# SOUTH FLORIDA WATER MANAGEMENT DISTRICT

July 28, 2015

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

Dear Ms. Llado:

**Subject:** ***William B. Swaim v. South Florida Water Management District***
**DOAH Case No. 14-0448**

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 561.682.6320.

Sincerely,

Kathie (Ruff) Redfield

Kathie A. (Ruff) Redfield, CP, FRP
Senior Paralegal

KAR
Enclosures

**BEFORE THE GOVERNING BOARD OF THE**
**SOUTH FLORIDA WATER MANAGEMENT DISTRICT**

WILLIAM B. SWAIM,

Petitioner,

vs.

SFWMD ORDER NO. 2015-055-FOF-ERP
DOAH Case No. 14-0448

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Respondent.
_____/

## FINAL ORDER

This matter came before the Executive Director of the South Florida Water Management District[1] ("District") for consideration of the Recommended Order issued by Administrative Law Judge ("ALJ") Bram D. E. Canter; the Exceptions and Proposed Corrections to the Recommended Order submitted by Respondent, South Florida Water Management District ("Respondent"); the Exceptions to the Recommended Order submitted by Petitioner, William B. Swaim ("Petitioner"); and the Responses to Petitioner's Exceptions to Recommended Order submitted by Respondent. A copy of the Recommended Order, dated May 14, 2015, is attached hereto as Exhibit ("Ex.") A. Having reviewed the Recommended Order, Exceptions, responses to Exceptions, the record of the proceeding below, and otherwise being fully advised in the premises, the District orders as follows.

[1] Pursuant to section 373.079(4)(a), Florida Statutes, the District's Governing Board delegated to the Executive Director the authority to take final action on permit applications under Part IV of Chapter 373, Florida Statutes. *District's Policies and Procedures, Subsection 101-41(a).*

## THE PROCEEDINGS BELOW

On November 5, 2013, Petitioner submitted an exemption verification request to the District requesting verification that his proposed activities qualify for the following exemptions from Environmental Resource Permit ("ERP") criteria: 1) the mosquito control activities exemption contained in Rule 62-340.750, Florida Administrative Code; 2) the seawall construction exemption contained in Section 403.813(1)(i), Florida Statutes; 3) the mangrove alteration exemption contained in Section 403.9328(5), Florida Statutes; 4) the maintenance of existing insect control structures, dikes, and irrigation and drainage ditches exemption contained in Section 403.813(1)(g), Florida Statutes; and 5) the maintenance dredging exemption contained in Section 493.813(1)(f), Florida Statutes.

On December 5, 2013, the District issued exemption determination No. 131105-6, which determined that the Petitioner's proposed activities qualify for the maintenance dredging exemption, but not the other four requested exemptions. On December 30, 2014, Petitioner filed a Petition for Administrative Hearing challenging the District's exemption determination. The Initial Petition was dismissed, and Petitioner filed an Amended Petition on January 10, 2014. The Amended Petition was referred to the Division of Administrative Hearings ("DOAH"). Prior to the final hearing, Petitioner withdrew his challenge to the requested exemptions, except with respect to the seawall construction exemption. A final administrative hearing was held on March 19 and 20, 2015.

## SUMMARY OF RECOMMENDED ORDER

Petitioner, William B. Swaim, challenged the District's decision declining to verify

that activities proposed by the Petitioner qualify for the seawall construction exemption. The ALJ concluded that the Petitioner's proposed activities do not qualify for the seawall construction exemption set forth in Section 403.813(1)(i), Florida Statutes (2014), because the request for verification: "(1) does not propose seawalls, but, rather, retaining walls to hold fill material; (2) is not in an artificially created waterway; (3) would violate state water quality standards; (4) would impede navigation; and (5) includes more backfilling than needed to level the land behind the walls." Ex. A at ¶ 47.

During the final hearing, the ALJ made some strong remarks concerning the Petitioner's proposed activities. The ALJ stated that in all his years in environmental law, he never heard of anything such as the proposal before him. (Tr. 158:7-12). The ALJ said that it appears that the Petitioner is attempting "to play a trick on the State and all of us by looking at certain words here, and certain words there, and turning it into some kind of right." (Tr. 163:19-22). He further stated "I have never seen anybody in modern times do something like this, propose something like that, and actually it's determined to be legal." (Tr. 164:24-165:2).

The ALJ concluded by recommending "that the South Florida Water Management District enter a Final Order determining that Petitioner's proposed development activities do not qualify for the seawall construction exemption from permitting under Paragraph 403.813(1)(i), Florida Statutes." Ex. A at page 15.

**PREVIOUS RELATED PROCEEDINGS**

Of note is the fact that the Petitioner previously filed a Petition in a similar matter the year before (DOAH Case No. 13-4859), challenging the District's determination that he did not qualify for ERP exemptions on a project in Boynton Beach. A final

administrative hearing was held on March 4 and 5, 2014, and the ALJ's Recommended Order in that case found that the Petitioner was not entitled to the mosquito control activities exemption and the seawall construction exemption. On August 14, 2014, the District's Governing Board issued a Final Order adopting the ALJ's Recommended Order with minor corrections.

In addition, on January 2, 8, and 9, 2015, the Petitioner filed three rule challenges with the District, and one rule challenge with the Department of Environmental Protection ("DEP"), related to his exemption verification requests (DOAH Case Nos. 15-0001RU, 15-0091RU, 15-0092RU, and 15-0135RU). Two of the related rule challenges were dismissed by ALJ Canter with prejudice, and one was voluntarily withdrawn by Petitioner. The Petitioner's related DEP rule challenge (DOAH Case No. 15-0091RU) was also dismissed with prejudice.[2]

In the instant case, the ALJ referred to these previous proceedings when he commented to the Petitioner during the final hearing that ". . . based upon the cases you've filed claiming unadopted rule, and some of the arguments you made in some of your previous filings, and now I look at this [the seawall exemption request at issue], I think there is a common denominator that I see. . . . I look at this impartially and am saying in this, and your pleadings, it sounds like you're looking . . . to play a trick on the State and all of us by looking at certain words here, and certain words there, and turning it into some kind of right." (Tr. 163:3-23).

## STANDARD OF REVIEW

Section 120.57(1)(l), Florida Statutes, prescribes that an agency reviewing a

[2] The Petitioner filed an additional administrative challenge this year, related to his previous exemption request in DOAH Case No. 13-4859, which was dismissed with prejudice.

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. (2014); *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. *E.g., Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm'n*, 671 So. 2d 287, 289 n.3 (Fla. 5th DCA 1996).

The ALJ's function in an administrative hearing is to consider all evidence presented, resolve conflicts, judge the credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent substantial evidence. *See Addison v. Agency for Persons with Disabilities*, 113 So. 3d 1053, 1056 (Fla. 1st DCA 2013) (citing *Heifetz v. Dep't of Bus. Regulation*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985)).

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. *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.

*E.g., Tedder v. Fla. Parole Comm'n*, 842 So. 2d 1022, 1025 (Fla. 1st DCA 2003) (citing *Heifetz*, 475 So. 2d at 1281). 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, e.g., Bridlewood Group Home v. Agency for Persons with Disabilities*, 136 So. 3d 652, 657 (Fla. 2d DCA 2013) (citing *Heifetz*, 475 So. 2d at 1281); *So. Fla. Cargo Carriers Ass'n, Inc. v. Dep't of Bus. & 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*, 475 So. 2d at 1281; *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. *Martuccio*, 622 So. 2d at 609.

