STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

ATLANTIC CIVIL, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**OGC CASE NO. 14-0741**
	)	**DOAH CASE NO. 15-1746**
FLORIDA POWER AND LIGHT COMPANY AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
	)	
Respondents.	)	
	)	
CITY OF MIAMI,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**DOAH CASE NO. 15-1747**
	)	
FLORIDA POWER AND LIGHT COMPANY AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
	)	
Respondents.	)	
	)	

FINAL ORDER

On February 15, 2016, an Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH) submitted a Recommended Order (RO) to the Department of Environmental Protection (DEP or Department) in the above referenced administrative proceeding. A copy of the RO is attached hereto as Exhibit A. The RO was served on counsel for the Petitioners, Atlantic Civil, Inc. (ACI), and City of Miami (the City) and counsel for the Respondent, Florida Power and Light Company (FPL), and the Respondent DEP. On March 1, FPL and DEP filed written Exceptions to the RO

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and the City filed a written Exception to the RO. On March 11, ACI and the City responded to DEP and FPL's Exceptions. On March 11, DEP responded to the City's Exception. This matter is now on review before the Secretary of the Department for final agency action.

BACKGROUND

Five electrical generating units were built at FPL's Turkey Point Power Plant in southeast Miami-Dade County. Units 1 and 2 were built in the 1960s. Unit 2 ceased operating in 2010. Units 3 and 4 are Florida's first nuclear generating units, which FPL constructed in the 1970s. Unit 5 is a natural gas combined cycle generating unit brought into service in 2007. The Turkey Point cooling canal system (CCS) is a 5,900-acre network of canals, which provides a heat removal function for Units 1, 3, and 4, and receives cooling tower blowdown from Unit 5. FPL constructed the CCS to satisfy a 1971 consent judgment with the U.S. Department of Justice which required FPL to terminate its direct discharges of heated water into Biscayne Bay.

The CCS canals are unlined, so they have a direct connection to the groundwater. The original salinity levels in the CCS were probably the same as Biscayne Bay. However, because the salt in saltwater is left behind when the water evaporates, and higher water temperature causes more evaporation, the water in the CCS became saltier. Salinity levels in the CCS are also affected by rainfall, air temperature, the volume of flow from the power plant, and the rate of water circulation.

In 2008, when FPL applied for certification of the uprate of Units 3 and 4, it reported average salinity to be 50 to 60 Practical Salinity Units (PSU). This is a hypersaline condition, which means the salinity level is higher than is typical for

seawater, which is about 35 PSU. In late 2013, salinity levels in the CCS began to spike, reaching a high of 92 PSU in the summer of 2014. FPL took action to reduce salinity within the CCS by adding storm water from the L-31E Canal (pursuant to emergency orders), adding water from shallow saline water wells, and removing sediment build-up in the canals to improve flow. These actions, combined with more normal rainfall, decreased salinity levels in the CCS to about 45 PSU at the time of the final hearing.

Higher salinity makes water more dense so the hypersaline water in the CCS sinks beneath the canals and to the bottom of the Biscayne Aquifer, which is about 90 feet beneath the CCS. At this depth, there is a confining layer that separates the Biscayne Aquifer from the deeper Upper Floridan Aquifer. The confining layer stops the downward movement of the hypersaline plume and it spreads out in all directions. Historical data show that when the CCS was constructed in the 1970s, saltwater had already intruded inland along the coast due to water withdrawals, drainage and flood control structures, and other human activities.

The front or westernmost line of saltwater intrusion is referred to as the saline water interface. In the 1980s, the saline water interface was just west of the interceptor ditch, which runs generally along the western boundary of the CCS. The interceptor ditch was installed when the CCS was first constructed as a means to prevent saline waters from the CCS from moving west of the ditch. Now, the saline water interface is four or five miles west of the CCS, and it is still moving west. The hypersaline plume from the CCS is pushing the saline water interface further west.

Fresh groundwater in the Biscayne Aquifer in southeast Miami-Dade County is an important natural resource that supports marsh wetland communities and is utilized by numerous existing legal water uses including irrigation, domestic self-supply, and public water supply. The Biscayne Aquifer is the main source of potable water in Miami-Dade County and is designated by the federal government as a sole source aquifer under the Safe Drinking Water Act. Saltwater intrusion into the area west of the CCS is reducing the amount of fresh groundwater in the Biscayne Aquifer available for natural resources and water uses.

The 2008 Conditions of Certification included a Section X, entitled "Surface Water, Ground Water, Ecological Monitoring," which, among other things, required FPL and the South Florida Water Management District (SFWMD) to execute a Fifth Supplemental Agreement regarding the operation and management of the CCS.[1] New monitoring was required and FPL was to "detect changes in the quantity and quality of surface and ground water over time due to the cooling canal system." Section X.D. of the Conditions of Certification provides in pertinent part:

> If the DEP in consultation with SFWMD and [Miami-Dade County Department of Environmental Resources Management] determines that the pre- and post-Uprate monitoring data: is insufficient to evaluate changes as a result of this project; indicates harm or potential harm to the waters of the State including ecological resources; exceeds State or County water quality standards; or is inconsistent with the goals and objectives of the CERP Biscayne Bay Coastal Wetlands Project, then additional measures,

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[1] When the CCS was first constructed, FPL and SFWMD's predecessor, the Central and Southern Florida Flood Control District, entered into an agreement to address the operation and management of the CCS. The agreement has been updated from time to time. The original agreement and updates called for monitoring the potential impacts of the CCS.

