SOUTH FLORIDA WATER MANAGEMENT DISTRICT

March 14, 2016

Subject: **Alico West Fund, LLC v. Miromar Lakes, LLC, and South Florida Water Management District, DOAH Case No. 15-0572**

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

Dear Ms. Llado:

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 561.682.6259.

Sincerely,

Joyce B. Rader
Paralegal Specialist

JBR
Enclosures

BEFORE THE SOUTH FLORIDA WATER MANAGEMENT DISTRICT

Alico West Fund, LLC,

Petitioner,

vs.

Miromar Lakes, LLC, and
South Florida Water Management District,

Respondents.
_____/

SFWMD No. 2016-015-FOF-ERP
DOAH Case No. 15-0572

FINAL ORDER

On January 27, 2016, D. R. Alexander, an administrative law judge ("ALJ") with the Division of Administrative Hearings ("DOAH"), issued a Recommended Order to the South Florida Water Management District ("District") in this case. A copy of the Recommended Order is attached as Exhibit A. After review of the Recommended Order, exceptions and responses to exceptions, and the record of the proceeding before DOAH, this matter is now before the District for final agency action.

SUMMARY OF RECOMMENDED ORDER

The issue before the ALJ was whether Miromar Lakes, LLC ("Applicant") is entitled to an Environmental Resource Permit ("ERP") modification. Applicant's request is for modification of a conceptual permit issued by the District in 1999, which approved the development of a large mixed-use residential development in Lee County known as Miromar Lakes. The modification is for the construction of a surface water management

system to serve a single-family residential development known as Peninsula Phase IV ("Phase IV" or "the Project"). RO[1] Statement of the Issue, p. 2; FOF 4.

The ALJ concluded that Applicant provided reasonable assurance that the proposed activity will satisfy all ERP criteria and will not be contrary to the public interest. COL 58. The ALJ recommended that the District issue the modification with eight additional permit conditions. RO Recommendation, pp. 28-30.

STANDARD OF REVIEW FOR RECOMMENDED ORDERS

I. FINDINGS OF FACT

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. (2015); *Stokes v. Bd. of Prof'l Eng'rs*, 952 So. 2d 1224 (Fla. 1st DCA 2007); *see also Padron v. Dep't of Envtl. Prot.,* 143 So. 3d 1037, 1041 (Fla. 3d DCA 2014). 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 as to each essential element and as to its admissibility under legal rules of evidence. *See Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm'n*, 671 So. 2d 287, 289 n.3 (Fla. 5th DCA 1996).

[1] Citations to the record are abbreviated as follows:
Recommended Order "RO"
Finding of Fact "FOF"
Conclusion of Law "COL"
Transcript "TR"
Transcript citations shall be to volume, page and lines

The ALJ's function in an administrative hearing is to consider all 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. *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. *See, e.g., Rogers v. Dep't of Health,* 920 So. 2d 27, 30 (Fla. 1st DCA 2005) (citing *Aldrete v. Dep't of Health, Bd. of Medicine*, 679 So. 2d 1244, 1246 (Fla. 1st DCA 2004)). 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 Constr. Co. v. Dyer*, 592 So. 2d 276, 280 (Fla. 1st DCA 1991). These evidentiary-related matters are within the province of the ALJ, as the "fact-finder" in these administrative proceedings. *See, e.g., Tedder v. Fla. Parole Comm'n,* 842 So. 2d 1022, 1025 (Fla. 1st DCA 2003); *Heifetz*, 475 So. 2d at 1281.

It is the ALJ's function to draw permissible inferences from the evidence and make ultimate findings based thereon. An ultimate fact is a mixture of fact and law defined as "'[t]hose facts found in that vaguely defined field lying between evidential facts on the one side and the primary issue or conclusion of law on the other, being but the logical results of the proofs, or, in other words, mere conclusions of fact.'" *Tedder*, 697 So. 2d at 902 (*citing Black's Law Dictionary* 1365 (5th ed. 1979)). Ultimate findings of fact are necessary for proper review of administrative orders and are within the sole province of the ALJ to make. *Tedder,* 697 So. 2d at 903.

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." *Heifetz*, 475 So. 2d at 1281. Evidentiary rulings are matters within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. *Martuccio v. Dep't of Prof'l Regulation,* 622 So. 2d 607, 609 (Fla. 1st DCA 1993).

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 Reg'l Water Supply Auth. v. IMC Phosphates Co.,* 18 So. 3d 1079, 1088 (Fla. 2d DCA 2009); *Collier Med. Ctr. v. State, Dep't of Health & Rehabilitative Servs.*, 462 So. 2d 83, 85 (Fla. 1st DCA 1985). An agency has no authority to make independent or supplemental findings of fact. *See, e.g.*, *City of North Port, Fla. v. Consol. Minerals*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994) ("The agency's scope of 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 & Rehabilitative 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).

II. CONCLUSIONS OF LAW

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." § 120.57(1)(l), Fla. Stat. (2015); *see also Barfield v. Dep't of Health, Bd. of Dentistry,* 805 So. 2d 1008 (Fla. 1st DCA 2001); *Deep Lagoon Boat Club,*

Ltd. v. Sheridan, 784 So. 2d 1140, 1143 (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., IMC Phosphates,* 18 So. 3d at 1089*; G.E.L. Corp. v. Dep't of Envtl. Prot.*, 875 So. 2d 1257, 1264 (Fla. 5th DCA 2004).

If an ALJ improperly labels a conclusion of law as a finding of fact, the label should be disregarded and the item treated as though it were actually a conclusion of law. *See, e.g., Battaglia Properties v. Fla. Land & 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. *See, e.g., Stokes*, 952 So. 2d at 1224.

An agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction and expertise. *Pub. Employees Relations Comm'n v. Dade County Police Benevolent Ass'n*, 467 So. 2d 987, 989 (Fla. 1985); *see also Manatee Educ. Ass'n v. Sch. Bd. of Manatee County*, 62 So. 3d 1176, 1183 (Fla. 1st DCA 2011) (citing *Fla. Public Employee Council 79 v. Daniels*, 646 So. 2d 813, 816 (Fla. 1st DCA 1994)). Considerable deference should be accorded to these agency interpretations of statutes and rules within their regulatory jurisdiction, and such agency interpretations should not be overturned unless "clearly erroneous." *Dep't of Envtl. Regulation v. Goldring*, 477 So. 2d 532, 534 (Fla. 1985); *Falk v. Beard*, 614 So. 2d 1086, 1089 (Fla. 1993). Furthermore, agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be the only reasonable interpretations. It is enough if such agency interpretations are "permissible" ones. *See, e.g., Suddath Van Lines, Inc. v. Dep't of Envtl. Prot.,* 668 So. 2d 209, 212 (Fla. 1st DCA 1996). However, an agency is

prohibited from using the rejection or modification of a conclusion of law to form the basis for rejection or modification of findings of fact. § 120.57(1)(l), Fla. Stat. (2015).

