STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

WWALS WATERSHED COALITION, INC.,	
Petitioner,	
vs.	**OGC CASE NO.: 15-0468**
	DOAH CASE NO.: 15-4975
SABAL TRAIL TRANSMISSION, LLC, and DEPARTMENT OF ENVIRONMENTAL PROTECTION,	
Respondents.	

CONSOLIDATED FINAL ORDER

On December 11, 2015, 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 captioned administrative proceeding. A copy of the RO is attached hereto as Exhibit A. The RO shows that copies were sent to counsel for the Petitioner, WWALS Watershed Coalition, Inc. (Petitioner), and counsel for the Respondents, Sabal Trail Transmission, LLC (Sabal Trail), and the Department. On December 28, 2015, the Petitioner filed its Exceptions to the RO. Sabal Trail responded on January 4, 2016, and the Department responded on January 7, 2016. This matter is now before the Secretary for final agency action.[1]

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

BACKGROUND

On July 10, 2015, the Department published its Consolidated Notice of Intent to Issue Environmental Resource Permit and Easement to Use Sovereign Submerged Lands to Sabal Trail for the Sabal Trail Natural Gas Pipeline. The Petitioner filed a petition for hearing on August 7, 2015, challenging the validity of these two authorizations. The Department dismissed the petition with leave to amend, and the Petitioner filed an amended petition, which added its subsidiary corporation, WWALS Watershed Coalition Florida, Inc. (WWALS-FL), as a second Petitioner. The Department dismissed the petition of WWALS-FL as untimely and struck portions of the amended petition. The Department then referred the amended petition to DOAH. At DOAH, the ALJ allowed the Petitioner to amend its petition again, but upon motion, certain claims in the last amended petition were struck because they were not cognizable in this state administrative proceeding.

On September 21, 2015, Sabal Trail filed a motion for summary hearing under Section 403.973(14)(b), Florida Statutes, which was granted. The final hearing was conducted on October 19 through 21, 2015, in Jasper, Florida. After filing of the hearing transcript and proposed recommended orders, the ALJ issued the RO on December 11, 2015.

SUMMARY OF THE RECOMMENDED ORDER

In the RO, the ALJ recommended that the Department enter a final order that approves issuance of the Environmental Resource Permit and grants an easement to use sovereign submerged lands to Sabal Trail for the Sabal Trail Natural Gas Pipeline. (RO at page 21). The ALJ concluded that Sabal Trail provided reasonable assurance

that the pipeline project will comply with all applicable regulatory criteria such that it is entitled to the Environmental Resource Permit. (RO ¶¶ 68, 69, 70). The ALJ further concluded that Sabal Trail proved the pipeline project will comply with all applicable criteria and it is entitled to the easement to use sovereign submerged lands. (RO ¶¶ 71, 72).

Standing

The ALJ found that, under the associational standing test, the Petitioner failed to establish its standing because it did not show that a substantial number of its members could be affected by the project. (RO ¶¶ 30, 36, 37, 59). The ALJ concluded that the speculative concerns of the Petitioner's members regarding the pipeline's impacts on their use and enjoyment of the Suwannee River, Santa Fe River, and surrounding areas, are not sufficient to confer standing. (RO ¶¶ 30, 31, 32, 33, 37, 57, 58).

Regulatory public interest test

The ALJ found that the Petitioner did not present any competent evidence to refute the evidence presented by Sabal Trail and the Department that the pipeline project would meet each of the seven public interest factors in Rule 62-330.302(1)(a). (RO ¶¶ 38-46, 68-70). The ALJ concluded that the proposed pipeline is not contrary to the public interest. (RO ¶¶ 47, 68). In the areas designated as Outstanding Florida Waters, the ALJ concluded that the proposed pipeline is clearly in the public interest. (RO ¶¶ 48, 49, 69).

Sovereign submerged lands easement

The ALJ found that the project creates a net public benefit when the public interest test for a sovereign submerged lands authorization under Rule 18-21.003(51) is

applied. (RO ¶¶ 50, 51, 72). The ALJ further found that the project will not conflict with Rule 18-21.004 because no sovereignty submerged lands will lose its essentially natural conditions, propagation of fish and wildlife will be maintained, and so will traditional recreational uses such as fishing, boating and swimming. (RO ¶ 52). The ALJ concluded that Sabal Trail proved the pipeline project will comply will applicable criteria and that it is entitled to the easement to use sovereign submerged lands. (RO ¶ 72).