In addition, 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 Health & Rehab. Servs.*, 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., City of North Port, Fla. v. Consol. Minerals, Inc.*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994) ("The agency's scope or review of the facts is limited to

ascertaining whether the hearing officer's factual findings are supported by competent substantial evidence."); *Manasota 88, Inc. v. Tremor*, 545 So. 2d 439, 441 (Fla. 2d DCA 1989) (*citing Friends of Children v. Dep't of Health & Rehab. Servs.*, 504 So. 2d 1345 (Fla. 1st DCA 1987)) (a state agency reviewing an ALJ's proposed order has no authority to make independent and supplementary findings of fact to support conclusions of law in the agency final order).

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." *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, are 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. *E.g., Battaglia Properties, Ltd. v. Fla. Land and Water Adjudicatory Comm'n*, 629 So. 2d 161, 168 (Fla. 5th DCA 1993). However, an agency should not label what is essentially an ultimate factual determination as a conclusion of law in order to modify or overturn what it may view as an unfavorable finding of fact. *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. *E.g., Pub. Employees Relations Comm'n v.*

*Dade County Police Benevolent Ass'n*, 467 So. 2d 987, 989 (Fla. 1985); *Fla. Public Employees Council 79, AFSCME 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." *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. *E.g., Suddath Van Lines, Inc. v. Dep't of Envtl. Prot.*, 668 So. 2d 209, 212 (Fla. 1st DCA 1996).

Pursuant to Chapters 373 and 403, Florida Statutes, and Titles 40E and 62 of the Florida Administrative Code, the Executive Director, as designee of the Governing Board, has the administrative authority and substantive expertise to exercise regulatory jurisdiction over the administration and enforcement of the Statewide Environmental Resource Permit ("SWERP") program. 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 it determines that its conclusions or interpretations are "as or more reasonable" than the conclusions or interpretations made by the ALJ.

**RULINGS ON EXCEPTIONS**

Parties to formal administrative proceedings must alert reviewing agencies of any perceived defects in DOAH hearing procedures or in the findings of fact of ALJs by filing

exceptions to DOAH Recommended Orders. *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. Coalition of Fla., Inc. v. Broward County,* 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991). *See also Colonnade Medical Ctr., Inc. v. State, Agency for Health Care Admin.,* 847 So. 2d 540, 542 (Fla. 4th DCA 2003)(an appellant cannot raise issues on appeal that were not properly excepted to or challenged before an administrative body).

In reviewing a Recommended Order and written exceptions, the agency's final order "shall include an explicit ruling on each exception." *See* §120.57(1)(k), Fla. Stat. (2014). However, the agency need not rule on an exception that "does not clearly identify the disputed portion of the Recommended Order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." *Id.*

**Petitioner's Exceptions Pertaining to Water Quality**

In Exceptions Nos. 11, 14, 15, 23, and 24, Petitioner objects to the ALJ's findings that he did not address water quality issues in his request for exemption verification and that his proposed activities will cause a violation of state water quality standards after the project is constructed. He contends that state water quality standards only apply during construction. He further contends that, pursuant to the seawall construction exemption rule, the water quality determinations "must be based on limited analysis and

to the actual construction period and not the long term effect of the exempted activity." (Petitioner's Exception No. 11 at ¶ 4).

The Petitioner submitted a Turbidity Control Plan, adapted from a plan he found in the District's files for another project, and a Project Methodology and Sequencing Plan (hereinafter "Construction Plan"). (Tr. 206; Pet. Ex. 2). Petitioner contends that submittal of the Construction Plan is all that is needed to qualify for the exemption. In several Exceptions, the Petitioner contends that a consideration of water quality is outside of the District's jurisdiction, or that consideration of certain impacts on water quality should not be part of the evaluation when considering his exemption request. (See Petitioner's Exceptions Nos. 11, 14, 15, 23, and 24). He further claims that a consideration of water quality is a violation of law.

Petitioner applied for an exemption pursuant to section 403.813(1)(i), Florida Statutes. This section states that a permit is not required under Chapters 373 or 403, Florida Statutes, for activities associated with the following:

> (i) The construction of . . . seawalls in artificially created waterways where such construction **will not violate existing water quality standards**, impede navigation, or affect flood control. This exemption does not apply to the construction of vertical seawalls in estuaries or lagoons unless the proposed construction is within an existing manmade canal where the shoreline is currently occupied in whole or part by vertical seawalls. (emphasis added).
>
> Section 403.813(1)(i), Fla. Stat.

As stated in this statute, the activity must not violate existing water quality standards. Existing state water quality standards are found in Chapters 62-4, 62-302, 62-520 and 62-550, Florida Administrative Code.

Rule 62-330.050, Florida Administrative Code, sets forth the Procedures for Review and Agency Action on Exemption Requests. Paragraph (9)(b) of this rule states that the following applies when specified in an exemption in Rule 62-330.051, Florida Administrative Code:

> (b) Construction, alteration, and operation shall not:
>
> . . . .
>
> 5. Cause or contribute to a violation of state water quality standards. Turbidity, sedimentation, and erosion shall be controlled **during and after** construction to prevent violations of state water quality standards, including any antidegradation provisions of paragraphs 62-4.242(1)(a) and (b), subsections 62-4.242(2) and (3) and Rule 62-302.300, F.A.C., and any special standards for Outstanding Florida Waters and Outstanding National Resource Waters due to construction-related activities. Erosion and sediment control best management practices shall be installed and maintained in accordance with the guidelines and specifications described in the *State of Florida Erosion and Sediment Control Designer and Reviewer Manual* (Florida Department of Environmental Protection and Florida Department of Transportation, June 2007), . . . and the *Florida Stormwater Erosion and Sedimentation Control Inspector's Manual* (Florida Department of Environmental Protection, Nonpoint Source Management Section, Tallahassee, Florida, July 2008), . . . (emphasis added).
>
> Rule 62-330.050(9)(b), Fla. Admin. Code.

It should be noted that this section states that turbidity, sedimentation and erosion shall be contained *during and after* construction (emphasis added). Satisfaction of this requirement during construction does not obviate the need to address the first part of the rule requiring that activities cannot cause or contribute to a violation of state water quality standards.

Therefore, the protection of water quality is not limited to only the period of construction under Florida Statutes or by rule. In fact, nowhere in Chapters 403 or 373, Florida Statutes, or the rules promulgated thereunder, is there a limitation of the protection of water quality to only the period of construction. Exceptions Nos. 11, 14, 15, 23, and 24 must therefore be denied. Where necessary to address other issues, these Exceptions are more specifically discussed below.

**Petitioner's Exceptions Pertaining to Evidentiary Matters**

Exceptions Nos. 1, 2, 5, 6, 8-12, 14, 16-19, 20 and 21 object to the ALJ's rulings on evidentiary matters. A reviewing agency may not reweigh the evidence presented at the final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See, e.g., Rogers*, 920 So. 2d at 30. 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. Dep't of Bus. & Prof'l Regulation*, 738 So. 2d 391 (Fla. 3d DCA 1999). The standard of review for rulings on evidentiary matters is more fully discussed on pages 4-7 above. The District must therefore deny the portions of Petitioner's Exceptions Nos. 1, 2, 5, 6, 8-12, 14, 16-19, 20 and 21, pertaining to objections to evidentiary rulings.

## RULINGS ON PETITIONER'S EXCEPTIONS

**Petitioner's Exception No. 1 to Findings of Fact 3 and 4**

The Petitioner takes exception and states that there was no competent testimony to the portion of Finding of Fact 3, wherein the ALJ found that the western side of the

property contains a healthy stand of red mangroves. Petitioner also takes exception and states that there was no competent testimony to the entire Finding of Fact 4, wherein the ALJ found that the eastern portion of the property is beneath the open waters of Spanish Creek, and that this submerged portion contains productive benthic habitat for a number of fish, invertebrates, oysters, conchs, clams, mussels, barnacles, and crabs.