> including enhanced monitoring and/or modeling, shall be required to evaluate or to abate such impacts. Additional measures include but are not limited to:
>
> * * *
>
> 3. operational changes in the cooling canal system to reduce any such impacts;

DEP determined that the monitoring data indicates harm to waters of the State because of the contribution of CCS waters to westward movement of the saline water interface. Under the procedures established in the Conditions of Certification, this determination triggered the requirement for "additional measures" to require FPL to "evaluate or abate" the impacts.

The Fifth Supplemental Agreement requires FPL to operate the interceptor ditch to restrict movement of saline water from the CCS westward of Levee 31E "to those amounts which would occur without the existence of the cooling canal system." The agreement provides that if the District determines that the interceptor ditch is ineffective, FPL and SFWMD shall consult to identify measures to "mitigate, abate or remediate" impacts from the CCS and to promptly implement those approved measures. SFWMD determined that the interceptor ditch is ineffective in preventing saline waters from the CCS in deeper zones of the Biscayne Aquifer from moving west of the ditch, which triggered the requirement of the Fifth Supplemental Agreement for FPL to mitigate, abate, or remediate the impacts. Following consultation between DEP and SFWMD, the agencies decided that, rather than both agencies responding independently to address the harm caused by the CCS, DEP would take action. DEP then issued an Administrative Order to address the harm through implementation and enforcement of the Conditions of Certification.

DOAH PROCEEDING

On December 23, 2014, the DEP issued Administrative Order OGC No. 14-0741 (AO) related to the CCS. On February 9, 2015, petitions for administrative hearing challenging the AO were filed by Tropical Audubon Society, Inc., Blair Butterfield, Charles Munroe, and Jeffrey Mullins; Miami-Dade County; ACI; and the City of Miami. After referral to DOAH, the four cases were consolidated for hearing.

Prior to the final hearing in November 2015, Miami-Dade County; Jeffrey Mullins; and Tropical Audubon Society, Blair Butterfield, and Charles Munroe filed Notices of Voluntary Dismissal. The ALJ conducted the final hearing on November 2-4, 2015, in Miami, Florida. The five-volume transcript of the final hearing was filed with DOAH and the parties filed proposed recommended orders. The ALJ subsequently issued the RO.

SUMMARY OF THE RECOMMENDED ORDER

In the RO, the ALJ recommended that the Department enter a final order that rescinded the AO or amended it as described in the RO. (RO at page 31 and ¶ 95). The ALJ concluded that the AO was an unreasonable exercise of DEP's enforcement discretion for three reasons. (RO ¶¶ 92-95). First, the ALJ concluded that the AO lacked the fundamentals of an enforcement action because it did not charge a party with one or more violations of the law, which the party has the right to refute. (RO ¶¶ 66 and 92). Second, the ALJ concluded that the AO's success criteria did not require FPL to come into compliance with standards or specify a reasonable time to come into compliance. (RO ¶ 93). Third, the ALJ concluded that the AO's "success criteria are inadequate to accomplish DEP's stated purposes." (RO ¶ 94).

The ALJ found that the AO stated that western migration of saline water "must be abated to prevent further harm to the waters of the state," and that a detailed Salinity Management Plan shall have the goal of reducing hypersalinity of the CCS to abate westward movement of CCS groundwater. (RO ¶¶ 48 and 50). The ALJ found that the AO defined the term "abate" as "to reduce in amount, degree or intensity; lessen; diminish." (RO ¶ 70). However, the ALJ disagreed with the DEP's position that the AO's definition of "abate" was consistent with the meaning of the term in Section X.D. of the Conditions of Certification. (RO ¶¶ 70-89). The ALJ ultimately found that "[i]f the success criteria in the AO are achieved, hypersaline water will no longer sink beneath the CCS, the rate of saltwater intrusion will be slowed, and the existing hypersaline plume would begin to freshen." (RO ¶ 53).

STANDARDS OF REVIEW OF DOAH RECOMMENDED ORDERS

Section 120.57(1)(l), Florida Statutes, prescribes that an agency reviewing a recommended order may not reject or modify the findings of fact of the 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); *Charlotte Cty. v. IMC Phosphates Co.*, 18 So. 3d 1089 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So. 2d 61 (Fla. 1st DCA 2007). 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 e.g., Scholastic*

Book Fairs, Inc. v. Unemployment Appeals Comm'n, 671 So. 2d 287, 289 n.3 (Fla. 5th DCA 1996); *Nunez v. Nunez,* 29 So. 3d 1191, 1192 (Fla. 5th DCA 2010).

A reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See, e.g., Rogers v. Dep't of Health,* 920 So.2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep't of Envtl. Prot.,* 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands Cty. Sch. Bd.,* 652 So. 2d 894 (Fla. 2d DCA 1995). If there is competent substantial evidence to support an ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co. v. Dyer,* 592 So. 2d 276, 280 (Fla. 1st DCA 1991); *Conshor, Inc. v. Roberts,* 498 So. 2d 622 (Fla. 1st DCA 1986).

The ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. *See, e.g., Peace River/Manasota Regional Water Supply Authority v. IMC Phosphates Co.,* 18 So. 3d 1079, 1088 (Fla. 2d DCA 2009)*; Collier Med. Ctr. v. State, Dep't of HRS*, 462 So. 2d 83, 85 (Fla. 1st DCA 1985); *Fla. Chapter of Sierra Club v. Orlando Utils. Comm'n*, 436 So. 2d 383, 389 (Fla. 5th DCA 1983). In addition, an agency has no authority to make independent or supplemental findings of fact. *See, e.g., North Port, Fla. v. Consol. Minerals*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994); *Fla. Power & Light Co. v. Fla. Siting Bd.*, 693 So. 2d 1025, 1026-1027 (Fla. 1st DCA 1997).

Section 120.57(1)(l), Florida Statutes, authorizes an agency to reject or modify an ALJ's conclusions of law and interpretations of administrative rules "over which it has

substantive jurisdiction." *See Barfield v. Dep't of Health*, 805 So. 2d 1008 (Fla. 1st DCA 2001); *L.B. Bryan & Co. v. Sch. Bd. of Broward Cty.*, 746 So. 2d 1194 (Fla. 1st DCA 1999); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140 (Fla. 2d DCA 2001). Considerable deference should be accorded to these agency interpretations of statutes and rules within their regulatory jurisdiction, and such agency interpretations should not be overturned unless "clearly erroneous." *See, e.g., Falk v. Beard*, 614 So. 2d 1086, 1089 (Fla. 1993); *Dep't of Envtl. Reg. v. Goldring*, 477 So. 2d 532, 534 (Fla. 1985). Furthermore, agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be the only reasonable interpretations. It is enough if such agency interpretations are "permissible" ones. *See, e.g., Suddath Van Lines, Inc. v. Dep't of Envtl. Prot.*, 668 So. 2d 209, 212 (Fla. 1st DCA 1996).

If an ALJ improperly labels a conclusion of law as a finding of fact, the label should be disregarded and the item treated as though it were actually a conclusion of law. *See, e.g., Battaglia Properties v. Fla. Land and Water Adjudicatory Comm'n*, 629 So. 2d 161, 168 (Fla. 5th DCA 1994). However, neither should the agency label what is essentially an ultimate factual determination as a "conclusion of law" in order to modify or overturn what it may view as an unfavorable finding of fact. *See, e.g., Stokes v. State, Bd. of Prof'l Eng'rs*, 952 So. 2d 1224 (Fla. 1st DCA 2007).

Agencies do not have jurisdiction, however, to modify or reject rulings on the admissibility of evidence. Evidentiary rulings of the ALJ that deal with "factual issues susceptible to ordinary methods of proof that are not infused with [agency] policy considerations," are not matters over which the agency has "substantive jurisdiction." *See Martuccio v. Dep't of Prof'l Reg.*, 622 So. 2d 607, 609 (Fla. 1st DCA 1993); *Heifetz*

v. Dep't of Bus. Reg., 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). Evidentiary rulings are matters within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. *See Martuccio,* 622 So. 2d at 609.

RULINGS ON EXCEPTIONS

A party that files no exceptions to certain findings of fact "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Envtl. Coalition of Fla., Inc. v. Broward Cty.*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Medical Ctr., Inc. v. State of Fla., Agency for Health Care Admin.*, 847 So. 2d 540, 542 (Fla. 4th DCA 2003). However, an agency head reviewing a recommended order is free to modify or reject any erroneous conclusions of law over which the agency has substantive jurisdiction, even when exceptions are not filed. *See* § 120.57(1)(l), Fla. Stat. (2014); *Barfield v. Dep't of Health,* 805 So. 2d 1008 (Fla. 1st DCA 2001); *Fla. Public Employee Council, 79 v. Daniels*, 646 So. 2d 813, 816 (Fla. 1st DCA 1994).

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

RESPONDENTS' EXCEPTIONS

Enforcement discretion

It is well recognized that the choice of an enforcement remedy is committed to an administrative agency's discretion and is a matter of enforcement policy unsuitable for judicial review. *See Heckler v. Chaney,* 470 U.S. 821, 831 (1985); *Chau v. Securities and Exchange Comm'n*, ---F. Supp. 3d---, 2014 WL 6984236 *13 (S.D.N.Y. 2014) ("Congress has provided the SEC with two tracks on which it may litigate certain cases. Which of those paths to choose is a matter of enforcement policy squarely within the SEC's province."). Similarly, at the state level, enforcement procedures and remedies are left to the Department's prosecutorial discretion and is not an appropriate subject for DOAH review. *See, e.g., Sarasota Cnty. v. Dep't of Envtl. Regulation and Falconer*, 9 F.A.L.R. 1822 (Fla. Dep't Envtl. Reg. 1986); *Cobb v. Dep't of Envtl. Regulation,* 1988 WL 618161 *6 (Fla. Dept. of Env. Reg. 1988); *Christensen v. Smith and Dep't of Envtl. Regulation,* 1996 WL 533981 (Fla. Dept. of Env. Reg. 1996).

In Chapter 403, the Legislature authorized the Department to pursue various enforcement remedies, including that the Department may "[i]ssue such orders as are necessary to effectuate the control of air and water pollution and enforce the same by all appropriate administrative and judicial proceedings." § 403.061(8), Fla. Stat. (2015). Section 403.061(8) has been recognized by the courts as an enforcement remedy available to the Department. *See, e.g., Save Our Suwannee, Inc. v. State of Fla. Dep't of Envtl. Prot.,* No. 2001-CA-001266 (Fla. 2d Cir. Ct. March 5, 2004), *aff'd* 898 So. 2d 943 (Fla. 1st DCA 2005).