STANDARDS OF REVIEW OF DOAH RECOMMENDED ORDERS

Section 120.57(1)(l), Florida Statutes, prescribes that an agency reviewing a recommended order may not reject or modify the findings of fact of an ALJ, "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (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).

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

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

Section 120.57(1)(l), Florida Statutes, authorizes an agency to reject or modify an ALJ's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." *See Barfield v. Dep't of Health,* 805 So.2d 1008 (Fla. 1st DCA 2001); *L.B. Bryan & Co. v. Sch. Bd. of Broward Cty.*, 746 So.2d 1194 (Fla. 1st DCA 1999); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So.2d 1140 (Fla. 2d DCA 2001). Considerable deference should be accorded to these agency interpretations of statutes and rules within their regulatory jurisdiction, and such agency interpretations should not be overturned unless "clearly erroneous." *See, e.g., Falk v. Beard*, 614 So.2d 1086, 1089 (Fla. 1993); *Dep't of Envtl. Regulation v. Goldring*, 477 So.2d 532, 534 (Fla. 1985). Furthermore, agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be the only reasonable interpretations. It is enough if such agency interpretations are "permissible" ones. *See, e.g., Suddath Van Lines, Inc. v. Dep't of Envtl. Prot.,* 668 So.2d 209, 212 (Fla. 1st DCA 1996).

Agencies do not have jurisdiction, however, to modify or reject rulings on the admissibility of evidence. Evidentiary rulings of the ALJ that deal with "factual issues susceptible to ordinary methods of proof that are not infused with [agency] policy considerations," are not matters over which the agency has "substantive jurisdiction." *See Martuccio v. Dep't of Prof'l Regulation*, 622 So.2d 607, 609 (Fla. 1st DCA 1993); *Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985); *Fla. Power & Light Co. v. Fla. Siting Bd.*, 693 So.2d 1025, 1028 (Fla. 1st DCA 1997). Evidentiary rulings are matters within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. *See Martuccio,* 622 So.2d at 609.

RULINGS ON EXCEPTIONS

A party that files no exceptions to certain findings of fact "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Envtl. Coalition of Fla., Inc. v. Broward Cty.*, 586 So.2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Medical Ctr., Inc. v. State of Fla., Agency for Health Care Admin.,* 847 So.2d 540, 542 (Fla. 4th DCA 2003). An agency head reviewing a recommended order is free to modify or reject any erroneous conclusions of law over which the agency has substantive jurisdiction, however, even when exceptions are not filed. *See* § 120.57(1)(l), Fla. Stat. (2012); *Barfield v. Dep't of Health,* 805 So.2d 1008 (Fla. 1st DCA 2001); *Fla. Public Employee Council, 79 v. Daniels*, 646 So.2d 813, 816 (Fla. 1st DCA 1994).

PETITIONER'S EXCEPTIONS

Exception No. 1

The Petitioner takes exception to page 3 of the RO, where the ALJ lists Willard Randall as a member of WWALS, but not as an expert witness. *See* Petitioner's Exceptions at page 1. The Petitioner argues that the ALJ incorrectly weighed evidence provided by "expert witness Willard Randall" as that of a lay witness. *Id.* The ALJ accepted Mr. Randall as an "expert welder" at the hearing (Randall, T. Vol. V, p. 480, lines 5-6). However, the record shows that the ALJ was concerned whether the testimony was relevant (Randall, T. Vol. V, pp. 488-489), and that Mr. Randall did not review the Sabal Trail project (Randall, T. Vol. V, pp. 500-501).

The issues of relevance and weight of the evidence are within the province of the ALJ as the trier of fact. An agency reviewing a recommended order may not reweigh the evidence, resolve conflicts, 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). Therefore, based on the foregoing reasons, Exception No. 1 is denied.