The record clearly indicates that Findings of Fact 3 and 4 are based on competent, substantial evidence, as indicated in the following citations to the record: Tr. 290:4-8; 295:16-20; 296:23-297:1; 460:22-461:13; 461:19-23; 464:2-466:10; 469:17-21; Resp. Comp. Ex. 8.

The Petitioner also contends that these Findings of Fact are irrelevant. Clearly, these findings are only to provide background information on the condition of the site. If Petitioner deems them irrelevant, one wonders why he is taking exception to them. Regardless, a determination of relevance requires an evidentiary ruling. Which is not within the substantive jurisdiction of the District. This portion of the Exception is denied on page 12 above.

For the reasons set forth above, Exception No. 1 must therefore be denied.

**Petitioner's Exception No. 2 to Findings of Fact 5, 6, and 7**

The Petitioner takes exception to Findings of Fact 5, 6, and 7, arguing that the ALJ made a title boundary determination. The Petitioner misunderstands the rulings. Findings of Fact 5, 6, and 7 do not include a title determination, but instead Finding of Fact 5 states that the DEP was not able to determine if the property was navigable at the time of statehood, or whether the property contained sovereignty submerged lands.

(Tr. 237:3-238:20).

In Exception No. 2, the Petitioner also states that some of his exhibits were incorrectly excluded by the ALJ. Evidentiary rulings are not within the substantive jurisdiction of the District. This portion of the Exception is denied on page 12 above.

The Petitioner further contends that the ALJ did not properly analyze the legal description of the property. Petitioner provides no reference to the transcript to indicate that the analysis was incorrect or not supported by competent, substantial evidence. Pursuant to section 120.57, Florida Statutes, the District is not required to rule on an exception where there is no citation to the record to support the exception.

For the reasons set forth above, Exception No. 2 must therefore be denied.

**Petitioner's Exception No. 3 to Findings of Fact 8 and 9**

Petitioner takes exception to Finding of Fact 8, wherein the ALJ stated that one of the proposed development activities included in Petitioner's exemption verification request was construction of an access road to the south of the property. In his exception, Petitioner points out that he no longer proposes the access road as part of the exemption request. However, Petitioner misreads this finding. Finding of Fact 8 references that Petitioner's original request for exemption verification included an access road. However, Finding of Fact 9 indicates that the Petitioner later modified his proposal. During the final hearing, the Petitioner withdrew his request for authorization to construct the access road under the exemption verification request and this modified proposal did not include a proposed access road. (Tr. 209). The ALJ was merely discussing the differences between the initial verification request and the exemption verification request at the time of the final hearing. There is, therefore, no basis to reject

or correct these Findings of Facts.

Exception No. 3 must therefore be denied.

**Petitioner's Exception No. 4 to Findings of Fact 11, 12, 13, and 14**

Petitioner takes exception to Findings of Fact 11, 12, 13, and 14, claiming that the ALJ reinterpreted the term "seawall." This is not correct. The ALJ instead sets forth the rule definition of seawall. He goes on to state that the rule definition is similar to the ordinary meaning of the term set forth within the dictionary. He does not create a new definition, but merely applies the existing rule to the proposed activity. The District, therefore, finds that the Petitioner misinterprets the Recommended Order. The ALJ does not create a new definition of the term "seawall" or state that the Petitioner submitted an invalid request. Instead, the ALJ finds the requested activities do not fall within the existing rule definition of a seawall.

Exception No. 4 must therefore be denied.

**Petitioner's Exception No. 5 to Finding of Fact 17**

Petitioner takes exception to Finding of Fact number 17, wherein the ALJ finds that Spanish Creek is a naturally-occurring waterbody and has appeared on historic documents since at least 1872. The Petitioner argues that the ALJ incorrectly relied on exhibits offered by the District and that his exhibit is the only survey the ALJ should have relied upon. The ALJ is the finder of fact and decides which exhibits to rely upon. The District may not reweigh the evidence presented to the ALJ. This Exception is denied on page 12 above.

Finding of Fact 17 indicates that the ALJ relied on exhibits and testimony presented by the District pertaining to "certified historic maps from the 1800s, aerial

photography, the National Wetlands Inventory database, topographic and hydrographic data, soil surveys and maps, and historic photographs" to clearly establish the finding that "Spanish Creek is a naturally-occurring waterbody." This Finding of Fact is supported by the record. (Tr. 240-244; 246-247; 249-252; 383:12-18; 389-390; 454:15-19; 475-476; 478:3-15; 554; Resp. Exs. 2, 6-7; Resp. Comp. Exs. 18-20; Resp. Exs. 23, 26-32, 39-44).

Since competent, substantial evidence exists to support this finding, Exception No. 5 must be denied.

**Petitioner's Exception No. 6 to Finding of Fact 18**

Exception No. 6 claims that in the only official survey of the state of Florida, Respondent's Composite Exhibit 20, Sheets 4-8, there was no competent, substantial evidence of any open water, stream, or mangroves or any type of navigable waters. The ALJ was actually making findings about past dredging in Spanish Creek. Petitioner references "the only official survey of the state of Florida," but does not explain how the survey pertains to any past dredging in Spanish Creek. The Petitioner's only citation to the record is one page from the transcript that discusses Sheet 4 of Respondent's Composite Exhibit 20 and includes a comment about the property being located in an area denoted as a marsh. This citation clearly does not support this Exception. Petitioner seems to be repeating the argument he made in his Exception No. 5, which is addressed directly above. Competent, substantial evidence exists to support this finding. (Tr. 244:11-22, 246:18-247:4, 249:17-250:20, 251:7-11, 252:25-253.14; Resp. Comp. Ex. 20; Resp. Ex. 30; Resp. Ex. 31).

The Petitioner claims that the ALJ should not have relied on other maps, other

than the "official survey" received into evidence. This portion of the Exception is denied on page 12 above. As previously stated, the District does not have substantive jurisdiction to make determinations regarding evidentiary matters pertaining to exhibits.

Exception No. 6 must therefore be denied.

**Petitioner's Exception No. 7 to Finding of Fact 20**

Petitioner takes exception to Finding of Fact 20, wherein the ALJ finds that Spanish Creek meets the definition of "stream." There is competent, substantial evidence to support this finding. (Tr. 452:8-453:4; 485:5-13).

Therefore, Exception No. 7 must be denied.

**Petitioner's Exception No. 8 to Finding of Fact 21**

Petitioner takes exception to Finding of Fact number 21, wherein the ALJ found that Spanish Creek is not a canal. There is competent, substantial evidence to support this finding at Tr. 454:20-455:4.

Petitioner further contends that the ALJ excluded several of his exhibits. This portion of the Exception is denied on page 12 above. The District does not have substantive jurisdiction over evidentiary matters.

The Petitioner also complains that the District failed to explain its deviation from past agency practices, but fails to provide a citation to the record regarding these practices. Pursuant to subsection 120.57(1)(k), Florida Statutes, it is not necessary for the District to rule on this portion of the Exception.

For the reasons set forth above, Exception No. 8 must therefore be denied.

**Petitioner's Exception No. 9 to Finding of Fact 22**

In Exception No. 9, the Petitioner again complains about the ALJ's exclusion of

evidence. As explained above, the District does not have substantive jurisdiction over evidentiary rulings. This portion of the Exception is denied on page 12 above.

In the second half of Exception No. 9, the Petitioner misstates Finding of Fact 22. This finding does not state that "Spanish Creek was only navigable after it was dredged." Therefore, since the second part of the Exception merely misstates the Finding of Fact, there is no basis to reject the finding.

Exception No. 9 must therefore be denied.

