 276, 278-80 (Fla. 1st DCA 2001)(An agency abused its discretion when it improperly rejected an ALJ's findings).

In this case competent substantial record evidence supports the ALJ's factual findings in paragraphs 13, 16, 20, 22, and 24. (Blueprint Exs. 5 and 6; DEP Ex. 7; Joint Ex. 11; T. Vol. I p. 41-43, 54; T. Vol. II pp. 131, 136, 138-144, 164-165; T. Vol. III pp. 266-278, 295-296). Therefore, based on the foregoing reasons, the Petitioner's Exceptions 1.a. through 1.e. are denied.

Exception 1.f.

The Petitioner takes exception to the third sentence in paragraph 25 where the ALJ found that "[t]he SWGP does not require the WRP to provide that all runoff from Capital Circle in the vicinity of Gum Swamp be discharged to the east (into the larger

part of Gum Swamp to the east of the road), as indicated in the SWGP engineering drawings." (RO ¶ 25). The Petitioner argues that the drawings submitted by Blueprint to support the WRP show the stormwater discharge to the west, while the drawings to support the SWGP show the stormwater discharge to the east. See Petitioner's Exceptions at paragraph 1.f. In other portions of paragraph 25 the ALJ found that "[t]he SWGP is a separate permit," and that "[i]ssues as to whether construction in accordance with Blueprint's WRP will result in compliance with the SWGP are not part of this WRP proceeding." (RO ¶ 25). To the extent that this finding of the ALJ is also a legal conclusion, the Department adopts the ALJ's conclusion in this Final Order. See also RO ¶¶ 39 and 47. Well established case law is clear that Blueprint's WRP application under Chapter 62-312, Florida Administrative Code, activated the Department's jurisdiction to only proceed with the WRP permitting process (See RO ¶¶ 38 and 39). See also *City of North Port, Fla. v. Consolidated Minerals, Inc.*, 645 So.2d 485, 486 (Fla. 2d DCA 1994); *Saddlebrook v. Wiregrass Ranch, Inc.*, 630 So.2d 1123, 1128 (Fla. 2d DCA 1993), *approved*, 645 So.2d 374 (Fla. 1994).

The ALJ's determination that, the direction of discharge would not result in any adverse impact under the applicable WRP permitting criteria, is supported by competent substantial record evidence. (RO ¶¶ 22³, 25, 47, 49; T. Vol. I p. 105; T. Vol. II p. 137, 165; T. Vol. III p. 303). Specifically, the Department's engineer testified that changing

³ The Petitioner did not take exception to that portion of Finding of Fact paragraph 22 where the ALJ found that ". . . runoff from the northernmost stormceptor will be directed to the east of Capital Circle. Runoff from the other three stormceptors will discharge to the west of Capital Circle but will enter Gum Swamp to the south and down-gradient of Petitioner's property. . ." (RO ¶ 22).

the discharge location from one side of the road to the other does not prohibit the Department from issuing the WRP. (T. Vol. III pp. 284, 290-291, 302-303).

Therefore, based on the foregoing reasons, the Petitioner's Exception 1.f. is denied.

Exception 2.a.

The Petitioner takes exception to the portion of Conclusion of Law paragraph 44 where the ALJ concluded that "Blueprint provided reasonable assurances that its project . . . will not be contrary to the public interest." The Petitioner argues that this conclusion was refuted by the Petitioner's expert who testified that "more likely than not" construction of the project would result in flooding to the Petitioner's property. See Petitioner's Exceptions at paragraph 2.a. and paragraph 1.c. As explained in the ruling on Exceptions 1.a. through 1.e. above, the ALJ's findings regarding flooding and flow are supported by competent substantial record evidence, including expert testimony, engineering plans, and detailed modeling. (Joint Ex. 11; Blueprint's Exs. 5 and 6; T. Vol. II pp. 132-137, 139-144; T. Vol. III pp. 275-278). Therefore, based on the foregoing reasons, the Petitioner's Exception 2.a. is denied.

Exception 2.b.

The Petitioner takes exception to the last sentence in Conclusion of Law paragraph 47 where the ALJ stated that "Issues as to compliance with the SWGP are not part of this WRP proceeding." (RO ¶ 47). The Petitioner makes the same argument as in Exception 1.f. The ruling on Exception 1.f. is adopted and incorporated herein. Therefore, the Petitioner's Exception 2.b. is denied.

Exception 2.c.