Exception No. 2

The Petitioner takes exception to the ALJ's finding in paragraph 14 of the RO that the "mud" used during HDD [Horizontal Directional Drilling] drilling is a "non-toxic . . . bentonite clay." (RO ¶ 14). The Petitioner does not argue that the finding is not supported by competent substantial evidence. Instead, the Petitioner contends that the ALJ failed to address "grouting material" and "other materials that will come into contact

with the water supply as a result of the installation of the pipeline. . ." *See* Petitioner's Exceptions at page 2.

An agency has no authority to make independent or supplemental findings of fact in order to address matters that a party believes should be addressed by the ALJ. *See, North Port, Fla. v. Consol. Minerals*, 645 So.2d 485, 487 (Fla. 2d DCA 1994). The factual findings in paragraph 14 are supported by competent substantial record evidence (Joint Ex. 5, p. 1514; Means, T. Vol. V, p. 563; Jones, T. Vol. VI, p. 670).

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

Exception No. 3

The Petitioner takes exception to paragraph 18 of the RO, where the ALJ found that "[t]he pipeline runs parallel to two existing natural gas pipelines that cross the Santa Fe River." (RO ¶ 18). The Petitioner does not argue that the finding lacks competent substantial evidence support. Instead, the Petitioner alleges that the proposed pipeline crosses the two existing pipelines at multiple points other than at the Santa Fe River crossing. *See* Petitioner's Exceptions at pages 2-3. The factual finding in paragraph 18 is supported by competent substantial record evidence (Bass, T. Vol. VI, p. 703; Malwitz-Jipson, T. Vol. III, pp. 248-249). An agency has no authority to make independent or supplemental findings of fact. *Id.*

The Petitioner also appears to take exception to paragraph 47 of the RO, where the ALJ concluded that "[c]onsidering the seven public interest factors listed [in Rule 62-330.302(1)(a)], the proposed pipeline is not contrary to the public interest." (RO ¶ 47). The Petitioner argues that the ALJ's recommendation that the Department presented evidence in support of the seven public interest factors is clearly erroneous. The

Petitioner contends that the agency's preliminary review of the pipeline proposal was cursory. However, this argument ignores the evidence presented in the *de novo* hearing conducted by the ALJ. It is well established that "Section 120.57 proceedings are intended to formulate final agency action, not to review action taken earlier and preliminarily." *McDonald v. Dep't of Banking and Fin.*, 346 So. 2d 569, 584 (Fla. 1st DCA 1977).

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

Exception No. 4

The Petitioner takes exception to the ALJ's finding in paragraph 19 that the closest major spring to the pipeline route is 1.7 miles away. (RO ¶ 19). Competent substantial record evidence supports the finding that the closest **major** spring is the Madison Blue Spring, which is 1.7 miles from the pipeline route (Jones, T. Vol. VI, pp. 677, 687-688; Sabal Trail Ex. 22). As the Petitioner points out there are springs within a mile of the pipeline, however, those springs are not classified as **major** springs (Jones, T. Vol. VI, pp. 659-662, 664-665; Joint Ex. 5, pp. 26-27, 2313-2314; Sabal Trail Exs. 19 and 20).

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

Exception No. 5

The Petitioner takes exception to paragraph 20, where the ALJ found that the pipeline would be only four to six feet below the land surface while the Falmouth Cave system is more than 100 feet below ground. (RO ¶ 20). Competent substantial record evidence supports the ALJ's findings in paragraph 20 (Jones, T. Vol. VI, p. 659, 681-682). The Petitioner points to contrary testimony from its own expert. *See* Petitioner's

Exceptions at page 3. However, the ALJ is free to accept the testimony of one expert witness over that of another expert. *See Peace River/Manasota Regional Water Supply Authority v. IMC Phosphates Co.,* 18 So.3d 1079, 1088 (Fla. 2d DCA 2009). In addition, when there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co. v. Dyer,* 592 So.2d 276, 280 (Fla. 1st DCA 1991); *Conshor, Inc. v. Roberts,* 498 So.2d 622 (Fla. 1st DCA 1986).

Therefore, based on the foregoing reasons, Exception No. 5 is denied.

Exception No. 6

The Petitioner takes exception to paragraphs 23 and 24 of the RO, where the ALJ found:

> 23. Karst terrain, which is limestone undergoing dissolution and characterized by the formation in the limestone of holes, cracks, fissures, conduits, and sinkholes, is common in North Florida and throughout the State.
>
> 24. Although fragile in particular locations, karst terrain is able to support large linear facilities in North Florida such as Interstate 10, Interstate 75, and railroads, which bear loads of many tons without collapses occurring in the underlying limestone.