Pursuant to Chapter 373, Florida Statutes, Title 40E and Chapter 62-330 of the Florida Administrative Code, the District has the administrative authority and substantive expertise to exercise regulatory jurisdiction over the administration and enforcement of the ERP program. Therefore, the District 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

I. GENERALLY

The case law of Florida holds that parties to formal administrative proceedings must alert reviewing agencies to any perceived defects in DOAH hearing procedures or in the findings of fact of ALJs by filing exceptions to DOAH recommended orders. *See, e.g., Comm'n on Ethics v. Barker,* 677 So. 2d 254, 256 (Fla. 1996); *Henderson v. Dep't of Health, Bd. of Nursing,* 954 So. 2d 77, 81 (Fla. 5th DCA 2007). Having filed no exceptions to certain findings of fact the party "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Envtl. Coalition of Fla., Inc. v. Broward County*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Medical Ctr., Inc. v. State of Fla., Agency for Health Care Admin.,* 847 So. 2d 540, 542 (Fla. 4th DCA 2003).

In reviewing a recommended order and any written exceptions, the agency's final order "shall include an explicit ruling on each exception." § 120.57(1)(k), Fla. Stat. (2015). 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.*

II. RULINGS ON PETITIONER'S EXCEPTIONS

An understanding of Petitioner's objections to the modification is useful in considering its exceptions to the Recommended Order. The ALJ summarized Petitioner's three areas of objection in Finding of Fact 23: First, Petitioner contends the modification should be treated as a major modification of the conceptual permit and, therefore, must satisfy current rules and regulations rather than the rules in effect when the conceptual permit was issued. Second, Petitioner contends the modification is inconsistent with the conceptual permit and must be treated as a new design subject to current rules and regulations. Finally, Petitioner contends that notwithstanding Applicant's agreement to modify its permit to address certain errors/deficiencies identified by the Petitioner at hearing, no revisions can be made at this stage of the proceeding, a new application must be filed, and the review process must be started over.

Petitioner's Exception 1 to the Preliminary Statement

Petitioner's exception is to the ALJ's ruling on its post-hearing Motion to Strike Non-Record Materials in Respondents' Proposed Recommended Orders. The "non-record materials" Petitioner challenges are revised special conditions which were

attached to Respondents' proposed recommended orders.[2] Petitioner generally argues that consideration of the attachments to Respondents' proposed recommended orders prejudices Petitioner because they "have not been properly vetted at a hearing" and Petitioner has not had the opportunity to elicit testimony from Respondents' witnesses or present rebuttal testimony.

As explained in Conclusions of Law 55 and 56, because this is a *de novo* proceeding, additional evidence not included in the permit application may be presented by the parties, and changes to the permit, including new conditions, may result. Petitioner does not argue that the attachments were not supported by evidence in the record; rather, Petitioner argues that the attachments themselves "are not a part of the record in this case." The ALJ's statement to which Petitioner objects, describes the attachments as "simply proposed permit conditions based on evidence presented at hearing," which explains the ALJ's basis for denial of Petitioner's motion. Additionally, although the ALJ refused to strike the challenged attachments, the ALJ's recommended special conditions 3 through 8 do not include the proposed revised permit conditions provided by Respondents, although they address the same issues. The ALJ made findings of fact regarding errors and/or deficiencies identified by Petitioner's experts at the final hearing, which the ALJ in turn addressed through his own recommended special conditions. FOFs 38-43; RO Recommendation, paras. 3-8.

Petitioner's exception to the Preliminary Statement does nothing more than seek to reargue the ALJ's ruling because Petitioner disagrees with the ALJ's reasoning.

[2] Petitioner's exception references attachments to the Recommended Order but it is clear from the context of the exception and the ALJ's statement in the Preliminary Statement which is the subject of this exception that it is referring to the Proposed Recommended Orders filed by the two respondents.

Evidentiary rulings of the ALJ that are not infused with agency policy considerations are not matters over which the District has substantive jurisdiction. *See* Standard of Review section, supra.

Petitioner's Exception 1 is therefore denied.

Petitioner's Exception 2 to Finding of Fact 11

Petitioner's exception is to the ALJ's finding that the Project will not increase the overall discharge rate from the control weir for Lake 5/6. Petitioner contends there is no competent substantial evidence in the record to support this finding. Petitioner also argues that the District could not determine changes in flood impacts for the Project because no flood control calculations were submitted to the District.

Contrary to Petitioner's assertion, there is competent substantial evidence in the record to support this finding. The District's experts testified that 1) the Project will not result in a higher discharge rate from the overall system outfall at Lake 5/6 (Tr. Vol. IV 634:15-23); 2) flood routing calculations were not necessary and the District would not generally see flood routing calculations of the type Petitioner referenced (Tr. Vol. IV 531:1-17); and, 3) Applicant provided reasonable assurances that the Project will not cause adverse flooding (Tr. Vol. IV 583:15-19).

The standard of review for a finding of fact is not whether contrary information exists in the record, but whether there is competent substantial evidence in the record to support the finding of fact. Where there is competent substantial evidence to support a finding of fact, the District may not disturb that finding. The District may not reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. These evidentiary-related matters are within the sole province of the ALJ as the fact-finder. *See* Standard of Review section, supra.

Petitioner's Exception 2 is therefore denied.

Petitioner's Exception 3 to Finding of Fact 15

Petitioner's exception is to the ALJ's finding that the required water quality treatment volume for the Project is provided by the wet detention area in Phase III before it is discharged to Lake 5/6. Petitioner contends there is no competent substantial evidence in the record to support this finding. Petitioner also argues that the wet detention area does not provide the required treatment because 1) the stormwater treatment capacity is not provided within the Phase IV project; and 2) a 2006 permit, referred to as the "Interconnect Permit," required an additional 50% water quality treatment for that permit and all subsequent permits under the conceptual permit.

