BEFORE THE SOUTH FLORIDA WATER MANAGEMENT DISTRICT

City of West Palm Beach,

Petitioner,

vs.

Palm Beach County, Department of Transportation, and South Florida Water Management District,

Respondents.
_____/

SFWMD No. 2017-034-FOF-ERP
DOAH Case No. 16-1861

FINAL ORDER

On March 31, 2017, 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 filed by the parties, 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 Florida Department of Transportation ("DOT") and Palm Beach County (collectively "Applicants") are entitled to an Environmental Resource Permit ("ERP") for construction and operation of a stormwater management system for a project know as State Road 7 ("Project").

The ALJ concluded Petitioner, City of West Palm Beach, ("the City") failed to meet its burden to prove the Project does not comply with all applicable permitting criteria. COL

175.[1] Applicants demonstrated compliance with all applicable permitting criteria and their entitlement to the permit. COL 175. The ALJ recommended the District issue the ERP.

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).

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

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

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*, 879 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 Part IV of Chapter 373, Florida Statutes, and associated rules 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). If a party does not file 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 DISTRICT STAFF'S EXCEPTIONS

District Staff's Exception Paragraphs 7 through 13 to Findings of Fact 20 and 66

Staff takes exception to the last sentence in each of the ALJ's Findings of Fact 20 and 66 because the statements are in conflict with the permits in the record and are not supported by competent substantial evidence. Staff states that the permits do not require that the Ibis system meet permitting criteria before discharge to the Ibis Preserve and none of the permits offered into evidence at final hearing make reference to allowable nutrient loads.[2]

Staff requests clarification that the Ibis surface water management system ("SWMS") is permitted as a two-part system where water first flows through a lake system within the Ibis development and then flows into the Ibis Preserve retention area. Staff states that "no discharge requirements—nutrient load or otherwise—apply within the SWMS." SFWMD Exceptions to Recommended Order at ¶ 13. Staff correctly recognizes that the outcome of this proceeding will not be affected by acceptance, rejection or clarification of these findings and the permit speaks for itself.

[2] Exhs. J-2, J-20, J-21, J-22, J-23, J-24, J-25, J-26.

Therefore, Staff's Exception set forth in paragraphs 7 through 13 is denied.

District Staff's Exception Paragraphs 14 through 25 to Conclusion of Law 136

Staff takes exception to the ALJ's application of Section 120.569(2)(p), Florida Statutes, which allows an applicant to make a prima facie case by simply entering the permit file into evidence and then giving the petitioner the burden of ultimate persuasion to prove the case in opposition to the permit. Section 120.569(2)(p), Florida Statutes, states:

> For any proceeding arising under chapter 373, chapter 378, or chapter 403, if a nonapplicant petitions as a third party to challenge an agency's issuance of a license, permit, or conceptual approval, the order of presentation in the proceeding is for the permit applicant to present a prima facie case demonstrating entitlement to the license, permit, or conceptual approval, followed by the agency. **This demonstration may be made by entering into evidence the application and relevant material submitted to the agency in support of the application, and the agency's staff report or notice of intent to approve the permit, license, or conceptual approval.** Subsequent to the presentation of the applicant's prima facie case and any direct evidence submitted by the agency, the petitioner initiating the action challenging the issuance of the license, permit, or conceptual approval has the burden of ultimate persuasion and has the burden of going forward to prove the case in opposition to the license, permit, or conceptual approval through the presentation of competent and substantial evidence. The permit applicant and agency may on rebuttal present any evidence relevant to demonstrating that the application meets the conditions for issuance. Notwithstanding subsection (1), this paragraph applies to proceedings under s. 120.574.

(Emphasis added).

Staff and the ALJ agree that this section is silent as to a permit the applicant modifies and the agency recommends for approval after the case is sent to DOAH but before the final hearing.[3] In this case the ALJ required Applicants to present testimony (in addition to the permit file) to make the prima facie case for the portion of the permit

[3] COL 136; SFWMD Exceptions to Recommended Order at ¶ 20.

that Applicant proposed to modify after the case was sent to DOAH. The ALJ ruled, "the modifications to the Project had to be proved in the 'normal' manner; the principal difference being that hearsay evidence would not be admissible to demonstrate that the modification complies with applicable permitting criteria." COL 136. Staff suggests that DOAH judges should allow applicants to present a prima facie case by simply submitting the permit file without testimony for the entire permit including the portion an applicant proposed to modify and the agency recommended for approval prior to the final hearing. Staff indicates that the ALJ's procedure in this case improperly changes the burden of persuasion to the Applicant rather than the City. SFWMD Exceptions to Recommended Order at ¶¶ 20 & 25.

