FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION

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HERSCHEL T. VINYARD JR.
SECRETARY

January 15, 2014

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

Re: Save Our Creeks, Inc. and Environmental Confederation of Southwest Florida vs. FFWCC and DEP
DOAH Case No.: 12-3427
OGC Case No.: 12-1547

Dear Clerk:

Attached for filing are the following documents:

1. Agency Final Order
2. FFWCC's Exceptions to Recommended Order
3. Petitioner's Exceptions to Recommended Order
4. DEP's Exceptions to Recommended Order
5. Petitioner's Response to FFWCC & DEP's Exceptions
6. DEP's Response to Petitioner's Exceptions

If you have any questions, please do not hesitate to contact me at 245-2212 or lea.crandall@dep.state.fl.us.

Sincerely,

Lea Crandall

Lea Crandall
Agency Clerk

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

SAVE OUR CREEKS, INC., and ENVIRONMENTAL CONFEDERATION OF SOUTHWEST FLORIDA, INC.,	)	
Petitioners,	)	
vs.	)	**OGC CASE NO. 12-1547**
	)	**DOAH CASE NO. 12-3427**
FLORIDA FISH AND WILDLIFE CONSERVATION COMMISSION AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
Respondents.	)	

CONSOLIDATED FINAL ORDER

An Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH"), on July 3, 2013, submitted a Recommended Order ("RO") to the Department of Environmental Protection ("DEP" or "Department") in the above captioned administrative proceeding. A copy of the RO is attached hereto as Exhibit A. The RO shows that copies were sent to counsel for the Petitioner, Save Our Creeks, Inc., and Environmental Confederation of Southwest Florida, Inc. ("Petitioners"), and to counsel for the co-Respondents Florida Fish and Wildlife Conservation Commission ("FWC") and the Department. On July 18, 2013, all the parties separately filed Exceptions to the Recommended Order. The DEP responded to the Petitioners' Exceptions on July 29, 2013. The Petitioners responded to the FWC's and DEP's Exceptions on July 29, 2013. The parties filed three Joint Motions for Continuance of Final Order on September 30, 2013, October 28, 2013, and November 25, 2013. The Joint Motions were granted,

which extended the Final Order deadline until January 15, 2014.[1] This matter is now on administrative review before the Secretary of the Department for final agency action.

BACKGROUND

In March and April 2011, the United States Environmental Protection Agency ("USEPA") issued Administrative Compliance Orders to the FWC that directed construction of six earthen check dams on Fisheating Creek as "initial corrective measures." (RO ¶¶ 40-41). The work became necessary after the FWC contracted, in April 2010, with A & L Aquatic Weed Control ("A & L") to "[m]echanically dismantle floating tussocks" by "shredding vegetation and accumulated organic material to re-open the navigation across Cowbone Marsh." Approximately two miles of Fisheating Creek that runs through Cowbone Marsh was dredged by a "cookie-cutter" machine. The DEP and the United States Army Corps of Engineers ("USACOE"), in July 2010, ordered FWC to stop the project due to its adverse environmental impacts, including the draining of Cowbone Marsh. (RO ¶¶ 20-32, 35).

The DEP issued to FWC, in May 2011, a Consolidated Environmental Resource Permit and Sovereign Submerged Lands Authorization in DEP File No. 22-0303652-001 ("permits").[2] The permits authorized installation of the six earthen check dams on Fisheating Creek to prevent the over-draining of Cowbone Marsh, through which

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[1] "Unless the time period is waived or extended with the consent of all parties, the final order . . . must be rendered within 90 days . . . [a]fter a recommended order is submitted to the agency." § 120.569(2)(l), Fla. Stat. (2013).

[2] The Secretary of the Department is delegated the authority to review and take final agency action on applications to use sovereignty submerged lands when the application involves an activity for which the Department has permitting responsibility. *See* Fla. Admin. Code R. 18-21.0051(2).