**Petitioner's Exception No. 10 to Findings of Fact 23 and 24**

In Exception 10, the Petitioner again complains about the ALJ's exclusion of evidence and the reliance on the evidence submitted by the Respondent. The Petitioner does not contend that there was a complete lack of competent and substantial evidence to support the findings. But instead, he argues that the ALJ should not have relied on the identified exhibits and should not have excluded other exhibits. As explained above, the District does not have substantive jurisdiction over evidentiary rulings. This Exception is denied on page 12 above.

Exception No. 10 must therefore be denied.

**Petitioner's Exception No. 11 to Finding of Fact 25**

Finding of Fact 25 states that the Petitioner did not present evidence on water quality other than a turbidity control plan. Again, in Exception No. 11 the Petitioner complains about how the ALJ analyzed evidence, and excluded some of his evidence. Petitioner does not contend that there is no evidence upon which Finding of Fact 25 was based, but instead complains that the ALJ should not have relied on this admitted evidence and should not have excluded his evidence. The District does not have

substantive jurisdiction over evidentiary matters. This portion of the Exception is denied on page 12 above.

The Petitioner then goes on to provide his legal analysis of the water quality portion of the rule on exemptions. As explained on pages 9-12, the exemption applied for by the Petitioner requires the Petitioner to demonstrate that the activity will not cause or contribute to a violation of state water quality standards. This portion of the Exception is denied on pages 9-12 above.

Petitioner goes on for several pages setting forth his disagreement with how the District analyzed his exemption request. However, that is not the subject matter of this finding of fact. This finding of fact merely states what information pertaining to water quality was offered into evidence by the Petitioner, and that the Petitioner failed to present competent evidence regarding the potential water quality impacts associated with his proposed activities. The Petitioner claims that the District failed to prove the activities would violate water quality standards. To the contrary, there is competent, substantial evidence in the record supporting Respondent's position that the Petitioner's proposed seawall, fill, and riprap construction will violate existing water quality standards. (Tr. 200-208, 491-498, 559, 566-568; Pet. Ex. 2).

For the reasons set forth herein, Exception No. 11 is denied.

**Petitioner's Exception No. 12 to Findings of Fact 26 and 27**

In Exception No. 12, Petitioner contends the access road was not the subject of the exemption request, and therefore should not have been considered in this proceeding. The ALJ found that the issue of the access road was actually introduced by the Petitioner when he submitted his proposed Construction Plan. (Pet. Ex. 2; Tr. 206).

The Construction Plan states that the access driveway will be utilized to haul muck removed from the property.

The access road, as a component of the Construction Plan introduced by the Petitioner as Pet. Ex. 2, was discussed in detail on pages 208 through 213 of the transcript. On page 211, the Petitioner objects to the discussion about the access road as irrelevant to the exemption request. Respondent's counsel responds by stating "he made it an issue when he wrote that in his project methodology and sequencing plan. Because if he can't get the fill through the access road, how is he going to get the fill into the area?" (Tr. 211:19-24). The ALJ overruled the objection because the information regarding the access road is "in the documents provided to the District. So . . . an explanation is relevant to understand what is going on with these documents in evidence." (Tr. 212:4-8).

Therefore, this objection relates to an evidentiary ruling made by the ALJ, which is not within the substantive jurisdiction of the District. This portion of the Exception is denied on page 12 above.

Exception No. 12 must therefore be denied.

**Petitioner's Exception No. 13 to Finding of Fact 28**

In this Exception, the Petitioner discusses his federal permits. These permits are not discussed in this Finding of Fact. Petitioner complains that his exhibits should not have been excluded by the ALJ. This objection to the ALJ's evidentiary ruling is not within the substantive jurisdiction of the District. This portion of Petitioner's Exception No. 13 is denied on page 12 above.

District exemption decisions are limited to the authority granted in Part IV of Chapter 373, Florida Statutes, the rules promulgated thereunder, and the exemptions set forth in Chapter 403, Florida Statutes. District exemption decisions may not be based on a permit issued by another agency.

Petitioner also argues that Spanish Creek has a depth of minus 7' at low tide. The Petitioner has misinterpreted Exhibit 20. The ALJ does not make a numerical finding regarding depth, but simply says that Spanish Creek is shallow. The finding that Spanish Creek is shallow is supported by testimony on pages 282 and 283 of the transcript. Therefore, there is no basis to reject this Finding of Fact.

For the reasons set forth herein, Exception No. 13 is denied.

**Petitioner's Exception No. 14 to Finding of Fact 29**

In Finding of Fact 29, the ALJ makes water quality findings regarding the impact of the proposed activity on currents, sediment movement, tidal flushing, erosion and shoaling. There is competent and substantial evidence to support Finding of Fact 29. (Tr. 340-342, 346, 492-496, 500-501, 559-560, 565-568, 581-584; Resp. Comp. Ex. 20, Sheet 2). Therefore, there is no basis to reject this finding of fact.

The Petitioner complains about the ALJ's reliance on the testimony of District witnesses. However, it is the ALJ's role to consider all evidence presented and judge the credibility of witnesses. This portion of the Exception is denied, on page 12 above.

For the reasons set forth herein, Exception No. 14 is denied.

**Petitioner's Exception No. 15 to Finding of Fact 30**

In Exception No. 15, the Petitioner again complains about application of the

water quality requirements to his exemption requests. This portion of the Exception is denied on pages 9-12 above.

Petitioner also contends that the District deviated from past agency practice. However, there is no citation to the record regarding the alleged deviation. Therefore, pursuant to section 120.57(1)(k), Florida Statutes, it is not necessary for the District to rule on this portion of the Exception.

For the reasons set forth herein, Exception No. 15 is denied.

**Petitioner's Exception No. 16 to Findings of Fact 31, 32, 33, and 34**

In Exception No. 16, the Petitioner contends that impacts to navigation in Spanish Creek cannot be considered because the property beneath Spanish Creek is privately owned. However, a witness from DEP stated that it is inclusive as to whether there is sovereignty submerged lands. Instead, the witness testified that the Board of Trustees has not expressly disclaimed its ownership interest in any portion of the property. (Tr. 237 to 238). This is competent and substantial evidence to support this finding.

Petitioner contends that the wrong standard was applied by the ALJ in considering navigation. He contends that the standard is that the proposed exempt activities must not "adversely" impede navigation. Pursuant to paragraph 403.813(1)(i), Florida Statutes, the statutory standard is that the activities must not "impede navigation." The word "impede" implies an adverse impact to navigation. Rule 62.330.050(9)(b)4., Florida Administrative Code, is more descriptive in its language and includes the word "adversely." There is competent and substantial information in the record to demonstrate that the project will adversely impede navigation. (Tr. 171, 190,

192-193, 195, 300-301, 316-321, 324, 333, 336-339, 341-342, 500-501, 559, 560-562, 583-584; Resp. Comp. Ex. 20, Sheet 57; Resp. Ex. 22; Pet. Ex. 2).

Petitioner contends that a District witness testified that the project will not impede navigation. However, the Exception does not include a citation to the record. Also, Petitioner refers to his Army Corps of Engineer ("ACOE") permit in this Exception. The Petitioner failed to cite to the record on this point. Therefore, pursuant to subsection 120.57(1)(k), Florida Statutes, it is not necessary for the District to rule on these two parts of the Exception.

The Petitioner contends that the ALJ erred in excluding some of his exhibits and evidence. Rulings on evidentiary matters are within the province of the ALJ. This portion of the Exception is denied on page 12 above. The Petitioner also contends that the ALJ went beyond his jurisdiction to rule on property boundaries. The Petitioner misstated the Recommended Order. Nowhere in the challenged Findings of Fact 31-34 are there any rulings on property boundaries. In fact, nowhere in the Recommended Order did the ALJ attempt to establish property boundaries.