Contrary to Petitioner's assertion, there is competent substantial evidence in the record to support this finding. The record shows that even though no additional water quality treatment was required, Applicant voluntarily agreed to increase the stormwater treatment capacity for Phase IV. FOF 45; Tr. Vol. III 494:8-497:7. This additional treatment is provided in Phase III. Phase III and Phase IV are both in Basin 6 and the increase in stormwater treatment capacity results in excess treatment in Basin 6. FOF 45; Tr. Vol. III 494:8-497:7. Additionally, the District's expert testified that there was no requirement under the rules for the permit to provide an additional 50% treatment. Tr. Vol. III 445:3-5.

The standard of review for a finding of fact is not whether contrary information exists in the record, but whether there is competent substantial evidence in the record to support the finding of fact. Where there is competent substantial evidence to support a finding of fact, the District may not disturb that finding. The District may not reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge

the credibility of witnesses. These evidentiary-related matters are within the sole province of the ALJ as the fact-finder. *See* Standard of Review section, supra.

Petitioner's Exception 3 is therefore denied.

Petitioner's Exception 4 to Finding of Fact 17

Petitioner's exception is to the ALJ's finding that the required water quality treatment volume for the Project is provided by the wet detention area in Phase III and the three dry detention areas to be constructed before it is discharged to Lake 5/6. Petitioner contends there is no competent substantial evidence in the record to support this finding. Petitioner also argues that this finding should be modified for the same reasons asserted in Exception 3.

Contrary to Petitioner's assertion, and as explained in the ruling on Petitioner's Exception 3, there is competent substantial evidence in the record to support this finding. The standard of review for a finding of fact is not whether contrary information exists in the record, but whether there is competent substantial evidence in the record to support the finding of fact. Where there is competent substantial evidence to support a finding of fact, the District may not disturb that finding. The District may not reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. These evidentiary-related matters are within the sole province of the ALJ as the fact-finder. *See* Standard of Review section, supra.

Petitioner's Exception 4 is therefore denied.

Petitioner's Exception 5 to Finding of Fact 20

Petitioner's exception is to the ALJ's finding that no nutrient loading analysis was required to be submitted by Applicant. Petitioner contends this finding is a conclusion of law rather than a finding of fact, and that there is no competent substantial evidence in

the record to support this finding. Petitioner also argues that the District should have required a nutrient loading analysis because a previous version of the application was considered a major modification of the conceptual permit.

First, it is unnecessary to determine whether this is a finding of fact, conclusion of law or ultimate fact because it is supported by the record and is consistent with the District's interpretation of its rules, and the application of those rules to the modification. *See* FOFs 25 through 37; Tr. Vol. III 440:11-443:6; Tr. Vol. IV 573:9-574:1, 575:4-9. In addition, Petitioner's argument regarding a prior version of the application is not relevant to whether the revised application is a minor modification, which is the finding in Finding of Fact 20. A minor modification of the conceptual permit is only required to satisfy the rules in effect when the conceptual permit was issued. Tr. Vol. IV 573:19-25, 613:16-614:1. Testimony reveals the requirement for a nutrient loading analysis was developed subsequent to the issuance of the conceptual permit. Tr. Vol. IV 575:16-25. A nutrient loading analysis was not required because Phase IV is consistent with the conceptual permit. Tr. Vol. III 444:12-23; Tr. Vol. IV 602:15-23.

The standard of review for a finding of fact is not whether contrary information exists in the record, but whether there is competent substantial evidence in the record to support the finding of fact. Where there is competent substantial evidence to support a finding of fact, the District may not disturb that finding. The District may not reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. These evidentiary-related matters are within the sole province of the ALJ as the fact-finder. *See* Standard of Review section, supra.

Petitioner's Exception 5 is therefore denied.

Petitioner's Exception 6 to Finding of Fact 21

Petitioner's exception is to the ALJ's finding that treatment for one inch of stormwater runoff was applied by Applicant to Phase IV because that is what the conceptual permit required in Basin 6. Petitioner contends there is no competent substantial evidence in the record to support this finding. Petitioner also argues that Applicant improperly relied on the water quality treatment criteria included in the conceptual permit, and that modifications subsequent to the conceptual permit are required to determine whether the percent imperviousness has changed from the conceptual permit.

First, Petitioner's argument appears to misconstrue this finding. This finding describes what Applicant relied on in submitting the revised application. It does not make a finding as to the level of treatment Phase IV was required to provide. Nonetheless, contrary to Petitioner's assertion, there is competent substantial evidence in the record to support this finding. The record shows that the conceptual permit provided for treatment for one inch of stormwater runoff (FOF 9; Tr. Vol. IV 576:3-13), and Applicant provided the calculations for determining the proper level of stormwater treatment for the revised application to the District and the District found them satisfactory (Tr. Vol. IV 581:15-23).

The standard of review for a finding of fact is not whether contrary information exists in the record, but whether there is competent substantial evidence in the record to support the finding of fact. Where there is competent substantial evidence to support a finding of fact, the District may not disturb that finding. The District may not reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. These evidentiary-related matters are within the sole province of the ALJ as the fact-finder. *See* Standard of Review section, supra.

Petitioner's Exception 6 is therefore denied.

Petitioner's Exception 7 to Finding of Fact 22

Petitioner's exception is to the ALJ's finding that Applicant provided reasonable assurances that the project will not cause flooding. Petitioner contends there is no competent substantial evidence in the record to support this finding. Petitioner also argues that flood routing calculations that were required to be submitted to the District were not submitted, thus preventing the District from determining changes in flood impacts for the Project or changes in flow from the discharge structure.

Contrary to Petitioner's assertion, there is competent substantial evidence in the record to support this finding. The District's experts testified that 1) the Project will not result in a higher discharge rate from the overall system outfall at Lake 5/6 (Tr. Vol. IV 634:15-23); 2) flood routing calculations were not necessary and the District would not generally see flood routing calculations of the type Petitioner referenced (Tr. Vol. IV 531:1-17); and, 3) Applicant provided reasonable assurances that the Project will not cause adverse flooding (Tr. Vol. IV 583:15-19).

The standard of review for a finding of fact is not whether contrary information exists in the record, but whether there is competent substantial evidence in the record to support the finding of fact. Where there is competent substantial evidence to support a finding of fact, the District may not disturb that finding. The District may not reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. These evidentiary-related matters are within the sole province of the ALJ as the fact-finder. *See* Standard of Review section, supra.

Petitioner's Exception 7 is therefore denied.