Fisheating Creek runs. The work was completed later that year. The USEPA's April 2011 Administrative Compliance Order also directed FWC that a final restoration plan "will include measures for backfilling the unauthorized cut through Cowbone Marsh." (RO ¶ 41). The DEP approved FWC's application in DEP File No. 22-0303652-002, on September 10, 2012, to modify the permits. The modification would allow FWC to backfill approximately two miles of Fisheating Creek. The Petitioners timely filed a petition for administrative hearing that was referred to DOAH to conduct an evidentiary hearing and issue a recommended order. The ALJ conducted a nine-day hearing in Tallahassee, Florida, in March 2013. After the hearing transcript was filed and all parties filed proposed recommended orders, the ALJ issued the RO on July 3, 2013.

SUMMARY OF THE RECOMMENDED ORDER

The ALJ recommended that the Department enter a final order denying the requested modification to FWC's Environmental Resource Permit and Sovereignty Submerged Lands Authorization. (RO at page 27).

Standing

The ALJ found that the Petitioner, Save Our Creeks, Inc., is a non-profit Florida corporation with its offices in Lake Place, Florida. Save Our Creeks' members are interested citizens and groups devoted to the conservation of natural resources, especially creeks and small waterways. Save Our Creeks owns property on Fisheating Creek in Glades County, approximately nine miles upstream of Cowbone Marsh. (RO ¶ 3). The ALJ found that the Petitioner, Environmental Confederation of Southwest Florida, Inc. ("ECOSWF"), is a non-profit Florida corporation with its offices in Sarasota, Florida. A substantial number of the members of Save Our Creeks and ECOSWF use

and enjoy the waters of Fisheating Creek for a variety of purposes, including canoeing, boating, fishing, and wildlife observation. The ALJ concluded that their substantial interests would be affected by the proposed project. (RO ¶¶ 4, 5, 64-66).

Judicial Estoppel

The ALJ found that under the terms of a 1999 settlement agreement,[3] the FWC was acting as the agent of the Board of Trustees in seeking to conduct the activities in Fisheating Creek that are authorized by the permits. The DEP was acting for the Board of Trustees in issuing the Sovereignty Submerged Lands Authorization for the activities in Fisheating Creek. The ALJ concluded that the doctrine of judicial estoppel barred the FWC and the DEP from presenting evidence in this administrative proceeding that would contradict the position taken by the Board of Trustees in the 1998 circuit court case. (RO ¶ 74). The ALJ found that, in this proceeding, neither the FWC nor the DEP was claiming that Fisheating Creek is not navigable. (RO ¶ 76). The ALJ further found that the Petitioners did not credibly establish that FWC and DEP's evidence in this administrative proceeding contradicted the position taken by the Board of Trustees in the 1998 circuit court case. (RO ¶¶ 75 and 76).

Environmental Resource Permit Criteria Are Not Met

The ALJ found that the proposed modification would adversely affect public welfare by impairing navigation and recreation on Fisheating Creek. The proposed modification would adversely affect the conservation of fish and wildlife by eliminating

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[3] *Board of Trustees of the Internal Improvement Trust Fund of the State of Florida, et al. v. Lykes Bros., Inc.*, CA 93-136 (Fla. 20th Cir. Ct.1998)(a 1998 circuit court judgment determined that Fisheating Creek is navigable; a related 1999 settlement agreement settled the appeal of the circuit court judgment by providing for protection of navigation but did not authorize dredging of Fisheating Creek through Cowbone Marsh). (RO ¶¶ 15-18).

the Creek or permanently reducing its natural dimensions so that the uses of the Creek by fish and wildlife are also eliminated or substantially reduced. (RO ¶¶ 52, 57-61, 80, 81).

The ALJ found that the proposed modification would adversely affect navigation and the flow of water in Fisheating Creek, and that it failed to restore the functions performed by the pre-disturbed Creek. (RO ¶¶ 52, 57-61, 82, 83). The ALJ concluded that the proposed modification is contrary to the public interest. (RO ¶ 84). The ALJ further concluded that the proposed modification failed to meet the criteria in rule 40E-4.301(1), Florida Administrative Code ("F.A.C."), to provide reasonable assurance that the proposed project would not adversely affect storage and conveyance capabilities, would not cause adverse secondary impacts, and would function as proposed. (RO ¶ 85).