For the reasons set forth herein, Exception No. 16 is denied.

**Petitioner's Exception No. 17 to Findings of Fact 36 and 37**

In Finding of Fact 36, the ALJ sets forth the applicable portion of Rule 62-330.051(12)(a), Florida Administrative Code. It is clear that the ALJ does not intend the language to represent the entire rule. The Petitioner wishes to supplement the Finding of Fact by setting forth the remainder of the rule. Since this portion of the rule cited by the Petitioner is not missing words, but only designed to be a partial quote, it is not incorrect. However, since this portion of the paragraph is really in the nature of a

conclusion of law, the District may modify it. Therefore, Paragraph 36 is modified as follows to include the entirety of Rule 62-330.051(12)(a), Florida Administrative Code:

> (12) Construction, Replacement, Restoration, Enhancement, and Repair of Seawall, Riprap, and Other Shoreline Stabilization –
> (a) Construction, replacement, and repair of seawalls or riprap in artificial waters and residential canal systems that are exempt under Section 403.813(1)(i), F.S., including only that backfilling needed to level the land behind seawalls or riprap.
>
> Rule 62-330.05(12)(a), Fla. Admin. Code.

The Petitioner cites to *Musselman v. Dep't of Envtl. Regulation*, 14 F.A.L.R. 3415 (Fla. Dep't of Envtl. Regulation Final Order, July 10, 1992) to support his contention that the District is not entitled to inquire into the amount of backfilling. In that case, the Department of Environmental Regulation incorrectly required the applicant to demonstrate need for the project. The Final Order found that this was not a valid requirement. This Final Order was issued in 1992. The ERP rules were adopted in October 1995, and the SWERP rules in October, 2013. Although the language of the 1992 exemption rule was similar, it was not the same. Therefore, that case is not based on existing applicable rules, and, is therefore, not relevant to the case at hand. Additionally, that case can be distinguished because the parties stipulated that the property was located in an artificial water body, would not violate state water quality standards, impede navigation or affect flood control.

Petitioner complains that he was not told how much fill to use in backfilling. This is not the basis for an exception. This question is answered in Rule 62-330.051(12)(a), Florida Administrative Code, which states "only that backfilling needed to level land behind seawalls or riprap."

Petitioner then argues that the testimony of the District biologist is irrelevant and cannot be considered. It is the ALJ's role to consider the evidence, resolve conflicts, judge the credibility of witness and reach ultimate findings of fact. The relevancy of testimony and evidence is an evidentiary matter within the province of the ALJ. This portion of Exception No. 17 is denied on page 12 above.

For the reasons set forth herein, Exception No. 17 is denied.

**Petitioner's Exception No. 18 to Findings of Fact 37, 38, and 39**

In Findings of Fact 37, 38 and 39,[3] the ALJ makes findings regarding the requirement in Rule 62-330.051(12)(a), Florida Administrative Code, that backfilling is allowed only as "needed to level the land behind seawalls or riprap." The Petitioner again complains that a finding on the amount of fill is not relevant. The Petitioner also complains that the ALJ drew an inference from the evidence presented that the "purpose of the fill is to create a buildable lot" rather than just the "backfilling needed to level the land behind the walls." He claims that this information on filling "is not relevant to the requested seawall exemption" despite the clear language of Rule 62-330.051(12)(a), Florida Administrative Code, on backfilling. As previously discussed, it is the ALJ's function to determine evidentiary matters related to relevancy. After considering the evidence, it is the role of the ALJ to draw inferences from the evidence to reach ultimate findings of fact. *Addison*, 113 So. 3d at 1056 (citing *Heifetz*, 475 So. 2d at 1281). Exception No. 18 is denied on page 12 above.

For the reasons set forth herein, Exception No. 18 is denied.

**Petitioner's Exception No. 19 to Conclusion of Law 42**

The Petitioner takes exception to the ALJ's Conclusion of Law 42 that, pursuant

[3] Petitioner objects to Finding of Fact 37 in both Exceptions Nos. 17 and 18.

to section 120.57(1)(j), Florida Statutes, Petitioner must prove the material facts that establish his entitlement to the exemption by a preponderance of the evidence. The Petitioner does not contest this standard, but instead contends that the ALJ improperly excluded material and exhibits, denying the Petitioner due process. Evidentiary-related matters are not within the substantive jurisdiction of the District. This Exception is denied on page 12 above.

Therefore, Petitioner's Exception No. 19 must be denied.

**Petitioner's Exception No. 20 to Conclusion of Law 43**

The Petitioner takes exception to the ALJ's Conclusion of Law 43 that an agency's interpretation of the statutes and rules it administers is entitled to deference and should be upheld unless it is clearly erroneous. Petitioner argues that the District completely ignored Rules 62-330.050 and 62-330.051(12)(a), Florida Administrative Code, the applicable rules on the procedures to review the exemption requests. However, he does not provide any citation to the record to support this argument. Section 120.57(1)(k), Florida Statutes, provides that an agency need not rule on an exception that "does not identify the legal basis for the exception, or that does not include appropriate citations to the record." Therefore, the District is not required to rule on this Exception.

Interpretation of the referenced rules falls within the District's substantive jurisdiction and the District is entitled to deference in that interpretation. See Standard of Review. The ALJ's interpretation is consistent with the District's interpretation.

For the reasons set forth herein, Exception No. 20 is denied.

**Petitioner's Exception No. 21 to Conclusion of Law 44**

Petitioner takes exception to the ALJ's Conclusion of Law 44, wherein the ALJ determined that the District's interpretation of the statutory term "artificially created waterways" to exclude natural waterbodies that have been dredged, is a reasonable one. Petitioner argues that the ALJ should not have allowed the District to use the term "artificial waters" found in the SWERP rule to interpret the statutory seawall construction exemption. The Petitioner also alleges that the ALJ made an interpretation that has never been made before when stating that "It furthers the legislative intent reflected in all of the exemptions created in section 403.813 that the exemptions apply to activities which will have little or no adverse effect on natural resources." The Petitioner fails to cite to any legal authority in support of his position. In addition, Petitioner refers to some unidentified "legally adopted rules." He fails to adequately describe the rules or reference the record. Therefore, pursuant to subsection 120.57(1)(k), Florida Statutes, it is not necessary for the District to rule on this part of the Exception. Petitioner also cites to a Sovereign Submerged Lands Environmental Resource Permit Operation Procedures Manual for the first time. This was not an exhibit in the final hearing and therefore, not part of the record. Therefore, it cannot now be utilized as a basis to support this Exception.

After the adoption of SWERP, the term "artificially created waterways" was interpreted to mean a waterway that "does not overlap natural wetlands or other surface waters." *See Swaim v. S. Fla. Water Mgmt. Dist.*, 36 F.A.L.R. 1982, 2032, 2036 (S. Fla. Water Mgmt. Dist. 2014).

Interpretation of section 403.813, Florida Statutes, and Rule 62-330.051(12)(a),

Florida Administrative Code, falls within the District's substantive jurisdiction and the District is entitled to deference in that interpretation. See Standard of Review. The ALJ's interpretation is consistent with the District's interpretation.

In addition, the Petitioner again complains that the ALJ improperly excluded several of his exhibits. Evidentiary-related matters are within the province of the ALJ as the fact-finder in administrative proceedings. This portion of the Exception is denied on page 12 above.

Petitioner's Exception No. 21 must be denied.