Petitioner's Exception 8 to Finding of Fact 24

Petitioner's exception is to the ALJ's finding that if Applicant's modification to the conceptual permit is minor, Applicant is only required to satisfy rules for permit issuance that existed at the time the conceptual permit was issued. Petitioner contends this finding is a conclusion of law rather than a finding of fact, and that there is no competent substantial evidence in the record to support this finding. Petitioner also argues that the Interconnect Permit was a major modification of the conceptual permit and changed requirements for all future permits and therefore it is irrelevant whether the revised application is a minor or major modification to the conceptual permit. Further, Petitioner argues that all applications for development subsequent to the Interconnect Permit would be required to satisfy this criteria.

First, it is unnecessary to determine whether this finding of fact is a finding of fact, conclusion of law or ultimate fact because it is supported by the record and is consistent with the District's interpretation of the rules, and the application of those rules to the modification. See FOFs 25 through 37; Tr. Vol. III 440:11-443:6; Tr. Vol. IV 573:9-574:1, 575:4-9. A minor modification of the conceptual permit is only required to satisfy the rules in effect when the conceptual permit was issued. Tr. Vol. IV 573:19-25, 613:16-614:1. The revised application is a minor modification. *See* FOFs 24 through 31, COL 59; Tr. Vol. VI 608:7-14. Petitioner's own expert testified there is no statute or rule that requires the District to compare Phase IV with a permit other than the conceptual permit. Tr. Vol. VIII 1070:14-1071:6.

The standard of review for a finding of fact is not whether contrary information exists in the record, but whether there is competent substantial evidence in the record to support the finding of fact. Where there is competent substantial evidence to support a

finding of fact, the District may not disturb that finding. The District may not reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. These evidentiary-related matters are within the sole province of the ALJ as the fact-finder. *See* Standard of Review section, supra.

Petitioner's Exception 8 is therefore denied.

Petitioner's Exception 9 to Finding of Fact 29

Petitioner's exception is to the ALJ's finding that the testimony of Petitioner's expert as to only one of the 14 factors used to perform a consistency analysis "implicitly conceded that the other 13 factors are not present" and weighed toward a finding of consistency. Petitioner contends there is no competent substantial evidence in the record to support this finding. Petitioner also argues that testimony of its expert, other than that addressing the 14 factors, supports the expert's conclusion that the Project is a major modification.

Contrary to Petitioner's assertion, there is competent substantial evidence to support this finding. Moreover, Petitioner does not dispute that its expert did not testify to any of the other 13 factors, and Petitioner has not challenged the ALJ's finding that none of those 14 factors are dispositive alone and that all of the factors are considered together. FOF 26. By not taking exception to Finding of Fact 26, Petitioner has acquiesced to or waived its objection to this finding. *See Envtl. Coalition of Fla.*, 586 So. 2d at 1213.

In addition, this finding describes the ALJ's analysis of the weight to be attributed to Petitioner's expert. Petitioner's exception requests the District to reweigh the evidence. The District may not reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. These evidentiary-related

matters are within the sole province of the ALJ as the fact-finder. *See* Standard of Review section, supra.

Petitioner's Exception 9 is therefore denied.

Petitioner's Exception 10 to Finding of Fact 30

Petitioner's exception is to the ALJ's finding that the more persuasive evidence is that the Master Plan in the conceptual permit is capable of meeting the treatment and attenuation requirements for the Project. Petitioner contends there is no competent substantial evidence in the record to support this finding. Petitioner also argues that this finding should be modified for the same reasons asserted in Exceptions 3 and 4.

Contrary to Petitioner's assertion, and as explained in the ruling on Petitioner's Exceptions 3 and 4, there is competent substantial evidence in the record to support this finding. The standard of review for a finding of fact is not whether contrary information exists in the record, but whether there is competent substantial evidence in the record to support the finding of fact. Where there is competent substantial evidence to support a finding of fact, the District may not disturb that finding. The District may not reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. These evidentiary-related matters are within the sole province of the ALJ as the fact-finder. *See* Standard of Review section, supra.

Petitioner's Exception 10 is therefore denied.

Petitioner's Exception 11 to Finding of Fact 31

Petitioner's exception is to the ALJ's finding that, based upon the preponderance of the evidence, the revised application is a minor modification. Petitioner contends there is no competent substantial evidence in the record to support this finding. Petitioner also argues that the evidence overwhelmingly demonstrates the District failed to conduct a

thorough review to determine whether the modification was major or minor, that the rule factors to be considered are not dispositive on their own, and that the totality of the evidence supports the conclusion that the Project is a major modification.

Contrary to Petitioner's assertion, there is competent substantial evidence in the record to support this finding. This finding also is in the nature of an ultimate fact. The preceding findings in the section of the Recommended Order regarding whether the application is a major or minor modification describe in detail the ALJ's findings based upon the evidence presented and the weight the ALJ afforded to that evidence. *See* FOFs 24-30. This finding applies those facts to determine that the revised application is a minor modification of the conceptual permit. Petitioner has taken exception to portions of those preceding facts, and those exceptions were denied. *See* Rulings on Exceptions 8, 9, and 10, supra. Petitioner did not, however, take exception to Finding of Fact 27 in which the ALJ credited the testimony of the District's experts that, based upon the District's reviews of the revised application, the Project meets the criteria for a minor modification. By not filing an exception to Finding of Fact 27, Petitioner "has thereby expressed its agreement with, or at least waived any objection to" this finding. *Envtl. Coalition of Fla.*, 586 So. 2d at 1213.

It is the ALJ's function to draw permissible inferences from the evidence and make ultimate findings based thereon. Ultimate findings of fact are necessary for proper review of administrative orders and are within the sole province of the ALJ to make. *Tedder,* 697 So. 2d at 903. The District may not intrude on that authority. The standard of review for a finding of fact is not whether contrary information exists in the record, but whether there is competent substantial evidence in the record to support the finding of fact. Where there is competent substantial evidence to support a finding of fact, the District may not disturb

that finding. The District may not reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. These evidentiary-related matters are within the sole province of the ALJ as the fact-finder. *See* Standard of Review section, supra.

Petitioner's Exception 11 is therefore denied.

Petitioner's Exception 12 to Finding of Fact 32

Petitioner's exception is to the ALJ's finding that there is no evidence that applicable water quality standards or special basin criteria have changed for Lake 5/6 since the conceptual permit was issued. Petitioner contends there is no competent substantial evidence in the record to support this finding. Petitioner also argues that state water quality standards have changed with adoption of the impaired water rules and that those new standards would trigger new requirements for Phase IV that were not in effect at the time of the conceptual permit.