Staff's exception is noted, however, the District declines to accept the invitation to issue this Final Order under protest. Staff correctly recognizes that because Section 120.569(2)(p), Florida Statutes, is not within the District's substantive jurisdiction the District may not reject the ALJ's conclusion.[4] *See* Standard of Review section, supra.

Therefore, Staff's Exception set forth in paragraphs 14 through 25 is denied.

District Staff's Exception Paragraphs 26 through 31 to Conclusion of Law 153

Staff takes exception to the ALJ's characterization in Conclusion of Law 153 that "[t]he District's argument is essentially that the [water quality] presumption cannot be rebutted." Staff emphasizes that the District position is <u>not</u> that the water quality presumption cannot be rebutted. While rejection of this sentence would clarify the District's position, neither acceptance nor rejection will affect the outcome of this proceeding.

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[4] SFWMD Exceptions to Recommended Order at ¶¶ 14 & 25.

It is not necessary to reject Conclusion of Law 153 because Conclusion of Law 154 moots the issue by finding that the project will not cause or contribute to a water quality violation in Grassy Waters.

Therefore, Staff's Exception set forth in paragraphs 26 through 31 is denied.

District Staff's Exception Paragraphs 32 and 33 to Conclusion of Law 157

Staff takes exception to the ALJ's characterization of the Department of Environmental Protection's ("DEP") narrative nutrient criteria in Conclusion of Law 157 that the "near-destruction of an ecosystem [is] the line that must be crossed before the [narrative nutrient] standard is violated."

Although the District does apply the narrative nutrient standard when it reviews and issues District permits, the standard is a DEP rule. Therefore, the District defers to DEP on interpretation of its substantive rules.

Staff's Exception set forth in paragraphs 32 and 33 is granted by noting that the District defers to DEP on interpretation of the narrative nutrient criteria.

District Staff's Exception Paragraphs 34 through 41 to Conclusion of Law 162

Staff takes exception to the ALJ's conclusion that deference to the agency concerning the sufficiency of mitigation was eliminated when the Uniform Mitigation Assessment Method ("UMAM") was adopted in 2004. The ALJ states that because UMAM establishes a quantifiable method for determining the amount of mitigation necessary to offset wetland losses, deference to an agency's determination of the sufficiency of mitigation is no longer necessary or appropriate. Because this conclusion of law involves the interpretation of Section 373.414, Florida Statutes, and the rules promulgated thereunder pertaining to UMAM and mitigation, it is within the District's

substantive jurisdiction to correct. Rejecting this Conclusion of Law will not affect the outcome of this proceeding because the ALJ independently ruled that the applicant provided reasonable assurances that the proposed mitigation will offset the impacts. COL 167.

The stated intent of UMAM is "to determine the amount of the mitigation needed to offset adverse impacts." Fla. Admin. Code R. 62-345.100(1) (emphasis added). UMAM does not assess the adequacy of the mitigation or the appropriateness of type or location of the mitigation. *Id.* at (2) and (4).

The case law providing deference to the agency on mitigation determinations did not change when UMAM was adopted. The case of *Peace River / Manasota Regional Water Supply Authority v. IMC Phosphates, Co.*, 18 So. 3d 1079 (Fla. 2d DCA 2009), post-dates the adoption of UMAM. The court specifically found:

> To the extent that DEP has found IMC's mitigation efforts sufficient to support the issuance of the permit based on the factual finding that no adverse impacts will remain postmitigation, DEP has properly exercised its statutory discretion under section 373.414(1)(b) to determine whether the proposed mitigation is sufficient.

Id. at 1086-87. The court in *Peace River* specifically cited cases that pre-dated the adoption of UMAM to support this finding, contrary to the ALJ's assertion that such cases should no longer be controlling on the issue.[5] *Id.*

The District finds that the ALJ's Conclusion of Law 162 is erroneous and as such must not be included in the District's Final Order. The District determines that deleting this conclusion of law is as or more reasonable than the conclusion or interpretation made by the ALJ.

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[5] *1800 Atl. Developers v. Dep't of Envtl. Regulation*, 552 So. 2d 946, 955 (Fla. 1st DCA 1989); *Save Anna Maria, Inc. v. Dep't of Transp.*, 700 So. 2d 113 (Fla. 2d DCA 1997).

Therefore, Staff's Exception set forth in paragraphs 34 through 41 is granted.

District Staff's Exception Paragraph 42 to the Preliminary Statement

Staff takes exception to correct the list of admitted District exhibits in the ALJ's preliminary statement on page 4. District Exhibit 26 was admitted but is not included in the list. TR. 931:3-4.

Therefore, Staff's Exception set forth in paragraph 42 is granted.