**Petitioner's Exception No. 22 to Conclusion of Law 45**

Petitioner takes exception to Conclusion of Law 45, wherein the ALJ states "Whether Spanish Creek contains state sovereign submerged lands is not a controlling factor in determining whether a proposed seawall qualifies for an exemption under section 403.813(1)(i)." The Petitioner claims that the ALJ made a boundary/title determination which is outside the jurisdiction of the administrative hearing process. There is no boundary/title determination in this Conclusion of Law or anywhere in the Recommended Order.

Interpretation of section 403.813, Florida Statutes, and Chapter 62-330, Florida Administrative Code, falls within the District's substantive jurisdiction and the District is entitled to deference in that interpretation. See Standard of Review. The ALJ's interpretation is consistent with the District's interpretation.

For the reasons set forth herein, Exception No. 22 is denied.

**Petitioner's Exception No. 23 to Conclusion of Law 46**

Petitioner takes exception to Conclusion of Law 46, wherein the ALJ concludes

that water quality considerations are not limited to turbidity and that all state water quality standards are applicable. The Petitioner fails to provide any citation to the record to support this Exception. Section 120.57(1)(k), Florida Statutes, provides that an agency need not rule on an exception that "does not identify the legal basis for the exception, or that does not include appropriate citations to the record." Therefore, the District is not required to rule on this Exception.

The fact that provisions on water quality are not limited to turbidity is fully discussed on pages 9-12 above.

Interpretation of section 403.813, Florida Statutes, and Chapter 62-330, Florida Administrative Code, falls within the District's substantive jurisdiction and the District is entitled to deference in that interpretation. See Standard of Review. The ALJ's interpretation is consistent with the District's interpretation.

For the reasons set forth herein, Exception No. 23 is denied.

**Petitioner's Exception No. 24 to Conclusion of Law 47**

Petitioner takes exception to entire Conclusion of Law 47, whereby The ALJ found and concluded that the Petitioner's proposed activities do not qualify for the seawall construction exemption set forth in section 403.813(1)(i), Florida Statutes, because the request for verification: "(1) does not propose seawalls, but, rather, retaining walls to hold fill material; (2) is not in an artificially created waterway; (3) would violate state water quality standards; (4) would impede navigation; and (5) includes more backfilling than needed to level the land behind the walls." Petitioner merely reargues the facts.

The ALJ's finding and conclusion (1) is supported by the following competent,

substantial evidence: (Tr. 155-156, 189-190, 196-198, 200, 401-402, 486-490; Joint Ex. 1; Pet. Ex. 2). Finding and conclusion (2) is supported by the following competent, substantial evidence: (Tr. 240-244, 246-247, 249-250, 458-459; Joint Ex. 1; Resp. Exs. 2, 6, 7; Resp. Comp. Ex. 8; Resp. Ex. 9; Resp. Comp. Exs. 18-20; Resp. Exs. 22-32, 39-44; Resp. Comp. Ex. 52). Finding and conclusion (3) is supported by the following competent, substantial evidence: (Tr. 200-208, 215, 218-219, 341-342, 401-403, 491-498, 500, 556, 559, 566-570; Pet. Ex. 2; Resp. Ex. 22). Finding and conclusion (4) is supported by the following competent, substantial evidence: (Tr. 154, 171, 190, 192-193, 195, 300-301, 316-317, 319, 333, 336-339, 341-342, 346, 500-501, 559, 560-562, 583-584; Resp. Comp. Ex. 20, Sheet 57; Resp. Ex. 22; Pet. Ex. 2). Finally, the ALJ's finding and conclusion (5) is supported by the following competent, substantial evidence: (Tr. 155-159, 197, 200, 399-403, 485-489; Pet. Ex. 2).

The Petitioner also argues other points that are not contained within the ALJ's Conclusion of Law 47; however, Petitioner either fails to cite to any legal authority in support of these assertions, fails to provide citations to the record, fails to explain how the assertion relates to the ALJ's Conclusion of Law, or the assertions have already been addressed in this Order's rulings on Petitioner's Exception Nos. 5, 17, 18, and 23.

For the reasons set forth herein, Exception No. 24 is denied.

**Petitioner's Exception No. 25 to Findings of Fact 3, 4, 11, 12, 13, 14, 20, 26 and 27 and Conclusion of Law 46**

The Petitioner lists the above immediately-referenced Findings of Fact and Conclusion of Law in his Exception No. 25, requesting their deletion and stating that these Findings, and the Conclusion, are not properly at issue in this proceeding and are not part of exemption review under Rule 62-330.050, Florida Administrative Code.

However, Petitioner fails to cite to the record or to provide any legal basis in support of this Exception. Therefore, this Exception need not be ruled on and must therefore be denied.

For the reasons set forth herein, Exception No. 25 is denied.

**Petitioner's Conclusion and Relief Requested**

The Petitioner's final paragraph, entitled Conclusion and Relief Requested, just goes on to re-state his assertion that the Recommended Order creates numerous unadopted rules. Again, the Petitioner fails to include any legal authority in support of this assertion.

Petitioner's Conclusion is denied for the reasons set forth in the rulings on Petitioner's Exceptions above.

## RULINGS ON RESPONDENT'S EXCEPTIONS

**Respondent's Exception No. 1 to Finding of Fact 6**

Respondent takes exception to the portion of Finding of Fact 6, wherein the ALJ stated that the Petitioner showed his title (to the property at issue) would extend to the centerline of Spanish Creek. Respondent points out that the legal description shows that the property lies "west of Spanish Creek." A title search report conducted on February 25, 2014, by Mike Debish, Senior Title Examiner in the Real Estate Section of the District's Land Resources Bureau, illustrates this point as it includes the legal description of the subject property. This description states as follows: The North 300 feet of the South 1,220.17 feet of Government Lot 5, **West of Spanish Creek** of Section 22, Township 45 South, Range 43 East, Palm Beach County, Florida. (emphasis added). (Tr. 373:22-375:24; Resp. Comp. Ex. 17).

Petitioner did not have a property boundary survey for the subject property. He did not show a survey or plat of his property, only adjacent properties. (Tr. 189:5). Mr. Swaim brought up the legal description of Parcels 1 and 2 to show that they extend to the centerline of Spanish Creek; however, those are not his parcels. (Tr. 131:24-132:5). He also stated that he could locate where the subject property's boundaries were located using the Inlet Cay and McCormick Mile Plats; however, as pointed out by the District's expert, Robert Schaffer, you can use adjacent plats as a reference, but they in no way determine boundaries. You have to rely strictly on your legal description. (Tr. 394-395).

Therefore, Respondent's Exception No. 1 is granted. Finding of Fact 6 is corrected to read "Petitioner alleged that his title would extend to the centerline of Spanish Creek, but he did not establish where the centerline is located."

**Respondent's Exception No. 2 to Finding of Fact 8**

Respondent takes exception to Finding of Fact 8 and requests that the measurement standard "feet above sea level" be deleted. Instead, Respondent requests that the Finding of Fact state only that the fill within the seawall is to an "approximate elevation of 8.0." This change would render the Finding of Fact nonsensical. It would be unclear if the finding is based on inches or feet.

It is the function of the ALJ, as the finder of facts in a formal administrative proceeding, "to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, *draw permissible inferences from the evidence*, and reach ultimate findings of fact based on competent substantial evidence." (emphasis supplied) *See, e.g., Goin v. Commission on Ethics*, 658 So. 2d 1131, 1138 (Fla. 1st DCA 1995); *Heifetz v. Dep't*

*of Business Regulation*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). The District concludes that the ALJ's inclusion of the word "feet" in Finding of Fact 8 is based on permissible inferences drawn by the ALJ from competent substantial evidence of record; however, the inclusion of the datum "above sea level" is not.