Sovereignty Submerged Lands Authorization

The ALJ concluded that the proposed modification failed to meet the requirements of rule 18-21.004(1), F.A.C., that activities on sovereignty land not be contrary to the public interest, and that the authorization "contain such terms, conditions, or restrictions as deemed necessary to protect and manage sovereignty lands." (RO ¶ 86). The ALJ further concluded that the proposed modification failed to meet the requirement of rule 18-21.004(2), F.A.C., that sovereignty lands be "managed primarily for the maintenance of essentially natural conditions, propagation of fish and wildlife, and traditional recreational uses such as fishing, boating, and swimming." (RO ¶ 87).

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. (2012); *Charlotte Cty. 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).

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 Cty. Sch. Bd.*, 652 So.2d 894 (Fla. 2d DCA 1995). If there is competent substantial evidence to support an administrative law judge's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co. v. Dyer,* 592 So.2d 276, 280 (Fla. 1st DCA 1991); *Conshor, Inc. v. Roberts,* 498 So.2d 622 (Fla. 1st DCA 1986).

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). 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 Cty.*, 746 So.2d 1194 (Fla. 1st DCA 1999); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So.2d 1140 (Fla. 2d DCA 2001). 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).

Agencies do not have jurisdiction, however, 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.

RULINGS ON EXCEPTIONS

A party that files no exceptions to certain findings of fact "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Envtl. Coalition of Fla., Inc. v. Broward Cty.*, 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). 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, however, even when exceptions are not filed. *See* § 120.57(1)(l), Fla. Stat. (2012); *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).

PETITIONERS' EXCEPTIONS

Exception No. 1

The Petitioners take exception to paragraph 33 in the RO, where the ALJ found that "[a]dditional evidence of dredging along the Creek channel is the soil cast up on the banks, . . ." The Petitioners argue that the "only competent, non-hearsay evidence" supporting this finding was the testimony of DEP expert, Jon Iglehart, "[b]ased solely on an aerial video. . ." *See* Petitioners' Exceptions at pages 1-2; Vol. VIII, Tr. pp. 947-948. The Petitioners then assert that the ALJ erred by excluding proffered evidence, which the Petitioners argue would conclusively rebut Mr. Iglehart's opinion.

The Petitioners do not argue that the record is devoid of competent substantial evidence to support the ALJ's finding. Instead, the Petitioners appear to argue that the Department should reject the ALJ's evidentiary ruling by accepting and weighing proffered but not admitted evidence. Agencies do not have jurisdiction, however, to modify or reject rulings on the admissibility of evidence. Evidentiary rulings are matters within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. *See, e.g., Martuccio v. Dep't of Prof'l Regulation*, 622 So.2d 607, 609 (Fla. 1st DCA 1993). Therefore, based on the foregoing reasons, the Petitioners' Exception No. 1 is denied.

Exception No. 2

The Petitioners take exception to the fourth sentence in paragraph 10 of the RO, where the ALJ found that "[t]here was credible evidence that other segments of the Creek were shallower and narrower." The Petitioners argue that the RO "correctly finds that there was 'credible evidence showing that some segments of Fisheating Creek were four to five feet deep and 20 to 30 feet wide,' but [that] there is absolutely no evidence that 'other segments of the Creek were shallower and narrower' than what was described by Jeff Cooner." *See* Petitioners' Exceptions at page 3. Contrary to the Petitioners argument, there is competent substantial record evidence that the ALJ found credible, which supports the challenged findings. (Vol. VIII, Tr. pp. 955-956; DEP Ex. 4, Slides 14 and 15; DEP. Ex. 2; Vol. IX, Tr. pp. 1183-1184; Joint Ex. 8, p. 5). *See* § 120.57(1)(l), Fla. Stat. (2012).

Therefore, based on the foregoing reasons, the Petitioners' Exception No. 2 is denied.

Exception No. 3

The Petitioners take exception to paragraphs 75 and 76 of the RO, where the ALJ concluded that the evidence presented by the Board of Trustees in *Board of Trustees of the Internal Improvement Trust Fund of the State of Florida et al. v. Lykes Bros., Inc.,* No. CA 93-136 (Fla. 20th Cir. Ct.) was "not credibly established in this administrative proceeding." The hearing transcript contains the ALJ's explanation and evidentiary ruling to exclude the proffered testimony of Ms. Reimer, as well as the basis for his decision to exclude Proffered Exhibit 53. (Vol. X, Tr. pp. 1224-1244). The Petitioners appear to assert that the Department should reject the ALJ's evidentiary ruling and reweigh the hearing evidence. *See* Petitioners' Exceptions at pages 5-6. Agencies do not have jurisdiction, however, to modify or reject rulings on the admissibility of evidence. These evidentiary rulings are matters within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. *See, e.g., Martuccio v. Dep't of Prof'l Regulation*, 622 So.2d 607, 609 (Fla. 1st DCA 1993).