Because the finding is that there is an absence of evidence, Petitioner would need to identify competent substantial evidence in the record that the ALJ overlooked. The testimony cited by Petitioner to support its argument relates to the definition of a water quality standard and specifically to changes to water quality standards in the Estero River, not in Lake 5/6. Nonetheless, there is competent substantial evidence in the record defining the meaning of state water quality standards and that no applicable changes for Lake 5/6 had occurred. Tr. Vol. III 455:22-456:21, 485:16-486:22.

The ALJ, as the trier of fact, is charged with weighing the evidence presented and making findings of fact based upon that evidence. The District may not reweigh the evidence or make additional findings of fact. *See* Standard of Review section, supra.

Petitioner's Exception 12 is therefore denied.

Petitioner's Exception 13 to Finding of Fact 32

Petitioner's exception is to the ALJ's finding that there is no requirement that the Phase IV permit be compared with any permit other than the conceptual permit. Petitioner contends this finding is a conclusion of law rather than a finding of fact, and that there is no competent substantial evidence in the record to support this finding. Petitioner also argues that this finding should be modified for the same reasons asserted in Exception 8.

It is unnecessary to determine whether this finding of fact is a finding of fact, conclusion of law or ultimate fact because it is supported by the record and is consistent with the District's interpretation of its rules, and the application of those rules to the modification. See FOFs 25 through 37; Tr. Vol. III 440:11-443:6; Tr. Vol. IV 573:9-574:1, 575:4-9. As explained in the ruling on Petitioner's Exception 8, there is competent substantial evidence in the record to support this finding.

The standard of review for a finding of fact is not whether contrary information exists in the record, but whether there is competent substantial evidence in the record to support the finding of fact. Where there is competent substantial evidence to support a finding of fact, the District may not disturb that finding. The District may not reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. These evidentiary-related matters are within the sole province of the ALJ as the fact-finder. *See* Standard of Review section, supra.

Petitioner's Exception 13 is therefore denied.

Petitioner's Exception 14 to Finding of Fact 33

Petitioner's exception is to the ALJ's determination that "[t]he District credibly determined that there is no inconsistency" between the Phase IV permit and the conceptual permit. Petitioner contends there is no competent substantial evidence in the

record to support this finding. Petitioner also argues that 1) the conceptual permit does not include enough detail to perform a consistency review; 2) the District never made a consistency determination as to imperviousness; 3) because the Interconnect Permit modified the surface water management system, new requirements were applicable to Phase IV; and, 4) the District failed to make a consistency determination regarding flood control.

Contrary to Petitioner's assertion, there is competent substantial evidence to support this finding. First, Petitioner did not challenge Finding of Fact 6 that found 1) it is not surprising that the conceptual permit "contains very little detail regarding the existence, location, or development of roads, lots, a stormwater management system, or grading"; 2) by their very nature, conceptual permits typically leave details for future development decisions because, at the time of the conceptual permit, the landowner does not know precisely how the property will be developed; 3) Petitioner's expert agreed "there is no requirement that conceptual permits include details of subsequent construction phases"; and, 4) the inference drawn by the ALJ is that "the District intended for the developer to have considerable latitude in developing the large tract of undeveloped land, phase by phase, over the life of the conceptual permit." By not taking exception to Finding of Fact 6, Petitioner has acquiesced to or waived its objection to the lack of detail in the conceptual permit, and therefore the sufficiency of the consistency review performed by the District. *See Envtl. Coalition of Fla.*, 586 So. 2d at 1213.

Next, Petitioner argues that because the conceptual permit does not specify the amount of imperviousness contemplated for the area, the District did not consider imperviousness as part of the consistency analysis. As explained in the preceding paragraph, Petitioner cannot challenge the level of specificity provided in the conceptual

permit. Nonetheless, Applicant provided the calculations for the revised application to the District and the District found them satisfactory. Tr. Vol. IV 581:15-23.

Next, Petitioner once again argues that the Interconnect Permit modified the stormwater management system and changed requirements for all future permits. This argument was addressed in the ruling on Exception 8 which is incorporated in response to this exception.

Finally, Petitioner contends that the District failed to perform a consistency determination as to flood control. Petitioner argues that the enlargement of the bleeder hole could have an effect on flood levels, that no calculations were provided to justify the proposed change, and without those calculations it is impossible to determine consistency of the flood control element. The District's witness testified that, while no calculations were submitted, he would not anticipate they would be because the change in the size of the orifice was so small. Tr. Vol. IV 551:21-552:2. Nevertheless, based upon testimony of Petitioner's expert and calculations provided by that expert, the ALJ found that the permit should contain a special condition reducing the size of the bleeder orifice. FOF 42. This makes the change in size even smaller than what the District's witness testified was already a small change.

The standard of review for a finding of fact is not whether contrary information exists in the record, but whether there is competent substantial evidence in the record to support the finding of fact. Where there is competent substantial evidence to support a finding of fact, the District may not disturb that finding. The District may not reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. These evidentiary-related matters are within the sole province of the ALJ as the fact-finder. *See* Standard of Review section, supra.

Petitioner's Exception 14 is therefore denied.

Petitioner's Exception 15 to Finding of Fact 34

Petitioner's exception is to the ALJ's finding that "[t]he District credibly determined that the activities in Phase IV, as revised, were similar to or less intensive than those authorized in the conceptual approval permit and may actually provide a net benefit to Lake 5/6." Petitioner also argues that the District never performed any analysis of the revised application.

Contrary to Petitioner's assertion, there is competent substantial evidence in the record to support this finding. The District reviewed the revised application and determined that, as revised, Phase IV may actually provide a net benefit to the system. Tr. Vol. IV 578:7-579:5.

The standard of review for a finding of fact is not whether contrary information exists in the record, but whether there is competent substantial evidence in the record to support the finding of fact. Where there is competent substantial evidence to support a finding of fact, the District may not disturb that finding. The District may not reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. These evidentiary-related matters are within the sole province of the ALJ as the fact-finder. *See* Standard of Review section, supra.

Petitioner's Exception 15 is therefore denied.

Petitioner's Exception 16 to Finding of Fact 35

Petitioner's exception is to the ALJ's finding that Phase IV, as revised, is consistent with the conceptual permit. Petitioner contends there is no competent substantial evidence in the record to support this finding. Petitioner also argues that this finding should be modified for the same reasons asserted in Exception 14.

Contrary to Petitioner's assertion, and as explained in the ruling on Exception 14, there is competent substantial evidence in the record to support this finding. The standard of review for a finding of fact is not whether contrary information exists in the record, but whether there is competent substantial evidence in the record to support the finding of fact. Where there is competent substantial evidence to support a finding of fact, the District may not disturb that finding. The District may not reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. These evidentiary-related matters are within the sole province of the ALJ as the fact-finder. *See* Standard of Review section, supra.