III. RULINGS ON APPLICANTS' EXCEPTIONS

Applicants' Exception 1 to Conclusion of Law 136

Applicants take exception to the ALJ's application of Section 120.569(2)(p), Florida Statutes. Applicants' argument is substantially similar to Staff's Exceptions to Recommended Order in paragraphs 14 through 25.

Therefore, Applicants' Exception 1 is denied for the same reasons stated in ruling on Staff's Exception paragraphs 14 through 25.

Applicants' Exception 2 to Conclusions of Law 151, 152, and 153

Applicants take exception to Conclusions of Law 151, 152, and 153 which characterize Respondents' arguments regarding application of water quality rules and criteria to the Project and set forth the ALJ's view of those arguments. Applicants' exception is rejected for the same reasons stated in ruling on District Staff's exception to Conclusion of Law 153, paragraphs 26 through 31 of Staff's exceptions.

Therefore, Applicants' Exception 2 is denied.

Applicants' Exception 3 to Endnotes 3 and 4

Applicants take exception to Endnotes 3 and 4 and argue the endnotes are reversed and should be corrected. Endnote 3 refers to issues discussed in Conclusion of Law 153, but instead is a reference associated with Finding of Fact 70. Likewise, Endnote 4 refers to issues discussed in Finding of Fact 70, but instead is a reference associated with Conclusion of Law 153.

Therefore, Applicants' Exception 3 is granted.

IV. RULINGS ON CITY'S EXCEPTIONS

City's Exceptions Generally

The City raises nine exceptions to the Recommended Order. Some of the exceptions fail to comply with the requirements of Section 120.57(1)(k), Florida Statutes, because they either do not include a legal basis for the exception, do not include appropriate citations to the record or do not clearly explain the disputed portion of the Recommended Order. Although, the District is not required to include an explicit ruling on exceptions that do not comply with Section 120.57(1)(k), Florida Statutes, the District has endeavored to ascertain what the City's exceptions are and, where possible, rule on each, despite their failure to comply with those statutory requirements. Additionally, in some instances the City takes exception to findings of fact to support their argument, but do not state that the findings of fact are incorrect. Although this is an improper exception as to those findings of fact under Section 120.57(1)(k), Florida Administrative Code, in an abundance of caution, the District has explained its ruling as to why those findings of fact are supported by competent substantial evidence.

City's Exceptions 1, 2, and 3 to Findings of Fact 36, 37, 38, 45, and 48; Conclusions of Law 155, 156, 157, 158, 159, and 160; End Note 2

In Exceptions 1, 2, and 3 the City disputes portions of the Recommended Order concerning water quality. The City contends that the ALJ erroneously interpreted the narrative nutrient water quality standard, failed to consider the antidegradation policy, and had no findings to support that the Project provides a net improvement to the water quality entering the Ibis system. The City argues that evidence they cite from the record is more persuasive than the evidence the ALJ relied on and recite their interpretation of the facts and the law to reargue their case.

ERP applicants must provide reasonable assurance that their project will not adversely affect water quality standards in the receiving waters. Fla. Admin. Code R. 62-330.301(1). However,

> If the applicant is unable to meet water quality standards because existing ambient water quality does not meet standards, the governing board or the department shall consider mitigation measures proposed by or acceptable to the applicant that cause net improvement of the water quality in the receiving body of water for those parameters which do not meet standards.

§ 373.414(1)(b)3., Fla. Stat.

Applicants did not have to incorporate a net improvement into their project design because the Ibis system (the direct discharge waterbody) and Grassy Waters (the ultimate receiving waterbody) are not "impaired." Applicants exceeded the statutory and rule requirements by providing a net improvement in water quality. FOFs 64, 67; COL 149, 160.

The dispositive issue on the topic of water quality is that the Project will result in a net improvement by treating its stormwater before it discharges to the Ibis system. FOF 64, COL 160. Therefore, findings of fact and conclusions of law addressing the narrative

nutrient standard and the antidegradation policy do not affect the outcome of this proceeding.[6] As explained in ruling on Staff's Exception paragraphs 32 and 33, the District defers to DEP's interpretation of its substantive rules regarding the narrative nutrient criteria.

The antidegradation policy allows the District to permit a project if it will not reduce the quality of the receiving waters below the classification established for them, meets the public interest test and provides a net improvement. Fla. Admin. Code R. 62-302.300(17); § 373.414(1), Fla. Stat. The Project complies with and exceeds the antidegradation requirements of Section 373.414(1), Florida Statutes, because it provides a net improvement and is not contrary to the public interest. FOF 64; COLs 160, 172.

The City argues there is no competent substantial evidence in the record to support the ALJ's findings and conclusions because he ignored, misapprehended, or failed to credit testimony of various witnesses and misapplied the evidence and testimony to the statutes and criteria relating to water quality. 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. 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.