Competent substantial record evidence supports the ALJ's findings (Jones, T. Vol. VI, pp. 655-657, 684; Sabal Trail Ex. 18). The Petitioner does not argue that the findings are not supported by competent substantial evidence. Instead, the Petitioner contends that the ALJ failed to address other issues regarding the nature of karst geology. *See* Petitioner's Exceptions at page 4. The Department does not have the authority to make independent or supplemental findings of fact. *See, North Port, Fla. v. Consol. Minerals,* 645 So.2d 485, 487 (Fla. 2d DCA 1994).

Therefore, based on the foregoing reasons, Exception No. 6 is denied.

Exception No. 7

The Petitioner takes exception to the ALJ's finding in paragraph 26 of the RO that the pipeline design specifications provide reasonable assurance that the formation of a sinkhole along its path would not cause it to break. (RO ¶ 26). The Petitioner argues that the ALJ's conclusion "assumes facts not in evidence." *See* Petitioner's Exceptions at pages 4-5. However, competent substantial record evidence supports the ALJ's ultimate finding in paragraph 26 (Lambeth, T. Vol. VI, pp. 719-733; Jones, T. Vol. VI, pp. 692-694; Sabal Trail Ex. 32; Joint Ex. 12, p. 373). *See* § 120.57(1)(l), Fla. Stat. (2015).

Therefore, based on the foregoing reasons, Exception No. 7 is denied.

Exception No. 8

The Petitioner takes exception to paragraph 27 of the RO, where the ALJ found that it is in the interest of Sabal Trail to build and operate the pipeline so that disruptions of service do not occur. (RO ¶ 27). The Petitioner argues that the ALJ assumes facts that are not in evidence. *See* Petitioner's Exceptions at page 5. However, as the Respondents point out, the finding is a reasonable inference from the competent substantial record evidence (Shammo, T. Vol. VI, pp. 24-26; Joint Ex. 12, p. 34). *See* Sabal Trail's Response at page 9; DEP's Response at page 7. It is well established that it is the ALJ's function to draw permissible inferences from the competent substantial evidence and reach ultimate findings of fact. *See Belleau v. Dep't of Envtl. Prot.,* 695 So.2d 1305, 1307 (Fla. 1st DCA 1997).

Therefore, based on the foregoing reasons, Exception No. 8 is denied.

Exception No. 9

The Petitioner takes exception to paragraph 29 of the RO, where the ALJ found that it did not present any evidence of adverse impacts caused by similar pipelines in similar areas. (RO ¶ 29). The Petitioner cites testimony of its witness Richard Gamble. However, the testimony was excluded after Sabal Trail's objection that the testimony was speculative, vague, and lacked relevance (T. Vol. VI, pp. 593-595). The Department has no authority to overturn this evidentiary ruling of the ALJ. *See Martuccio v. Dep't of Prof'l Regulation*, 622 So.2d 607, 609 (Fla. 1st DCA 1993).

The Petitioner also takes exception to paragraph 40, where the ALJ found that it failed to refute the Respondents' evidence that the pipeline project would not result in adverse impacts on public health, safety, or welfare. (RO ¶ 40). The Petitioner asserts error by the ALJ in allowing "safety" testimony that was excluded in the Order dated October 15, 2015. *See* Petitioner's Exceptions at page 6. In the Order, the ALJ struck the Petitioner's allegations regarding pipeline safety as regulated under federal law. *See* DEP's Response at page 9. The ALJ reiterated the scope of his ruling during the hearing by stating that he was "not making any findings about safety, pipeline safety, except as it affects – potential effects on the environment and human use of the water resources." (T. Vol. VI, p. 735). Thus, the Petitioner's argument that the ALJ took "safety" evidence from the Respondents and did not allow any response from the Petitioner is not accurate. The type of pipeline "safety" testimony that the Petitioner tried to present was excluded by the ALJ's Order. *See* DEP's Response at page 9; T. Vol. VI, pp. 735-736. While the Respondents' evidence was directed at the first of the seven

public interest test factors in Rule 62-330.302(1)(a), Florida Administrative Code. (RO ¶ 40).