Petitioner's Exception 16 is therefore denied.

Petitioner's Exception 17 to Finding of Fact 36

Petitioner's exception is to the ALJ's finding crediting the testimony of Applicant's expert regarding Phase IV's consistency with the conceptual permit on the issues of land use, size and location, allowable stormwater discharge rate, flood control elevations, mitigation plans, permitted stormwater reuse, flood routings and storm stages. Petitioner contends there is no competent substantial evidence in the record to support this finding. Petitioner also argues that nothing in the record indicates Applicant's expert performed "a District consistency analysis," and the record reveals that Applicant's expert failed to perform flood modeling. In addition, Petitioner argues that this finding should be modified for the same reasons asserted in Exception 14.

Contrary to Petitioner's assertion, there is competent substantial evidence in the record to support this finding. Petitioner's argument that Applicant's expert never performed a "District consistency analysis" reflects an apparent misunderstanding of the ALJ's finding. The ALJ's finding is that Applicant's expert testified regarding consistency,

not that he performed a "District consistency analysis." Tr. Vol. II 164:17-167:12. Similarly, Petitioner's argument that Applicant's expert failed to perform flood modeling is irrelevant. The ALJ's finding of fact is that Phase IV did not change the flood routings. Consistent with the ALJ's finding, flood routing calculations were not necessary. *See* Tr. Vol. IV 530:20-533:6. There is also testimony that the Project would not cause adverse flooding. *See* Tr. Vol. IV 583:15-19. Additionally, the ruling on Exception 14 is incorporated in response to this exception.

The standard of review for a finding of fact is not whether contrary information exists in the record, but whether there is competent substantial evidence in the record to support the finding of fact. Where there is competent substantial evidence to support a finding of fact, the District may not disturb that finding. The District may not reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. These evidentiary-related matters are within the sole province of the ALJ as the fact-finder. *See* Standard of Review section, supra.

Petitioner's Exception 17 is therefore denied.

Petitioner's Exception 18 to Finding of Fact 37

Petitioner's exception is to the ALJ's finding that the Phase IV land uses are the same as contemplated in the conceptual permit and prior phases, and the new permit is consistent with the conceptual permit. Petitioner contends there is no competent substantial evidence in the record to support this finding. Petitioner also argues that this finding should be modified for the same reasons asserted in Exceptions 9, 11 and 14.

Contrary to Petitioner's assertion, and as explained in the ruling on Petitioner's Exceptions 9, 11, and 14, there is competent substantial evidence in the record to support this finding. The standard of review for a finding of fact is not whether contrary information

exists in the record, but whether there is competent substantial evidence in the record to support the finding of fact. Where there is competent substantial evidence to support a finding of fact, the District may not disturb that finding. The District may not reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. These evidentiary-related matters are within the sole province of the ALJ as the fact-finder. *See* Standard of Review section, supra.

Petitioner's Exception 18 is therefore denied.

Petitioner's Exception 19 to Finding of Fact 44

Petitioner's exception is to the ALJ's finding that the Project, as currently designed, meets the one-inch water quality treatment required by the District's criteria. Petitioner contends there is no competent substantial evidence in the record to support this finding. Petitioner also argues that Applicant failed to demonstrate the appropriate land use cover for calculating the proper level of stormwater treatment.

Contrary to Petitioner's assertion, there is competent substantial evidence in the record to support this finding. Petitioner's expert testified that "[f]rom what I have seen, they've met the design criteria for wet detention systems if the treatment volume is one-inch." Tr. Vol. XI 1537:2-4. The record further shows that the conceptual permit provided for treatment for one inch of stormwater runoff (FOF 9; Tr. Vol. IV 576:3-13), and Applicant provided the calculations for determining the proper level of stormwater treatment for the revised application to the District and the District found them satisfactory (Tr. Vol. IV 581:15-23).

The standard of review for a finding of fact is not whether contrary information exists in the record, but whether there is competent substantial evidence in the record to support the finding of fact. Where there is competent substantial evidence to support a

finding of fact, the District may not disturb that finding. The District may not reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. These evidentiary-related matters are within the sole province of the ALJ as the fact-finder. *See* Standard of Review section, supra.

Petitioner's Exception 19 is therefore denied.

Petitioner's Exception 20 to Finding of Fact 45

Petitioner's exception is to the ALJ's finding that there is no requirement that Phase IV treat an additional 50% of stormwater and that the one inch of treatment provided by Phase IV meets the requirements for issuing a permit. Petitioner contends there is no competent substantial evidence in the record to support this finding. Petitioner also argues that 1) the conceptual permit no longer controls for the additional 50% treatment because the Interconnect Permit modified the requirement and all subsequent modifications have since required the additional treatment; 2) no direct discharge into an Outstanding Florida Water ("OFW") is required to trigger the additional 50% treatment requirement and the provision of a nutrient loading analysis; and, 3) Petitioner's expert never agreed the current one inch treatment for the Project meets the rule.

Contrary to Petitioner's assertion, there is competent substantial evidence in the record to support this finding. Petitioner's argument that the Interconnect Permit changed requirements for all future permits was addressed in the ruling on Exception 8 which is incorporated in response to this exception. Petitioner's argument that all subsequent modifications have since required the additional 50% treatment points to the testimony of Petitioner's expert, however nothing in the cited testimony indicates that the subsequent modifications all included requirements to meet the additional 50% treatment. Contrary to Petitioner's argument, the ALJ found that the 2013 Phase III permit, which contained

the two wet detention structures that will also serve the Phase IV project, was issued using the rules and regulations in effect at the time the conceptual permit was issued. FOF 12. Petitioner did not challenge this finding of fact. Regarding Petitioner's argument that a direct discharge into an OFW is not required to trigger the additional 50% treatment and the provision of a nutrient loading analysis, Petitioner's expert testified that the District has a requirement for an additional 50% treatment for direct discharges to an OFW. Tr. Vol. XI 1507:1-15. Phase IV does not directly discharge into an OFW. FOF 11. Because there is no direct discharge from Phase IV into an OFW, the rules for direct discharges to OFWs—including the additional 50% treatment requirement—do not apply to Phase IV. Tr. Vol III 444:5-11. A nutrient loading analysis was not required because Phase IV is consistent with the conceptual permit. Tr. Vol. III 444:12-23; Tr. Vol. IV 602:15-23. Finally, Petitioner argues its expert never agreed that the current one inch treatment meets rule requirements. However, when asked whether he disputed that the Project has met the design criteria, Petitioner's expert testified that "they've met the design criteria for wet detention systems if the treatment volume is one-inch." Tr. Vol. XI 1536:25-1537:4.