Therefore, based on the foregoing reasons, the Petitioners' Exception No. 3 is denied.

Exception No. 4

The Petitioners take exception to the RO at pages 22-24, on the basis that the Department should reject the ALJ's conclusion that the doctrine of judicial estoppel does not apply to exclude "credible evidence about the natural conditions of Fisheating Creek." (RO ¶¶ 72-78). The ALJ essentially concluded in paragraphs 72 through 78 that the FWC and DEP did not take a position in this administrative proceeding that was inconsistent with the position taken by the Board of Trustees in the circuit court case

that Fisheating Creek is navigable. (RO ¶¶ 72-78). The ALJ specifically found in paragraph 76 that neither FWC nor DEP "is claiming that Fisheating Creek is not navigable." (RO ¶ 76).

As discussed in the above rulings, agencies do not have jurisdiction to modify or reject rulings on the admissibility of evidence. *See Id.* In addition, agencies do not have the authority to modify or reject conclusions of law that apply general legal concepts (such as judicial estoppel) 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); *Barfield v. Dep't of Health,* 805 So.2d 1008 (Fla. 1st DCA 2001).

Therefore, based on the foregoing reasons, the Petitioners' Exception No. 4 is denied.

FWC'S EXCEPTIONS

FWC's Exception No. 1

FWC takes exception to paragraphs 52, 57, 58, and 61 of the RO. The ALJ's findings are supported by competent substantial evidence and reasonable inferences therefrom. (Vol. III, Tr. p. 344; Vol. IV, Tr. p. 448; Vol. VI, Tr. p. 721, 738-740; Joint Ex. 6). FWC asserts, however, that the findings are incorrect and should be "corrected" with FWC's "more persuasive evidence." FWC argues that the more persuasive evidence shows that the project will "restore the natural conditions of Fisheating Creek and the natural shallow stream profile as it passes through the Marsh." *See* FWC's Exceptions at pages 1-2. 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).

If there is competent substantial evidence to support an ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co. v. Dyer,* 592 So.2d 276, 280 (Fla. 1st DCA 1991); *Conshor, Inc. v. Roberts,* 498 So.2d 622 (Fla. 1st DCA 1986).

Therefore, based on the foregoing reasons, FWC's Exception No. 1 is denied.

FWC's Exception No. 2

FWC takes exception to paragraphs 54 through 56[4] of the RO. The ALJ's findings are supported by competent substantial evidence and reasonable inferences therefrom. (Vol. VIII, Tr. p. 1041; Vol. IX, Tr. p. 1120; Vol. III, Tr. p. 334; Vol. VIII, Tr. pp. 1014-1016; Joint Exs. 1 and 5; Joint Ex. 8). FWC contends, however, that the findings are incorrect and should be "corrected" with FWC's "more persuasive evidence." FWC argues that the more persuasive evidence shows that the proposed modification meets the criteria for a minor modification. *See* FWC's Exceptions at page 4. 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). If there is competent substantial evidence to support an ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co. v. Dyer,* 592 So.2d 276, 280 (Fla. 1st DCA 1991); *Conshor, Inc. v. Roberts,* 498 So.2d 622 (Fla. 1st DCA 1986).

Therefore, based on the foregoing reasons, FWC's Exception No. 2 is denied.

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[4] FWC's Exception No. 2 did not address the substance of paragraph 56, but see the ruling on DEP's Exception below.