Because paragraph 40 is supported by competent substantial record evidence (Prather, T. Vol. II, pp. 230, 361-364), and based on the foregoing reasons, Exception No. 9 is denied.

Exception Nos. 10, 14, 21, 22, and 23

The Petitioner takes exception to paragraphs 30, 33, 36, and 37 of the RO, where the ALJ found that the testimony of the Petitioner's members did not establish that a substantial number of its members would be substantially affected by the pipeline. *See* Petitioner's Exceptions at pages 7-8 and 9. The Petitioners essentially argue that the Department should reweigh the evidence and draw conclusions contrary to those drawn by the ALJ. As outlined above, it is well established that it is the ALJ's function to draw permissible inferences from the competent substantial evidence and reach ultimate findings of fact. *See Belleau v. Dep't of Envtl. Prot.,* 695 So.2d 1305, 1307 (Fla. 1st DCA 1997). In addition, competent substantial record evidence supports the ALJ's conclusion that the pipeline's location and potential impacts from a sinkhole had no relation to alleged interference with use of area waters by the Petitioner's members (Prather, T. Vol. IV, pp. 374-375, 369; Bass, T. Vol. VI, p. 713). (RO ¶¶ 30, 33, 36, and 37).

The Petitioners also take exception to the ALJ's conclusions in paragraphs 56, 57, 58, and 59 that under applicable case law the Petitioner failed to establish standing because it did not show that a substantial number of its members could be affected by the project. *See St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist.,* 54

So. 3d 1051, 1054 (Fla. 5th DCA 2011). The Petitioner's arguments do not establish that the ALJ's conclusions of law in paragraphs 56, 57, 58, and 59 are clearly erroneous.

Therefore, based on the foregoing reasons, Exception Nos. 10, 14, 21, 22, and 23, are denied.

Exception No. 11

The Petitioner takes exception to paragraph 31 of the RO, where the ALJ found that use of drilling mud and grout for HDD operations is unlikely to affect residential wells of the Petitioner's members or non-members. (RO ¶ 31). The Petitioner argues that the Department's Final Order should not adopt this paragraph because the ALJ applied the incorrect standard. *See* Petitioner's Exceptions at page 8. The Petitioner asserts that in this factual finding the ALJ should have used the legal standard regarding reasonable assurance that water quality standards will not be violated. *Id.*

Contrary to the Petitioner's assertion, the ALJ's ultimate legal conclusions in paragraphs 67 and 68 show that the ALJ did apply the correct legal standard. (RO ¶¶ 67 and 68). Also, competent substantial evidence supports the ALJ's findings in paragraph 31 (Means, T. Vol. V, p. 557; Lambeth, T. Vol. VI, p. 735).

Therefore, based on the foregoing reasons, Exception No. 11 is denied.

Exception No. 12

The Petitioner takes exception to paragraph 32 of the RO, where the ALJ found that there was "[n]o competent evidence . . . presented about the possibility that HDD drilling under the rivers could result in adverse impacts to fish and wildlife." (RO ¶ 32). The Petitioner asserts that its argument in Exception No. 2 and a statement from the

ALJ during the hearing that includes the phrase "[i]f the drilling fluid is a pollutant," constitutes the competent evidence that drilling mud will have an adverse impact to fish and wildlife. *See* Petitioner's Exceptions at page 8.

Contrary to the Petitioner's assertions, the ruling on Exception No. 2 above found that the ALJ's factual finding that drilling mud is a non-toxic, naturally occurring bentonite clay, is supported by competent substantial evidence. Therefore, based on the foregoing reasons, Exception No. 12 is denied.

Exception No. 13

The Petitioner takes exception to paragraph 34 of the RO, where the ALJ found that air quality is not a cognizable issue in this proceeding because there is a separate permit associated with air quality impacts of the pipeline. (RO ¶ 34). Competent substantial evidence showed that air quality impact concerns are not addressed in this type of environmental resource permit proceeding (Prather, T. Vo. III, p. 313). *See, e.g., FINR II, Inc. v. CF Industries, Inc., and Dep't of Envtl. Protection,* Case No. 11-6495 (Fla. DOAH April 30, 2012; Fla. DEP June 6, 2012), *aff'd* 118 So. 3d 809 (Fla. 1st DCA 2013) ("FINR's allegations regarding air impacts, . . . are likewise beyond the scope of the Department's permitting criteria for ERPs . . .").