The standard of review for a finding of fact is not whether contrary information exists in the record, but whether there is competent substantial evidence in the record to support the finding of fact. Where there is competent substantial evidence to support a finding of fact, the District may not disturb that finding. The District may not reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. These evidentiary-related matters are within the sole province of the ALJ as the fact-finder. *See* Standard of Review section, supra.

Petitioner's Exception 20 is therefore denied.

Petitioner's Exception 21 to Finding of Fact 47

Petitioner's exception is to the ALJ's finding that there is insufficient evidence to sustain Petitioner's allegations that the Project will cause a discharge of excess nutrients into an OFW. Petitioner contends there is no competent substantial evidence in the record to support this finding. Petitioner also argues that its expert, Dr. Pollman, testified that there would be increased loadings of total nitrogen to Lake 6, and thus Lake 5 and the Estero River because of Phase IV. In addition, Petitioner argues that other experts of Petitioner testified to the nutrient loading analysis they conducted which found increased post-development nutrient loadings over pre-development level.

Contrary to Petitioner's assertion, there is competent substantial evidence in the record to support this finding. The ALJ's finding is an analysis of the reliability of the testimony Dr. Pollman provided. The ALJ's finding lists deficiencies in the evidence provided by Dr. Pollman, including timing of the water samples he relied upon for his opinion; the lack of testing, analysis, or modeling demonstrating that a pollutant would reach the Estero River; and, the failure to take a baseline water quality sample for nutrients for which the slough, Estero River or Estero Bay may be impaired. The ALJ then concludes that the evidence was insufficient to sustain Dr. Pollman's allegation. Petitioner does not argue that Dr. Pollman did any of the things the ALJ found not to have been done. Petitioner instead relies on testimony from other experts to contend that there was sufficient evidence to sustain Dr. Pollman's allegation. Petitioner appears to misunderstand the ALJ's finding because the finding only addresses Dr. Pollman's testimony and therefore whether other experts testified to any of the things the ALJ found deficient in Dr. Pollman's testimony is irrelevant.

The standard of review for a finding of fact is not whether contrary information exists in the record, but whether there is competent substantial evidence in the record to support the finding of fact. Where there is competent substantial evidence to support a finding of fact, the District may not disturb that finding. The District may not reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. These evidentiary-related matters are within the sole province of the ALJ as the fact-finder. *See* Standard of Review section, supra.

Petitioner's Exception 21 is therefore denied.

Petitioner's Exception 22 to Finding of Fact 50

Petitioner's exception is to the ALJ's finding that Petitioner "failed to prove by a preponderance of the evidence that [Applicant] has not provided reasonable assurance that the activities authorized by the ERP comply with all applicable ERP permitting criteria." Petitioner contends there is no competent substantial evidence in the record to support this finding. Petitioner also argues that based upon all of its arguments in its preceding exceptions, the ALJ's finding should be stricken.

Contrary to Petitioner's assertions, there is competent substantial evidence provided in both the ALJ's findings of fact in the Recommended Order and the rulings denying Petitioner's preceding exceptions to support this finding. The rulings on the preceding exceptions are incorporated in response to this exception. In addition, the District's experts testified that such reasonable assurance was provided. Tr. Vol. IV 583:2-584:11.

The standard of review for a finding of fact is not whether contrary information exists in the record, but whether there is competent substantial evidence in the record to support the finding of fact. Where there is competent substantial evidence to support a

finding of fact, the District may not disturb that finding. The District may not reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. These evidentiary-related matters are within the sole province of the ALJ as the fact-finder. *See* Standard of Review section, supra.

Petitioner's Exception 22 is therefore denied.

Petitioner's Exception 23 to Finding of Fact 51

Petitioner's exception is to the ALJ's finding that Petitioner "failed to prove by a preponderance of the evidence that [Applicant] has not provided reasonable assurance that the proposed project is not contrary to the public interest." Petitioner contends there is no competent substantial evidence in the record to support this finding. Petitioner also argues that based upon all of its arguments in its preceding exceptions, the ALJ's finding should be stricken.

Contrary to Petitioner's assertion, there is competent substantial evidence provided in both the ALJ's findings of fact in the Recommended Order and the rulings denying Petitioner's preceding exceptions to support this finding. The rulings on the preceding exceptions are incorporated in response to this exception. In addition, the District's experts testified that such reasonable assurance was provided. Tr. Vol. III 458:11-462:18.

The standard of review for a finding of fact is not whether contrary information exists in the record, but whether there is competent substantial evidence in the record to support the finding of fact. Where there is competent substantial evidence to support a finding of fact, the District may not disturb that finding. The District may not reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge

the credibility of witnesses. These evidentiary-related matters are within the sole province of the ALJ as the fact-finder. *See* Standard of Review section, supra.

Petitioner's Exception 23 is therefore denied.

Petitioner's Exception 24 to Conclusion of Law 55

Petitioner's exception is to the ALJ's conclusion that Petitioner would not be prejudiced by amendments or revisions to the permit based upon the additional information provided at hearing. Petitioner contends there is no competent substantial evidence in the record to support this finding. Petitioner also argues that this conclusion should be modified for the same reasons asserted in Exception 1.

Contrary to Petitioner's assertion, there is competent substantial evidence in the record to support this conclusion. The ALJ acknowledged Petitioner's contention that a new application must be filed and the review process restarted to correct errors and/or deficiencies in the Phase IV application. FOF 23. The ALJ also found that there was "no evidence that [Petitioner] is prejudiced" by revising the permit to include special conditions regarding soils, lot grading detail, best management practices, bleeder orifice size, and revisions to special conditions regarding docks and old boat ramps. FOF 38. All of those revisions are addressed in the ALJ's recommended permit conditions in paragraphs 3 through 8 of his recommendation. The ALJ then concluded that "the permit revisions agreed to by [Applicant] are supported by the evidence and may be incorporated into the permit." COL 56. Because Petitioner did not take exception to Findings of Fact 23 and 38, paragraphs 3 through 8 of the recommendation, and Conclusion of Law 56, Petitioner cannot now challenge the ALJ's conclusion that there is no evidence Petitioner will be prejudiced. Petitioner has acquiesced to or waived its objection to the ALJ's findings. *See*

Envtl. Coalition of Fla., 586 So. 2d at 1213. In addition, the ruling on Exception 1 is incorporated in ruling on this exception.