In this case the AO was issued after it was determined that the monitoring data indicated harm to waters of the State because of the contribution of CCS waters to westward movement of the saline water interface. Under the procedures established in the Conditions of Certification, this determination triggered the requirement for "additional measures" to require FPL to "evaluate or abate" the impacts. (RO ¶¶ 42-43). The ALJ described the AO in paragraphs 47 through 52 of the RO. The ALJ found that the AO states that western migration of saline water "must be abated to prevent further harm to the waters of the state," and that a detailed Salinity Management Plan shall have the goal of reducing hypersalinity of the CCS to abate westward movement of CCS groundwater. (RO ¶¶ 48 and 50). The ALJ ultimately found that "[i]f the success criteria in the AO are achieved, hypersaline water will no longer sink beneath the CCS, the rate of saltwater intrusion will be slowed, and the existing hypersaline plume would begin to 'freshen.'" (RO ¶ 53).

Chapter 403 is a remedial statute enacted for the public benefit, although containing some penal provisions. *See, e.g., Ranger Insurance Co. v. Bal Harbour Club, Inc.,* 509 So. 2d 940, 943 (Fla. 3d DCA 1985). "The test most often articulated for determining whether a particular provision of legislation is penal in character is whether the legislative aim in providing the sanction was to punish the individual for engaging in the activity involved or to regulate the activity in question." *Id.* at 943. The Department's choice to exercise its authority at this time in favor of remediation to protect the public health than in favor of punishment by charges and fines is a matter of enforcement discretion squarely within the Department's province. *See, e.g., Dep't of Envtl. Prot. v.*

South Palafox Props., LLC, Case No. 14-3674 (Fla. DOAH March 2, 2015; Fla. DEP May 29, 2015).

The RO reflects that the ALJ inappropriately invaded this exclusive province of the Department to choose an enforcement remedy by essentially finding that he would have chosen the penal remedy that charges FPL with "one or more violations of law." (RO ¶ 66).[2] Because of his opinion that a charging document was more appropriate, the ALJ concluded that the AO was not a reasonable exercise of enforcement discretion, which contained "infirmities" and should be rescinded. (RO ¶¶ 92-95).

The ALJ also concluded that Section 403.088(2)(e) "gives the DEP enforcement authority suited for [this] circumstance," but "DEP did not choose this approach." (RO ¶ 69). However, the plain language of Section 403.088(2)(e) gives the Department permitting authority to issue certain discharge permits under certain circumstances. The Department's final order in *Lane, et al. v. Department of Environmental Protection,* Case Nos. 05-1609, etc. (Fla. DOAH May 11, 2007; Fla. DEP Aug. 8, 2007), explained this permitting authority:

> The provisions of Section 403.088(2) (e) and (f), F. S., express the clear intent of the Florida Legislature to provide the DEP with the authority to issue permits that do not meet all the regular standards for the proposed activity, provided that at least one of the stated conditions of the statutory provision is met. Consequently, Sections 403.088(2) (e) and (f), constitute a limited statutory exception to the "reasonable assurance" permitting requirement set forth in Rule 62-4.070, F.A.C. *See e.g. Valencic v. Miami-Dade County Water and Sewer Dept.*, 23 FALR 1966, 1969 (Fla. DEP 2001), *aff.* 803 So.2d 719 (Fla. 1st DCA 2001).

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[2] Administrative enforcement is also authorized under the provisions of Section 403.121(2), Florida Statutes. This enforcement remedy is instituted by issuing a written notice of violation containing allegations (charges) regarding violations of the law. *See* § 403.121(2), Fla. Stat. (2015).

Lane, et al. v. Dep't of Envtl. Prot., Case Nos. 05-1609, etc. (Fla. DOAH May 11, 2007; Fla. DEP Aug. 8, 2007), *per curiam dismissed* 44 So. 3d 650 (Fla. 1st DCA 2010).

Contrary to the ALJ's conclusions in paragraphs 66, 69, 92-95, and as discussed above, the AO is an enforcement instrument authorized under Section 403.061(8). It contains findings, and it requires FPL to comply with Condition of Certification X.D. by submitting and implementing a Salinity Management Plan that will achieve the goals and timelines specified in the AO. (RO ¶¶ 47-53; Joint Ex. 1). And, its provisions can be enforced by appropriate administrative and judicial proceedings. *See* § 403.061(8), Fla. Stat. (2015). This legal conclusion interpreting Chapter 403, Florida Statutes, is as or more reasonable than those of the ALJ. *See, e.g., Fla. Audubon Soc. v. Sugar Cane Growers Coop. of Fla.*, 171 So. 3d 790, 797 (Fla. 2d DCA 2015) (reflecting that an agency bears the primary responsibility to interpret statutes within its regulatory expertise and jurisdiction).

Reasonable exercise of enforcement discretion

The ALJ identified three reasons for concluding that the AO is an unreasonable exercise of DEP's enforcement discretion. (RO ¶¶ 92-95). First, the ALJ concluded that the AO is procedurally flawed because it is not a charging document. (RO ¶¶ 66 and 92). As discussed above, the ALJ's conclusion that the AO must be a charging document is rejected. Also, as the ALJ points out, since the AO was not a charging document, "FPL did not come to the final hearing to defend against these charges." (RO ¶ 66).