Therefore, based on the foregoing reasons, Exception No. 13 is denied.

Exception Nos. 15 and 16

The Petitioner takes exception to paragraphs 40-47 of the RO, where the ALJ found that the Petitioner did not present any competent evidence to refute Sabal Trail's and the Department's evidence that the project satisfies the seven public interest factors. (RO ¶¶ 40-47). Competent substantial record evidence supports the ALJ's

findings in paragraphs 40-47 (Prather, T. Vol. II, pp. 220-221, 226, 229-234; T. Vol. IV, pp. 360-376; Joint Ex. 9; Joint Ex. 10, pp. 3-4; Ambrosino, T. Vol. II, pp. 189-193; Sabal Trail Ex. 9). *See* § 120.57(1)(l), Fla. Stat. (2015). The weight to be given any contrary evidence from the Petitioner is within the province of the ALJ as the trier of fact. The Department's review of the recommended order may not include reweighing the evidence, resolving conflicts, or judging 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).

Therefore, based on the foregoing reasons, Exception Nos. 15 and 16 are denied.

Exception No. 17

In this exception, the Petitioner states that the ALJ's paragraphs 48 and 49 properly apply the heightened "clearly in the public interest" standard with regard to the Suwannee and Santa Fe Rivers, which are Outstanding Florida Waters. The remainder of the Petitioner's exception focuses on its arguments regarding the Department's preliminary review of Sabal Trail's application prior to agency action. As previously discussed, this argument ignores the evidence presented in the *de novo* hearing conducted by the ALJ. It is well established that "Section 120.57 proceedings are intended to formulate final agency action, not to review action taken earlier and preliminarily." *McDonald v. Dep't of Banking and Fin.,* 346 So. 2d 569, 584 (Fla. 1st DCA 1977).

In addition, competent substantial record evidence supports the ALJ's findings in paragraphs 48 and 49 (Jones, T. Vol. VI, pp. 672-675; Prather, T. Vol. II, p. 221, 223;

Joint Ex. 10, p. 4). Therefore, based on the foregoing reasons, Exception No. 17 is denied.

Exception No. 18

The Petitioner appears to take exception to paragraph 51, where the ALJ found that the pipeline's need determination by the Public Service Commission is a public benefit under the public interest test for sovereign submerged lands authorizations. (RO ¶ 51). The Petitioner argues that the ALJ's finding is a fact not in evidence. However, competent substantial record evidence supports the ALJ's finding (Shammo, T. Vol. I, pp. 25-27, 34-35; Joint Ex. 12, p. 34).

In addition, the Petitioner ignores the public interest test in Rule 18-21.003(51), Florida Administrative Code, for authorizing the pipeline easement, which the ALJ outlined in paragraph 50 of the RO. The Petitioner erroneously contends that the sovereign submerged lands easement is governed by the regulatory "reasonable assurance" standard that governs the environmental resource permit. *See* Petitioner's Exceptions at page 11. This is contrary to well established statutory and rule criteria applicable to the regulatory environmental resource permit program (Section 373.414, Florida Statutes, and Rule 62-330.302, Florida Administrative Code) versus the sovereignty submerged lands authorizations (chapter 253, Florida Statutes, and Rule chapter 18-21, Florida Administrative Code). *See, e.g., Last Stand, Inc. v. Fury Mgmt., Inc., and Dep't of Envtl. Protection,* Case No. 12-2574 (Fla. DOAH Dec. 31, 2012; Fla. DEP Feb. 7, 2013).

Therefore, based on the foregoing reasons, Exception No. 18 is denied.

Exception No. 19

The Petitioner takes exception to paragraph 52 of the RO, where the ALJ found that the Petitioner did not present competent evidence "to show that any sovereignty submerged lands would lose their essential natural conditions, that fish and wildlife propagation would be diminished, or that traditional recreational uses would be interfered with." (RO ¶ 52). The Petitioner argues that it did present evidence on these issues. *See* Petitioner's Exceptions at page 12.