FWC's Exception No. 3

FWC takes exception to paragraphs 60 and 61 of the RO, where the ALJ found that the proposed backfilling and planting would not maintain the navigability of the Creek, even for shallow draft vessels such as canoes and kayaks, and thus the proposed permit modification would not be consistent with the 1999 settlement agreement. The ALJ's findings are supported by competent substantial evidence and reasonable inferences therefrom. (Vol. III, Tr. p. 419-420; Vol. V, Tr. p. 684; Vol. VI, Tr. p. 820; Vol. X, Tr. pp. 1246-1249; Vol. IV, Tr. pp. 490-491; Pet. Ex. 161A at p. 92; Joint Ex. 8). FWC asserts, however, that the findings are incorrect and should be "corrected" with FWC's "more persuasive evidence." FWC argues that the more persuasive evidence shows that after completion of the proposed backfilling, a shallow stream profile will result after natural subsidence of the fill, and a preferential flowway will remain in the stream. *See* FWC's Exceptions at pages 4-5. 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). If there is competent substantial evidence to support an ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co. v. Dyer,* 592 So.2d 276, 280 (Fla. 1st DCA 1991); *Conshor, Inc. v. Roberts,* 498 So.2d 622 (Fla. 1st DCA 1986).

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

DEP'S EXCEPTIONS

Exception to Finding Fact 55

The DEP takes exception to Finding of Fact paragraph 55 of the RO, where the ALJ found that the proposed permit modification does not meet the criteria for a minor modification because it required new site visits, substantially alters the original permit conditions, and has substantially different impact on the wetlands. The ruling on FWC's Exception No. 2 above is adopted in this ruling, and DEP's exception to Finding of Fact paragraph 55 is denied.

Exception to Finding of Fact 56

The DEP also takes exception to Finding of Fact paragraph 56, where the ALJ concluded that:

> 56. The criteria applicable to an application for a major modification were not identified, nor was it shown how the evidence presented at the final hearing satisfies the requirements for such an application.

The DEP asserts that the ALJ's focus on whether the proposed agency action at issue satisfied the criteria for a minor modification under Florida Administrative Code Rule 62-343.100, is misplaced. At the final hearing, the DEP did not contend the proposed agency action at issue was in the nature of a minor permit modification. The Joint Prehearing Stipulation and the DEP's hearing presentation identified the applicable regulatory criteria and attempted to show how they were met by FWC's application. (Vol. VIII, Tr. pp. 999-1003). The rule provides that "[r]equests for minor modifications, whether by letter or formal application, shall be reviewed using the same criteria as new applications in accordance with the standards in Chapters 62-4, 62-341, and 62-330, F.A.C., and this chapter." (emphasis added). Fla. Admin. Code R. 62-

343.100(1)(a). The rule further provides that a major modification "shall be reviewed and noticed using the same criteria as new applications, in accordance with the procedures, standards, and fees in Chapters 62-4, 62-341, and 62-330, F.A.C., and this chapter." Fla. Admin. Code R. 62-343.100(1)(b). The same regulatory criteria are applied to review a minor or a major permit modification. Thus, the ALJ's finding that the "criteria applicable to an application for a major modification were not identified," is not based on competent substantial record evidence. *See* § 120.57(1)(l), Fla. Stat. (2012). Therefore, the DEP's exception to the first part of Finding of Fact paragraph 56 is granted.

The DEP further argues that FWC and DEP "offered competent substantial evidence to demonstrate the manner in which the permit application satisfied the applicable regulatory criteria." *See* DEP's Exceptions at page 5. The ALJ's factual findings to the contrary, however, are supported by competent substantial record evidence. (RO ¶¶ 52, 56 - 61, 79 – 85; Vol. III, Tr. p. 344; Vol. IV, Tr. p. 448; Vol. VI, Tr. p. 721, 738-740; Joint Ex. 6; *see also* above rulings on FWC Exception Nos. 1-3). Therefore, the DEP's exception to the second part of Finding of Fact paragraph 56 is denied.

CONCLUSION

Having considered the applicable law in light of the rulings on the parties' 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 herein by reference.

B. FWC's modification application in DEP File No. 22-0303652-002, is DENIED.

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

DONE AND ORDERED this 15th day of January, 2014, 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.

Kay Buchanan
CLERK

1/15/14
DATE

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing Final Order was sent by electronic mail only to:

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by electronic filing to:

Division of Administrative Hearings
The DeSoto Building
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this 15th day of January, 2014.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

FRANCINE M. FFOLKES
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