Second, the ALJ concluded that the AO's success criteria do not require FPL to come into compliance with standards or specify a reasonable time to come into

compliance. (RO ¶ 93). This reason paraphrases the secondary authority cited for the AO in its opening paragraph. (Joint Ex. 1). Section 403.151 provides that "[a]ll rules or orders of the department which require action to comply with standards adopted by it, or orders to comply with any provisions of this act, may specify a reasonable time for such compliance." § 403.151, Fla. Stat. (2015). Having found that the AO "does not authorize any action" (RO ¶ 68), the ALJ then goes on to conclude that the AO does not represent the first category of orders described in Section 403.151. However, as an order designed to effectuate (i.e., bring about) the control of water pollution the AO represents the second category of order described in Section 403.151 and authorizes that such orders "may specify a reasonable time for . . . compliance." *See* §§ 403.151 and 403.061(8), Fla. Stat. (2015). This legal conclusion interpreting Chapter 403, is as or more reasonable than that of the ALJ. *See, e.g., Fla. Audubon Soc. v. Sugar Cane Growers Coop. of Fla.*, 171 So. 3d 790, 797 (Fla. 2d DCA 2015) (reflecting that an agency bears the primary responsibility to interpret statutes within its regulatory expertise and jurisdiction).

The third reason identified by the ALJ for concluding that the AO is an unreasonable exercise of DEP's enforcement discretion, is that the AO's "success criteria are inadequate to accomplish DEP's stated purposes." (RO ¶ 94). The ALJ's conclusions in paragraph 94 must be rejected because they are based on mistakes of fact and law regarding the AO's stated purpose and the success criteria. (Joint Ex. 1).

The ALJ found that the AO states that western migration of saline water "must be abated to prevent further harm to the waters of the state," and that a detailed Salinity Management Plan shall have the goal of reducing hypersalinity of the CCS to abate

westward movement of CCS groundwater. (RO ¶¶ 48 and 50). The ALJ acknowledges that the AO defines the term "abate" as "to reduce in amount, degree or intensity; lessen; diminish." (RO ¶ 70). However, the ALJ disagrees with the DEP's position that the AO's definition of "abate" is consistent with the meaning of the term in Section X.D. of the Conditions of Certification. (RO ¶¶ 70-89). And since the AO purports to implement and enforce Section X.D., the ALJ concluded that the AO does not "eliminate the CCS's contribution" to the "western movement of saltier groundwater." (RO ¶ 95).

Contrary to the ALJ's conclusion, the record reflects that the DEP's interpretation of the Conditions of Certification is supported by competent substantial evidence (T. Vol. II, p. 157; Joint Exhibit 1). Also, the DEP's interpretation is within the agency's substantive jurisdiction to "administer and manage" the Conditions of Certification, and to assure compliance with those Conditions. *See* §§ 403.504(14) and 403.514, Fla. Stat. (2015). The Department's legal conclusion interpreting the AO and the Conditions of Certification is more reasonable than that of the ALJ. *See, e.g., Fla. Audubon Soc. v. Sugar Cane Growers Coop. of Fla.*, 171 So. 3d 790, 797 (Fla. 2d DCA 2015) (reflecting that an agency bears the primary responsibility to interpret statutes within its regulatory expertise and jurisdiction).

In paragraph 53, the ALJ specifically found that "[i]f the success criteria in the AO are achieved, hypersaline water will no longer sink beneath the CCS, the rate of saltwater intrusion will be slowed, and the existing hypersaline plume would begin to freshen." (RO ¶ 53). Despite this finding, the ALJ concluded that the 34 PSU "success criterion" is not reasonable based on a mistaken belief that "it could be an unnecessary impediment" that would preclude FPL from proposing to "lower the salinity in the CCS

even further if it is practical and could achieve greater benefits." (RO ¶ 94.a.i. through 94.a.iii). The ALJ's conclusion is based on a mistake of fact reflected in paragraph 51. The record shows that the AO expressly contemplates that FPL may reduce CCS salinity below 34 PSU. (Joint Ex. 1, at paragraphs 42 and 43).

Contrary to the ALJ's conclusion, the Department finds that the 34 or below PSU success criterion is a reasonable exercise of enforcement discretion, for the reasons explained by the ALJ in paragraphs 94.a.i. through 94.a.iii. This legal conclusion is more reasonable than that of the ALJ. *See, e.g., Fla. Audubon Soc. v. Sugar Cane Growers Coop. of Fla.*, 171 So. 3d 790, 797 (Fla. 2d DCA 2015) (reflecting that an agency bears the primary responsibility to interpret statutes within its regulatory expertise and jurisdiction).

In paragraph 51, the ALJ also found that the AO's second success criterion was to demonstrate "decreasing salinity trends in four monitoring wells located near the CCS." (RO ¶ 51). The ALJ concludes that this success criterion is not reasonable because the decreasing trend is not quantified. (RO ¶ 94.b.i.). Yet, at the same time, the ALJ acknowledges that the achievement of this success criterion is related to the computer modeling relied on by DEP. (RO ¶ 94.b.ii.). The ALJ's analysis does not fully represent the requirements of the AO with regard to this success criterion. The AO requires that monitoring of salinity trends also include installation and monitoring of a new deep well "at the City of Homestead" in addition to the four monitoring wells located near the CCS. (Joint Ex. 1, paragraphs 37.a. and 37.f.). The AO also requires continued monitoring of "the wells/well clusters identified in the 2009 Monitoring Plan, as Amended." (Joint Ex. 1, paragraph 37.f.). The ALJ's findings and conclusions do not

form a basis for finding that the AO's second success criterion is unreasonable. This legal conclusion is more reasonable than that of the ALJ. *See, e.g., Fla. Audubon Soc. v. Sugar Cane Growers Coop. of Fla.*, 171 So. 3d 790, 797 (Fla. 2d DCA 2015) (reflecting that an agency bears the primary responsibility to interpret statutes within its regulatory expertise and jurisdiction).