The Petitioner takes exception to the last sentence in Conclusion of Law 49, where the ALJ concluded that “[d]ischarging some runoff to the west of the roadway does not modify the SWGP because the culvert/wildlife crossings mix the surface water on either side of the road, and there is no change in where the system permitted by the SWGP discharges treated water.” (RO ¶ 49). These factual findings⁴ of the ALJ are supported by competent substantial record evidence, including, hearing testimony that the stormceptors improve water quality along the roadway and do not alter the flow of water to the five stormwater facilities that were identified in the SWGP application. (T. Vol. II p. 158; T. Vol. III pp. 302-303, 310-311, 314-317; T. Vol. III p. 284-285; T. Vol. III p. 286, lines 1 through 12; T. Vol. III p. 334, line 11 through p. 335, line 16;). In paragraph 49 the ALJ ultimately found that:

49. Notwithstanding differences between the engineering drawings supporting the SWGP application and the engineering drawings supporting the WRP application, Blueprint’s SWGP supports a finding that Blueprint’s WRP meets water quality requirements. The addition of the Gum Road and Swamp Fox facilities in the WRP does not increase the volume of stormwater runoff required to be treated and does not modify the SWGP. Likewise, the addition of stormceptors discharging to the west of the road does not modify the SWGP. Both additions will improve water quality. Discharging some runoff to the west of the roadway does not modify the SWGP because the culvert/wildlife crossings mix the surface water on either side of the road, and there is no change in where the system permitted by the SWGP discharges treated water.

⁴ Conclusion of Law paragraph 49 is essentially an ultimate factual determination. See, e.g., *Stokes v. State, Bd. of Prof'l Eng'rs*, 952 So.2d 1224 (Fla. 1st DCA 2007).

Because paragraph 49 is supported by competent substantial record evidence, the Petitioner's Exception 2.c. is denied.

Exception 3.

The Petitioner states that it "makes no exceptions" to the ALJ's Recommendation. However, in this exception, the Petitioner attempts to add another permit condition or qualify the ALJ's recommended permit condition. The Petitioner's additional conditions states: "and provided that the project may not be constructed in phases or segments without a formal modification of the storm water and wetland resource permits." See Petitioner's Exceptions at paragraph 3. Contrary to the Petitioner's suggestion the ALJ specifically found that "[i]t is clear that Blueprint's WRP does not approve a phased or segmented project and that Blueprint must comply with its WRP." Thus "[t]here is no need for an additional condition as to those matters." (RO ¶ 28). In paragraph 29 the ALJ also noted that any future modification of the WRP "would give Petitioner a point of entry to initiate a separate proceeding to challenge the modification." (RO ¶ 29). In addition, contrary to the Petitioner's suggestion, the ALJ specifically concluded in paragraph 47 that:

47. The SWGP was issued under rule 62-25.801, which grants a general permit for the construction and operation of qualifying stormwater discharge facilities, including those that provide treatment for a specified volume of stormwater runoff. As such, the SWGP cannot be modified. Issues as to compliance with the SWGP are not part of this WRP proceeding. (Emphasis added).

Thus the reference in the Petitioner's additional language to "formal modification" of the "storm water" permit is inappropriate.

Therefore, based on the foregoing reasons, the Petitioner's Exception 3 is denied to the extent that it purports to add more permit conditions or inappropriately qualify the ALJ's recommendation.

CONCLUSION

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

A. The ALJ's Recommended Order (Exhibit A) is adopted and incorporated by reference.

B. The Wetland Resource Permit number 37-0281978-002-DF is GRANTED, subject to the additional condition stated in paragraph 28 and in the Recommended Order at pages 21-22.

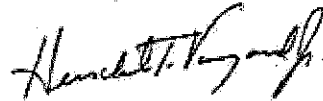
JUDICIAL REVIEW

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by filing a Notice of Administrative 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 accompanied by the applicable filing fees with the appropriate District Court of Appeal.

The Notice of Administrative 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 25 day of May, 2011, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



HERSCHEL T. VINYARD JR.
Secretary

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

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



CLERK

5/25/11
DATE

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing Final Order has been sent by United

States Postal Service to:

Sidney L. Matthew, Esquire
Post Office Box 1754
Tallahassee, FL 32302

Debra Schiro, Blue Print 2000
1311 Executive Center Drive
Tallahassee, FL 32301

F. Joseph Ullo, Esquire
Lewis, Longman & Walker, P.A.
245 Riverside Avenue, Suite 150
Jacksonville, FL 32202

Edwin A. Steinmeyer, Esquire
Lewis, Longman & Walker, P.A.
2600 Centennial Place, Suite 100
Tallahassee, FL 32301

by electronic filing to:

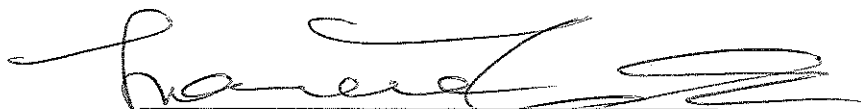
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

and by hand delivery to:

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

this 26th day of May, 2011.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



FRANCINE M. FFOLKES
Administrative Law Counsel

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