Moreover, an agency's review of legal conclusions in a recommended order, are restricted to those that concern matters within the agency's substantive jurisdiction. Conclusion of Law 55 is a statement regarding a general area of law over which the District does not have substantive jurisdiction. Therefore, the District may not reject or modify this conclusion. *See* Standard of Review section, supra.

Petitioner's Exception 24 is therefore denied.

Petitioner's Exception 25 to Conclusion of Law 58

Petitioner's exception is to the ALJ's conclusion that, by a preponderance of the evidence, Applicant has provided reasonable assurance that the Project, as revised, will satisfy all ERP criteria and will not be contrary to the public interest. Petitioner contends there is no competent substantial evidence in the record to support this conclusion. Petitioner also argues that based upon all of its arguments in its preceding exceptions, the ALJ's conclusion should be stricken.

Contrary to Petitioner's assertion, there is competent substantial evidence provided in both the ALJ's findings of fact in the Recommended Order and the rulings denying Petitioner's preceding exceptions to support this conclusion. The rulings on the preceding exceptions are incorporated in response to this exception. In addition, the District's experts testified that such reasonable assurance was provided. FOFs 50 and 51; Tr. Vol. III 458:11-462:18; Tr. Vol. IV 583:2-584:11.

An agency's review of legal conclusions in a recommended order, are restricted to those that concern matters within the agency's substantive jurisdiction. The ALJ's conclusion is supported by the record, within the District's substantive jurisdiction, and is

consistent with the District's interpretation of the applicable rules and criteria. *See* Standard of Review section, supra.

Petitioner's Exception 25 is therefore denied.

Petitioner's Exception 26 to Conclusion of Law 59

Petitioner's exception is to the ALJ's conclusion that the Project, as revised, is a minor modification to the conceptual permit and is consistent with that permit. Petitioner contends there is no competent substantial evidence in the record to support this conclusion. Petitioner also argues this conclusion should be stricken for the same reasons asserted in Exception 11.

Contrary to Petitioner's assertion, and as explained in the ruling on Petitioner's Exception 11, there is competent substantial evidence in the record to support this finding. In addition, the ALJ's conclusion is consistent with the District's interpretation of the applicable rules and criteria. *See* Standard of Review section, supra.

Petitioner's Exception 26 is therefore denied.

Petitioner's Exception 27

Petitioner does not have an Exception 27.

Petitioner's Exception 28 to Conclusion of Law 60

Petitioner's exception is to the ALJ's conclusion that Petitioner failed to meet its burden of proving that the permit should not be issued, as revised. Petitioner contends there is no competent substantial evidence in the record to support this finding. Petitioner also argues that based upon all of its arguments in its preceding exceptions, the ALJ's conclusion should be stricken.

Contrary to Petitioner's assertion, there is competent substantial evidence provided in both the ALJ's findings of fact in the Recommended Order and the rulings

denying Petitioner's preceding exceptions to support this conclusion. The rulings on the preceding exceptions are incorporated in response to this exception.

An agency's review of legal conclusions in a recommended order are restricted to those that concern matters within the agency's substantive jurisdiction. The ALJ's conclusion is supported by the record, within the District's substantive jurisdiction, and is consistent with the District's interpretation of the applicable rules and criteria. To the extent Petitioner is asking the District to reweigh evidence, evidentiary rulings are matters within the ALJ's prerogative and the District does not have the authority to overturn those evidentiary rulings. *See* Standard of Review section, supra.

Petitioner's Exception 28 is therefore denied.

Petitioner's Exception 29 to Recommendation Condition 1

Petitioner's exception is to the ALJ's recommended permit condition incorporating plans, drawings, and specifications included in a revision to the original permit application that was submitted prior to the final hearing and was included and admitted as an exhibit at hearing. This condition is intended to replace information in the original application with information from the revised project. Petitioner contends there is no competent substantial evidence in the record to support this recommendation. Petitioner also argues this finding should be modified or stricken for the same reasons asserted in Exception 1.

Contrary to Petitioner's assertion, and as explained in the ruling on Petitioner's Exception 1, there is competent substantial evidence in the record to support this recommendation. This recommended condition also cites to the hearing exhibit number containing the information being substituted and the exhibit was admitted. Tr. Vol. II 9-18. In addition, the ruling on Exception 1 is incorporated in ruling on this exception. There is

ample authority for approving permits with new conditions where those conditions are supported by evidence at the final hearing. COL 56.

Petitioner's Exception 29 is therefore denied.

Petitioner's Exception 30 to Recommendation Condition 2

Petitioner's exception is to the ALJ's recommended permit condition incorporating water quality calculations included in a revision to the original permit application that was admitted as an exhibit at hearing. This condition is intended to replace information in the original application with information from the revised project. Petitioner contends there is no competent substantial evidence in the record to support this recommendation. Petitioner also argues that this finding should be modified or stricken for the same reasons asserted in Exception 1 and that the revised information in the recommended condition is "admittedly incorrect."

Contrary to Petitioner's assertion, and as explained in the ruling on Petitioner's Exception 1, there is competent substantial evidence in the record to support this recommendation. This recommended condition also cites to the hearing exhibit number containing the information being substituted and the exhibit was admitted. Tr. Vol. II 9-18. Petitioner's record citation is to its own expert, not to testimony from Applicant or District admitting it is incorrect. In addition, the ruling on Exception 1 is incorporated in ruling on this exception. There is ample authority for approving permits with new conditions where those conditions are supported by evidence at the final hearing. COL 56.

Petitioner's Exception 30 is therefore denied.

ORDER

Having reviewed the Recommended Order, the exceptions and 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.

B. The Recommended Order is adopted in its entirety and incorporated herein by reference.

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

Pursuant to section 373.079(4)(a), Florida Statutes, the Governing Board delegated to the Executive Director its authority to take final action on permit applications under Part IV of Chapter 373. The Executive Director's delegated authority, as codified in the *South Florida Water Management District Policies Code*, Section 101-41(a)(1), was designated to the Assistant Executive Director as authorized therein.

DONE AND ORDERED this 11 day of March, 2016, in West Palm Beach, Florida.

SOUTH FLORIDA WATER
MANAGEMENT DISTRICT

Lennart J. Lindahl, P.E.
Assistant Executive Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of foregoing has been furnished by electronic mail on this 11 day of March, 2016, to:

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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.

- 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.