In paragraphs 94.c. and 95, the ALJ's conclusion that the AO should require FPL to determine and terminate its contribution to the westward movement of the saline water interface relates back to his disagreement with the Department's definition of "abate" in the AO and the Conditions of Certification. As discussed above, the ALJ's disagreement is rejected and the AO's definition of "abate" is found to be a reasonable interpretation of the term as used in Section X.D. of the Conditions of Certification.

DEP Exception No. 2

DEP takes exception to a portion of paragraph 51 as not supported by competent substantial evidence. DEP argues that the plain language of the AO reflects that the first success criterion is to maintain salinity at or below 34 PSU. As discussed above, the ALJ's finding is a mistake of fact that is not supported by competent substantial evidence. In fact the competent substantial evidence supports modifying the ALJ's finding to accurately reflect the requirement of the AO's first success criterion (Joint Ex. 1, paragraphs 42 and 43); *see* § 120.57(1)(l), Fla. Stat. (2015).

Therefore, based on the foregoing reasons, DEP's Exception No. 2 to a portion of paragraph 51, is granted.

DEP Exception No. 4; FPL Exception No. 4

DEP takes exception to paragraphs 66 through 69 on the basis that they would intrude on the exclusive province of the Department to determine enforcement procedures and remedies. FPL takes exception to paragraphs 64 through 66, 92 and 93, on the basis that the ALJ misconstrued the nature of the AO. FPL argues that the ALJ failed to recognize the AO as a mechanism for enforcing and implementing the Conditions of Certification and erroneously concluded that it was not a reasonable exercise of enforcement discretion.

FPL specifically argues that in paragraph 64, the ALJ erroneously concludes that Condition X.D. is only directed at the Department. As FPL points out, the Condition, by its terms, is focused on potential harm to waters of the state caused by the CCS. Ultimately, FPL must implement "additional measures" to "abate" such impacts. (Joint Ex. 1, paragraph 25; Joint Ex. 2, Section X.D. of Conditions of Certification). Thus, the ALJ's conclusion in paragraph 64 that Condition X.D. is directed only to the Department is not a reasonable interpretation of its plain language. The interpretation of Condition X.D. is within the Department's substantive jurisdiction. Therefore, FPL's exception to paragraph 64 is granted.

FPL's exception to paragraph 65 is denied because the paragraph accurately describes the Conditions of Certification and the Respondents' arguments in the hearing.

The Respondents' exception to paragraph 66 is granted for the reasons discussed above; the AO is a type of enforcement remedy, but it is not a charging document.

DEP's exceptions to paragraphs 67 and 68 are denied because the paragraphs accurately describe the parties' arguments during the hearing.

DEP's exception to paragraph 69, where the ALJ states that Section 403.088(2)(e) gives DEP enforcement authority, is granted for the reasons discussed above.

FPL's exception to paragraphs 92 and 93 is granted for the reasons discussed above.

DEP Exception No. 6; FPL Exception Nos. 6 and 7

DEP takes exception to paragraphs 90 through 95 and FPL takes exception to paragraphs 91 and 94. As discussed above, these conclusions of the ALJ reflect his enforcement discretion analysis.

DEP's exception to paragraph 90 is denied because, as discussed above, the AO is an enforcement remedy that is subject to the reasonable exercise of enforcement discretion standard. The Respondents' exception to paragraph 91 is granted because the above discussion shows that the ALJ's three identified reasons for concluding that the AO is an unreasonable exercise of DEP's enforcement discretion (RO ¶¶ 92-95) are flawed. For those same reasons, the exceptions to paragraphs 92, 93, and 94, are granted.

DEP Exception No. 5; FPL Exception No. 5

DEP takes exception to paragraphs 70-89 and FPL takes exception to paragraphs 73-89 regarding the ALJ's analysis of the term "abate." For the reasons discussed above, the Department's legal conclusion interpreting the AO and the Conditions of Certification as having a consistent definition for "abate," is more

reasonable than that of the ALJ. *See, e.g., Fla. Audubon Soc. v. Sugar Cane Growers Coop. of Fla.*, 171 So. 3d 790, 797 (Fla. 2d DCA 2015) (reflecting that an agency bears the primary responsibility to interpret statutes within its regulatory expertise and jurisdiction).

Therefore, for the foregoing reasons, the exceptions to paragraphs 70-89 are granted.