The weight to be given any contrary evidence from the Petitioner is within the province of the ALJ as the trier of fact. The Department's review of the recommended order may not include reweighing the evidence, resolving conflicts, or judging 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).

Because competent substantial evidence supports the ALJ's findings in paragraph 52 (Prather, T. Vol. IV, pp. 374-375), and based on the foregoing reasons, Exception No. 19 is denied.

Exception No. 20

The Petitioner takes exception to paragraph 55 of the RO, where the ALJ states a legal conclusion and cites case law that, "[e]conomic or business interests are not substantial interests in this environmental permitting proceeding." *See Agrico Chem. Co. v. Dep't of Envtl. Reg.,* 406 So. 2d 478, 482 (Fla. 2d DCA 1981). The Petitioner argues that "[p]aragraph 55 insinuates that WWALS seeks standing due to economic injury," and goes on to argue that it seeks standing based on members' use and

enjoyment of the Santa Fe and Suwannee Rivers. *See* Petitioner's Exceptions at page 12.

Contrary to the Petitioner's argument, there was evidence presented concerning impacts to business interests on which the ALJ made factual findings in paragraph 35. (RO ¶ 35) ("A few members believe there could be impacts that would adversely affect their business interests, which are not interests that this proceeding was designed to protect."). The Petitioner did not take exception to paragraph 35. 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).

Therefore, based on the foregoing reasons, Exception No. 20 is denied.

Exception No. 24

The Petitioner takes exception to the second sentence in paragraph 65 of the RO, where the ALJ quotes a definition of "reasonable assurance" from the case *Metro. Dade Cnty. v. Coscan Fla.*, 609 So. 2d 644, 648 (Fla. 3d DCA 1992). The Petitioner essentially argues that the definition (successful implementation of a project) by itself does not fully explain the "reasonable assurance" standard. *See* Petitioner's Exceptions at page 14. However, the Petitioner both misstates the Court's holding in *Coscan* and the ALJ's conclusion in paragraph 65.

Coscan held that the "reasonable assurance" standard contemplates "a substantial likelihood that the project will be successfully implemented." *Id.* In paragraph

65, the ALJ stated that "[a]n applicant must provide reasonable assurance that it will comply with all applicable regulatory criteria. Reasonable assurance means a 'substantial likelihood that the project will be successfully implemented.'" (RO ¶ 65). The Petitioner's argument that the ALJ misstated the law is not accurate.

Therefore, based on the foregoing reasons, Exception No. 24 is denied.

Exception No. 25

The Petitioner takes exception to paragraph 69 of the RO, where the ALJ concluded that "[b]ecause Sabal Trail clearly demonstrated compliance with all applicable regulatory criteria, the project is clearly in the public interest." (RO ¶ 69). The Petitioner again argues that the sovereign submerged lands easement is subject to the regulatory seven factors in section 373.414, Florida Statutes. However, as outlined in the ruling on Exception No. 18 above, this is not the case.

Contrary to the Petitioner's other assertions, the ALJ clearly understood that the regulatory "public interest test" is found in section 373.414, and Rule 62-330.302. *See* RO ¶¶ 38-48 and 65-70. "All applicable regulatory criteria," of course, includes satisfying the public interest test (i.e., the seven public interest factors) and other criteria dealing with water quality.

Therefore, based on the foregoing reasons, Exception No. 25 is denied.

CONCLUSION

Having reviewed the matters of record and being otherwise duly advised,

It is therefore ORDERED that:

A. The Recommended Order (Exhibit A) is adopted in its entirety and is incorporated by reference herein.

B. Sabal Trail's application for an Environmental Resource Permit in File No. 0328333-001 is APPROVED.

C. Sabal Trail's application for an Easement to use Sovereign Submerged Lands is GRANTED.

JUDICIAL REVIEW

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by filing a Notice of Appeal pursuant to Rules 9.110 and 9.190, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the clerk of the Department.

DONE AND ORDERED this 15th day of January, 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 1-15-16
CLERK DATE

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing Final Order has been furnished by electronic mail to the following persons on this 15th day of January, 2016.

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and by electronic filing:

Division of Administrative Hearings
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STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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