Therefore, Respondent's Exception No. 2 is granted in part and denied in part. Finding of Fact 8 is corrected to read "filling within the seawalls to an approximate elevation of 8.0 feet with offsite fill." This requested Exception has no precedent on future applications or requests because it pertains only to what was requested in the initial request for verification of exemption. (Joint Ex. 1).

**Respondent's Exception No. 3 to Finding of Fact 9**

Respondent takes exception to Finding of Fact 9, wherein the ALJ stated that the Petitioner proposes to place 300 feet of riprap along the western boundary of the property. A review of the record indicates that there will be 294 feet, plus or minus, of riprap boulders along the west embankment of property from property line to top of embankment. (Tr. 190:1-3; Pet. Ex. 2, Sheet 1 of 4).

Therefore, Respondent's Exception No. 3 is not denied, but instead clarified. Finding of Fact 9 will be clarified to add the word "approximately" and will read "Petitioner still proposes to place approximately 300 feet of riprap along the western boundary of the property." This requested Exception has no precedent on future applications or requests because it pertains only to what was requested in the initial and modified request for verification of exemption. (Joint Ex. 1; Pet. Ex. 2).

**Respondent's Exception No. 4 to Finding of Fact 18**

Respondent takes exception to a portion of Finding of Fact 18 which states

"Some dredging was conducted in Spanish Creek, probably in the 1950s or 1960s." Only part of this sentence is an affirmative finding ("some dredging was conducted in Spanish Creek"). The latter half of the sentence is not an affirmative finding due to the use of the word "probably." Therefore, a modification of the finding is not necessary. The ambivalence of the latter half of the sentence renders it of no precedential value.

Respondent's Exception No. 4 is denied.

**Respondent's Exception No. 5 to Finding of Fact 18**

Respondent takes exception to a portion of Finding of Fact 18 which states "The preponderance of the evidence indicates that the property once included a larger area of shallow marsh or mangrove vegetation and a smaller area of open water, but dredging decreased the area of vegetated wetlands and increased the area of open water."

After looking at page 108 of Joint Exhibit 1, a vicinity map from Petitioner's initial request for verification, and Petitioner's Exhibit 12, a 1947 Florida Navigation aerial, the ALJ stated "Well, this shows me that the open water is much larger than it used to be. It definitely looks like what used to be wetlands or uplands became water. Okay. So combined with the permit, it's likely that something got dredged out there." (Tr. 146:23-147:3; Jt. Ex. 1; Pet. Ex. 12). The District's expert, Robert Hopper, stated that based on his review of historic documentation, there appears to have been changes that entailed Spanish Creek being made deeper and wider on the east side of the centerline of the creek. (Tr. 534:1-4; 534:24-535:3). In addition, when the District's expert, Robert Schaffer, was asked what the difference is in historic Spanish Creek between the 1953 overlay of the Parker plat and the 2013 overlay of the Parker plat, he said "right off the

bat you can see that Spanish Creek has gotten wider. . . . So some work has definitely happened in there." (Tr. 381:10-19; Resp. Comp. Ex. 18, Sheet 3).

Respondent's experts produced historic aerial photography, maps, and a survey confirming that the property has contained marsh wetlands since at least 1872. (Tr. 241; 249; 379; 440-441; 475-476; 483-484; Resp. Exs. 2, 6-7; Resp. Comp. Exs. 18-20; Resp. Exs. 30-32; 43-44). The Respondent's expert, Robert Hopper, explained that the property has always contained wetlands, but it transitioned from one type of wetland (marsh) to another (mangrove) over time. (Tr. 477-478). Additionally, Respondent's Ex. 7, the 1927 U.S. Coast and Geodetic Survey Topographic Map ("T" map), was corroborated by an aerial photograph from the 1920s, which also depicts the property located in a tidal herbaceous marsh area adjacent to Spanish Creek. (Tr. 475-478; Resp. Ex. 7).

Although the Respondent's experts do not specifically state that dredging decreased the area of vegetated wetlands, it is permissible for the ALJ to draw that inference, based on other evidence presented, that dredging in Spanish Creek decreased the area of vegetated wetlands and increased the area of open water.

As indicated above, Respondent's experts acknowledge that Spanish Creek was widened. However, there is not documentation in the record to support that this change specifically occurred on the Petitioner's property, versus Spanish Creek generally.

Therefore, Respondent's Exception No. 5 is granted in part and the Finding of Fact is corrected to state "The preponderance of the evidence indicates that Spanish Creek ~~the property~~ once included a larger area of shallow marsh or mangrove vegetation and a smaller area of open water; but dredging decreased the area of

vegetated wetlands and increased the area of open water."

**Respondent's Exception No. 6 to Finding of Fact 36**

Respondent takes exception to Finding of Fact 36 which states that "Rule 62-330, entitled 'Exempt Activities' is applicable to all exemption requests." This portion of the Finding of Fact is actually a conclusion of law. Section 120.57(1)(*l*), Florida Statutes, authorizes an agency to reject or modify an ALJ's conclusion of law and interpretations of administrative rules "over which it has substantive jurisdiction." *Barfield v. Dep't of Health*, 805 So. 2d 1008, 1010 (Fla. 1st DCA 2001); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140-1142 (Fla. 2d DCA 2001).

The actual section which sets forth the procedure and therefore applies to all exemption requests is Rule 62-330.051, Florida Administrative Code, which is entitled "Procedures for Review and Agency Action on Exemption Requests." As discussed above, the District may modify a conclusion of law over which it has substantive jurisdiction. If a request for an exemption is made, the procedures pertaining to exemption requests set forth in Rule 62-330.051, Florida Administrative Code, are applicable. This Conclusion of Law is therefore corrected to state: "Rule 62-330.051, Fla. Admin. Code, entitled 'Procedures for Review and Agency Action on Exemption Requests' is applicable to all exemption requests."

**Respondent's Exception No. 7 to Finding of Fact 36**

Respondent's Exception No. 7 requests that Finding of Fact 36 be clarified to include the quote of the entire sentence of Rule 62-330.051(12)(a), Florida Administrative Code. The sentence for which clarification is requested is actually a Conclusion of Law which the District may modify.

This clarification is already made by including the entire text of the rule, in response to Petitioner's Exception No. 17.

**Corrections, Clarifications, and Modifications to the Recommended Order**

The Recommended Order's Paragraph 36 is modified as follows to include the entirety of Rule 62-330.051(12)(a), Florida Administrative Code:

> (12) Construction, Replacement, Restoration, Enhancement, and Repair of Seawall, Riprap, and Other Shoreline Stabilization –
> (a) Construction, replacement, and repair of seawalls or riprap in artificial waters and residential canal systems that are exempt under Section 403.813(1)(i), F.S., including only that backfilling needed to level the land behind seawalls or riprap.
>
> Rule 62-330.05(12)(a), Fla. Admin. Code.

Finding of Fact No. 6 is corrected to read "Petitioner alleged that his title would extend to the centerline of Spanish Creek, but he did not establish where the centerline is located."

Finding of Fact 8, section (2) is corrected to read "filling within the seawalls to an approximate elevation of 8.0 feet ~~above sea level~~ with offsite fill."

The last sentence of Finding of Fact 9 is corrected to read "Petitioner still proposes to place approximately 300 feet of riprap along the western boundary of the property."

The last sentence of Finding of Fact 18 is corrected to read "The preponderance of the evidence indicates that ~~the property~~ Spanish Creek once included a larger area of shallow marsh or mangrove vegetation and a smaller area of open water; but dredging decreased the area of vegetated wetlands and increased the area of open water."

## ORDER

The Governing Board has delegated to the Executive Director its authority to take final action on permit applications under Parts II or IV of Chapter 373, Florida Statutes, or petitions for variances or waivers of permitting requirements under Parts II or IV of Chapter 373, Florida Statutes, or verification of exemptions to permitting criteria under Part IV of Chapter 373, Florida Statutes, and Chapter 403, Florida Statutes, and any rules promulgated thereunder. The Executive Director may execute this delegated authority through designated staff.