Water quality violations

DEP Exception Nos. 1 and 7; FPL Exception No. 3

The Respondents take exception to paragraphs 38-40 and related portions of paragraphs 92 and 96. In paragraphs 38-40, the ALJ made the following findings of fact:

> 38. At the final hearing, a DEP administrator testified that DEP was unable to identify a specific violation of state groundwater or surface water quality standards attributable to the CCS, but DEP's position cannot be reconciled with the undisputed evidence that the CCS has a groundwater discharge of hypersaline water that is contributing to saltwater intrusion. Florida Administrative Code Rule 62-520.400, entitled "Minimum Criteria for Ground Water," prohibits a discharge in concentrations that "impair the reasonable and beneficial use of adjacent waters."
>
> 39. Saltwater intrusion into the area west of the CCS is impairing the reasonable and beneficial use of adjacent G-II groundwater and, therefore, is a violation of the minimum criteria for groundwater in rule 62-520.400.
>
> 40. In addition, sodium levels detected in monitoring wells west of the CCS and beyond FPL's zone of discharge are many times greater than the applicable G-II groundwater standard for sodium. The preponderance of the evidence shows that the CCS is contributing to a violation of the sodium standard.

The Respondents essentially argue that the ALJ should not have made independent findings regarding violations of water quality standards because of potential due

process problems identified by the ALJ in other paragraphs of the RO. (RO ¶¶ 66 and 92). DEP also argues that the findings in paragraphs 38-40 are internally inconsistent with the conclusions in paragraph 92. However, for the reasons discussed above, the ALJ's conclusions in paragraph 92 that the AO must be a charging document was rejected. DEP's exception to paragraph 92 was granted for the reasons discussed in the ruling on DEP Exception No. 6 above.

The conclusion that the AO is an enforcement remedy available to the Department, although not a charging document, does not preclude the ALJ's factual findings in paragraphs 38-40 and the reference to "current violations" in paragraph 96. The factual findings in paragraphs 38-40 are based on competent substantial evidence adduced at the hearing. (T. Vol. 1, p. 127; Joint Ex. 3; T. Vol. II, p. 209, lines 4-8, pp. 279-280; DEP Ex. 7; ACI Exs. 11 and 66). Most of that evidence formed the basis for the Department's finding of harm under Section X.D. of the Conditions of Certification leading to issuance of the AO. (T. Vol. 1, p. 127; Joint Ex. 3; T. Vol. II, pp. 279-280; ACI Ex. 11; DEP Ex. 7; ACI Ex. 66); *see* § 120.57(1)(l), Fla. Stat. (2015); *Heifetz v. Dep't of Bus. Reg.*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985).

Therefore, based on the foregoing reasons, the Respondents' exceptions to paragraphs 38-40, and 96, are denied.

FPL'S REMAINING EXCEPTIONS

FPL Exception No. 1

FPL takes exception to paragraph 34, where the ALJ found that "Respondents made no effort to show how any factor other than the CCS is currently contributing to the continuing westward movement of the saline water interface in this area of the

County." (RO ¶ 34). FPL argues that there is no competent substantial record evidence to support this finding. FPL cites to testimony from DEP and SFWMD witnesses to argue that there is competent substantial evidence regarding other factors. (T. Vol. 1, pp. 123-125; T. Vol. II, pp. 250-251). However, paragraph 34 is a reasonable inference from the totality of the witnesses' testimony. (T. Vol. 1, pp. 123-125; T. Vol. II, pp. 194-196; 239-240; T. Vol. II, pp. 250-251, 261-266); *see* § 120.57(1)(l), Fla. Stat. (2015); *Heifetz v. Dep't of Bus. Reg.*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985).

Therefore, based on the foregoing reasons, FPL's exception to paragraph 34 is denied.

FPL Exception No. 2

FPL takes exception to paragraphs 35, 49, and the second sentence of paragraph 54. FPL argues that these findings of fact are not supported by competent substantial evidence and are irrelevant to the disposition of this proceeding.

Contrary to FPL's argument, these findings of fact are supported by competent substantial record evidence. (T. Vol. I, p. 127, lines 19-20; T. Vol. I, p. 130, lines 17-19; Joint Ex. 1, paragraph 25; T. Vol. II, p. 250, lines 16-20; T. Vol. III, p. 403, lines 8-12; T. Vol. III, pp. 408-410); *see* § 120.57(1)(l), Fla. Stat. (2015); *Heifetz v. Dep't of Bus. Reg.*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985).

Therefore, based on the foregoing reasons, FPL's exception to paragraphs 35, 49, and the second sentence of paragraph 54, is denied.

Standing

DEP Exception No. 3

DEP takes exception to paragraphs 60-62 of the RO, where the ALJ concluded that the City of Miami and ACI established standing. DEP argues that in paragraph 60 the ALJ "mischaracterizes the holding in *Osceola County v. St. Johns River Water Management District,* 486 So. 2d 616 (Fla. 5th DCA 1986)." *See* DEP's Exceptions at page 5. That case arose from a petition for writ of prohibition filed with a district court of appeal and the question concerned the petitioner's standing to seek the writ of prohibition. *See Osceola Cty. v. St. Johns River Water Mgmt. Dist.,* 486 So. 2d 616, 617 (Fla. 5th DCA 1986) ("Respondent challenges Osceola County's standing to seek this writ."). DEP further argues that in paragraph 61, the ALJ incorrectly applied the *Osceola County* decision because the authority of a local government to approve a comprehensive plan under Chapter 163, Florida Statutes, is not within the zone of interests protected by the Department's Chapter 403 regulatory programs. The court in *Osceola County* did not address the question of standing to seek a Section 120.57(1) administrative hearing. However, in the other case cited by the ALJ in paragraphs 60 and 61, the court found that the City of St. Cloud's petition demonstrated standing. *See South Fla. Water Mgmt. Dist. v. City of St. Cloud*, 550 So. 2d 551, 552 (Fla. 5th DCA 1989). The City of St. Cloud's petition alleged that it had a substantial interest in the quality and availability of its water supply and that this interest would be adversely affected by the proposed water wells' construction. *Id.* at 553.

Therefore, the ALJ's conclusions of law in paragraphs 60 and 61 are modified to reject any reliance on the *Osceola County* case to answer the question of the City's

standing to seek a Section 120.57 administrative hearing. This conclusion of law is more reasonable than that of the ALJ because the question involves the Department's interpretation of Chapter 403, including the scope of interests protected by Chapter 403 proceedings. *See Friends of the Everglades v. Bd. of Trustees of the Internal Improvement Trust Fund,* 595 So. 2d 186, 189 (Fla. 1st DCA 1992) (reflecting that the statute defines the scope or nature of the proceeding); *Reily Enters., LLC v. Dep't of Envtl. Prot.*, 990 So. 2d 1248, 1251 (Fla. Fourth DCA 2008) (reflecting that the Department's Secretary reversed the ALJ's legal conclusion regarding standing).

In paragraph 62, the ALJ ultimately determined that "ACI and the City presented competent evidence that their substantial interests could be affected." (RO ¶ 62). The ALJ's conclusion of law in paragraph 57 stated that "[t]o establish standing, a party must present evidence to show that its substantial interests could be affected." (RO ¶ 57). *See St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist.*, 54 So. 3d 1051, 1054 (Fla. 5th DCA 2011). Paragraph 62 is an ultimate factual finding that is supported by the ALJ's underlying findings of fact in paragraphs 4, 5, 6, 7, 31, 32, 36, 37, 56, and by competent substantial record evidence (T. Vol. II, pp. 300-302; City Ex. 40; Prehearing Stip. Section V. ¶¶ W-X; ACI Exs. 8 and 9).

Therefore, based on the foregoing reasons, the DEP's Exception No. 3 is granted as to paragraphs 60 and 61, which are modified as discussed above; and denied as to paragraph 62.

City of Miami's Exception No. 1

The City takes exception to paragraphs 58 and 59 of the RO, where the ALJ concluded that the doctrine of *parens patriae* does not allow a municipality to claim

standing to intervene in a DEP enforcement action. (RO ¶ 59). The City asserts that the ALJ should have extended the doctrine of *parens patriae* to encompass the City's standing to challenge the administrative order on behalf of its citizens. The City acknowledges that the ALJ ultimately held that the City had standing independent of *parens patriae*. However, the City filed this exception to "preserve the City's right to appellate review on a pure conclusion of law." *See* City's Exception at pages 1-2.

The ALJ's conclusions in paragraphs 58 and 59 are supported by the Florida Supreme Court precedent cited in paragraph 58 and by prior Department final orders. *See Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006); *see e.g., Hamilton Cty. Bd. of Cty. Comm'rs v. TSI Southeast, Inc., and Dep't of Envtl. Reg.*, 12 F.A.L.R. 3774 (Fla. Dept. of Env. Reg. 1990), *aff'd,* 587 So. 2d 1378 (Fla. 1st DCA 1991). Therefore, the City of Miami's Exception No. 1 is denied.

CONCLUSION

Contrary to the ALJ's legal conclusions, the AO is an enforcement instrument authorized under Section 403.061(8). It contains findings, and it requires FPL to comply with Condition of Certification X.D. by submitting and implementing a Salinity Management Plan that will achieve the goals and timelines specified in the AO. (RO ¶¶ 47-53; Joint Ex. 1). The AO's provisions can be enforced by appropriate administrative and judicial proceedings. *See* § 403.061(8), Fla. Stat. (2015). The AO is a reasonable exercise of the Department's enforcement discretion under Sections 403.061(8) and 403.151. Thus, the ALJ recommendation to rescind the AO as an unreasonable exercise of enforcement discretion, or amend it as suggested in the RO, is rejected.

Notwithstanding the ultimate conclusion below, the record developed during this case raises issues of environmental concern which require further consideration. Accordingly, Department staff shall consider the findings of this order, specifically those related to the findings in the RO at paragraphs 38-40, as well as any other additional information staff might have available at this time, and take any further action as is necessary.

Having considered the applicable law in light of the written exceptions, responses, and the above rulings, and being otherwise duly advised, it is ORDERED that:

A. The Recommended Order (Exhibit A) is adopted, except as modified by the above rulings, and incorporated herein by reference.

B. The Department's Administrative Order issued on December 23, 2014, is hereby APPROVED.

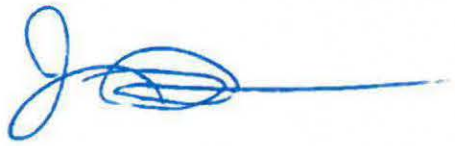
JUDICIAL REVIEW

Any party to this proceeding has the right to seek judicial review of the Final Order under section 120.68, Florida Statutes, by filing of a Notice of Appeal under rule 9.110 and 9.190, Florida Rules of Appellate Procedure, with the Agency Clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal.

The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the Agency Clerk.

DONE AND ORDERED this 21st day of April, 2016, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



JONATHAN P. STEVERSON
Secretary

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

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

Lea Crandall
CLERK

4-21-16
DATE

CERTIFICATE OF SERVICE

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

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and by electronic filing to:

Division of Administrative Hearings
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this 21st day of April, 2016.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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