Having reviewed the Recommended Order, the Exceptions, responses to Exceptions, and the record of the proceeding before DOAH, and having considered the applicable law and being otherwise duly advised, it is ORDERED that:

A. Petitioner's Exceptions are denied, for the reasons set forth above. However, Finding of Fact 36 is clarified to add the entire language of Rule 62-330.051(12)(a), Florida Administrative Code.

B. Respondent's Exceptions are denied except for the corrections or clarifications set forth in the Corrections, Clarifications, and Modifications to the Recommended Order section, supra, for the reasons set forth above.

C. The Recommended Order (Ex. A) is adopted in its entirety, except as corrected in the Corrections, Clarifications, and Modifications to the Recommended Order section, supra, and incorporated herein by reference.

D. A Notice of Rights is attached as Ex. B.

DONE AND ORDERED this 28th day of July, 2015, in West Palm Beach, Florida.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, BY ITS EXECUTIVE DIRECTOR

Blake C. Guillory, P.E., Executive Director

ATTEST:

BY: _____

DATE: July 28, 2015

LEGAL FORM APPROVED:

BY: _____
Susan Roeder Martin, Esq.

DATE: July 27, 2015

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by United States mail and electronic mail to William B. Swaim, 600 Via Lugano Circle, Delray Beach, Florida 33484, swaim35@msn.com on this 28 day of July, 2015.

_____
Susan Roeder Martin

## NOTICE OF RIGHTS

As required by Sections 120.569 and 120.60(3), Fla. Stat., the following is notice of the opportunities which may be available for administrative hearing or judicial review when the substantial interests of a party are determined by an agency. Please note that this Notice of Rights is not intended to provide legal advice. Not all of the legal proceedings detailed below may be an applicable or appropriate remedy. You may wish to consult an attorney regarding your legal rights.

### RIGHT TO REQUEST ADMINISTRATIVE HEARING

A person whose substantial interests are or may be affected by the South Florida Water Management District's (SFWMD or District) action has the right to request an administrative hearing on that action pursuant to Sections 120.569 and 120.57, Fla. Stat. Persons seeking a hearing on a SFWMD decision which affects or may affect their substantial interests shall file a petition for hearing with the Office of the District Clerk of the SFWMD, in accordance with the filing instructions set forth herein, within 21 days of receipt of written notice of the decision, unless one of the following shorter time periods apply: (1) within 14 days of the notice of consolidated intent to grant or deny concurrently reviewed applications for environmental resource permits and use of sovereign submerged lands pursuant to Section 373.427, Fla. Stat.; or (2) within 14 days of service of an Administrative Order pursuant to Section 373.119(1), Fla. Stat. "Receipt of written notice of agency decision" means receipt of written notice through mail, electronic mail, or posting that the SFWMD has or intends to take final agency action, or publication of notice that the SFWMD has or intends to take final agency action. Any person who receives written notice of a SFWMD decision and fails to file a written request for hearing within the timeframe described above waives the right to request a hearing on that decision.

If the District takes final agency action which materially differs from the noticed intended agency decision, persons who may be substantially affected shall, unless otherwise provided by law, have an additional Rule 28-106.111, Fla. Admin. Code, point of entry.

Any person to whom an emergency order is directed pursuant to Section 373.119(2), Fla. Stat., shall comply therewith immediately, but on petition to the board shall be afforded a hearing as soon as possible.

A person may file a request for an extension of time for filing a petition. The SFWMD may, for good cause, grant the request. Requests for extension of time must be filed with the SFWMD prior to the deadline for filing a petition for hearing. Such requests for extension shall contain a certificate that the moving party has consulted with all other parties concerning the extension and that the SFWMD and any other parties agree to or oppose the extension. A timely request for an extension of time shall toll the running of the time period for filing a petition until the request is acted upon.

### FILING INSTRUCTIONS

A petition for administrative hearing must be filed with the Office of the District Clerk of the SFWMD. Filings with the Office of the District Clerk may be made by mail, hand-delivery, or e-mail. Filings by facsimile will not be accepted. A petition for administrative hearing or other document is deemed filed upon receipt during normal business hours by the Office of the District Clerk at SFWMD headquarters in West Palm Beach, Florida. The District's normal business hours are 8:00 a.m. – 5:00 p.m., excluding weekends and District holidays. Any document received by the Office of the District Clerk after 5:00 p.m. shall be deemed filed as of 8:00 a.m. on the next regular business day. Additional filing instructions are as follows:

- Filings by mail must be addressed to the Office of the District Clerk, P.O. Box 24680, West Palm Beach, Florida 33416.



EXHIBIT B

- Filings by hand-delivery must be delivered to the Office of the District Clerk. Delivery of a petition to the SFWMD's security desk does not constitute filing. It will be necessary to request that the SFWMD's security officer contact the Office of the District Clerk. An employee of the SFWMD's Clerk's office will receive and file the petition.
- Filings by e-mail must be transmitted to the Office of the District Clerk at clerk@sfwmd.gov. The filing date for a document transmitted by electronic mail shall be the date the Office of the District Clerk receives the complete document. A party who files a document by e-mail shall (1) represent that the original physically signed document will be retained by that party for the duration of the proceeding and of any subsequent appeal or subsequent proceeding in that cause and that the party shall produce it upon the request of other parties; and (2) be responsible for any delay, disruption, or interruption of the electronic signals and accepts the full risk that the document may not be properly filed.

**INITIATION OF AN ADMINISTRATIVE HEARING**

Pursuant to Sections 120.54(5)(b)4. and 120.569(2)(c), Fla. Stat., and Rules 28-106.201 and 28-106.301, Fla. Admin. Code, initiation of an administrative hearing shall be made by written petition to the SFWMD in legible form and on 8 1/2 by 11 inch white paper. All petitions shall contain:

1. Identification of the action being contested, including the permit number, application number, SFWMD file number or any other SFWMD identification number, if known.
2. The name, address, any email address, any facsimile number, and telephone number of the petitioner and petitioner's representative, if any.
3. An explanation of how the petitioner's substantial interests will be affected by the agency determination.
4. A statement of when and how the petitioner received notice of the SFWMD's decision.
5. A statement of all disputed issues of material fact. If there are none, the petition must so indicate.
6. A concise statement of the ultimate facts alleged, including the specific facts the petitioner contends warrant reversal or modification of the SFWMD's proposed action.
7. A statement of the specific rules or statutes the petitioner contends require reversal or modification of the SFWMD's proposed action.
8. If disputed issues of material fact exist, the statement must also include an explanation of how the alleged facts relate to the specific rules or statutes.
9. A statement of the relief sought by the petitioner, stating precisely the action the petitioner wishes the SFWMD to take with respect to the SFWMD's proposed action.

**MEDIATION**

The procedures for pursuing mediation are set forth in Section 120.573, Fla. Stat., and Rules 28-106.111 and 28-106.401–.405, Fla. Admin. Code. The SFWMD is not proposing mediation for this agency action under Section 120.573, Fla. Stat., at this time.

**RIGHT TO SEEK JUDICIAL REVIEW**

Pursuant to Section 120.68, Fla. Stat., and in accordance with Florida Rule of Appellate Procedure 9.110, a party who is adversely affected by final SFWMD action may seek judicial review of the SFWMD's final decision by filing a notice of appeal with the Office of the District Clerk of the SFWMD in accordance with the filing instructions set forth herein within 30 days of rendition of the order to be reviewed, and by filing a copy of the notice with the clerk of the appropriate district court of appeal.