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[6] The City argues that Finding of Fact 45 is incomplete because it does not address whether the Project will violate the antidegradation water quality policy.

Finding of Fact 36 is supported by competent substantial evidence. TR. 343:5-344:24, 361:3-7, 599:24-600:7, 619:6-11, 704:10-705:1. Finding of Fact 37 is supported by competent substantial evidence. TR. 385:5-386:5, 410:12-17. Finding of Fact 38 is supported by competent substantial evidence. TR. 407:9-408:4, 410:3-17. Finding of Fact 45 is supported by competent substantial evidence. TR.357:4-12, 679:3-24, 681:1-4, 1047:1-1048:1. Finding of Fact 48 is supported by competent substantial evidence. TR. 1065:14-1069:10, 1073:7-1075:18.

Conclusions of Law 155, 156, 158, 159, and 160 are consistent with the ALJ's findings of fact.

Therefore, the City's Exceptions 1, 2, and 3 are denied.

City's Exception 4 to Findings of Fact 16, 17, 20, and 21; Conclusion of Law 174; and End Note 1

In Exception 4 the City contends that Applicants do not have the legal capability to discharge into the Ibis Preserve and Grassy Waters Preserve, both of which are owned by the City.[7] The ALJ found that because the Applicants both have the power of eminent domain, they satisfied the requirement to demonstrate legal capability to comply with requirements of the permit and the City did not show that they do not have the capability. To obtain a permit District rules require applicants to show they have a sufficient real property interest in the land where the activities will occur. Having eminent domain authority satisfies that requirement. Once applicants obtain a permit, they must prove ownership before work can begin. *See* Fla. Admin. Code R. 62-330.060(3); § 4.2.3(d), Environmental Resource Permit Applicant's Handbook Vol. 1 (October 1, 2013); Exh. J-

[7] The Project will directly discharge into the Ibis lakes, not the areas owned by the City. FOFs 13, 28, 19, 62, 64.

19. The City acknowledges Applicants' eminent domain authority and the inclusion of the required condition in the permit at issue. Prehr'g Stip. at 27 ¶ 4; Petitioner's Exceptions to Recommended Order at 27.

The City argues that there is no competent substantial evidence in the record to support the ALJ's findings of fact and conclusions of law because the ALJ erred in excluding evidence the City sought to introduce. They do not, however, argue there is no evidence in the record upon which the ALJ could base his findings and conclusions. Where there is competent substantial evidence to support a finding of fact, the District may not disturb that finding. These evidentiary-related matters are within the sole province of the ALJ as the fact-finder. *See* Standard of Review section, supra. The District declines to usurp the ALJ's authority to rule on the admissibility of evidence.

Finding of Fact 16 is supported by competent substantial evidence. Exhs. J-20, J-21, J-22, J-23, J-24; TR. 149:10-12, 1243:7-1244:4. Finding of Fact 17 is supported by competent substantial evidence. Exhs. J-20, J-21, J-22, J-23, J-24. Finding of Fact 20 is supported by competent substantial evidence. Exhs. J-20, J-21, J-22, J-23, J-24; TR. 1247:12-1249:16. Finding of Fact 21 is supported by competent substantial evidence. Exh. J-24; TR. 166:14-18, 991:5-7, 1255:11-16.

Therefore, the City's Exceptions 4 is denied.

City's Exception 5 to Findings of Fact 29, 64-66, 69, 70-72, and 74; Conclusions of Law 153, 154, 159, and 160

In Exception 5 the City alleges that the ALJ made improper evidentiary and procedural rulings regarding nutrient loading to Grassy Waters Preserve. First, the City argues that the ALJ erred in denying a continuance of the final hearing to allow its expert more time to evaluate the proposed modified permit. The District has no authority to rule

on this matter. Next, the City argues there is no competent substantial evidence in the record to support the ALJ's findings of fact and conclusions of law because he erred in excluding evidence the City sought to introduce and ignored, misapprehended, or failed to credit testimony of various witnesses. 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. Findings of Fact 29, 64, 65, 66, 69, 70, 71, 72, and 74 are supported by competent substantial evidence and the District may not disturb that finding.[8] The District may not reweigh evidence presented, 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.

Finding of Fact 29 is supported by competent substantial evidence. Exh. PBC 11; TR. 91:9-13, 97:11-22, 213:1-4. Finding of Fact 62 is supported by competent substantial evidence. TR. 147:21-151:9, 998:9-18. Finding of Fact 64 is supported by competent substantial evidence. Exhs. J-27, SFWMD 24; TR. 100:24-101:3, 104:6-12, 107:7-17, 148:23-149:3, 149:20-23, 151:16-152:7. Finding of Fact 65 is supported by competent substantial evidence. Exh. J-27; TR. 148:23-149:3, 549:23-551:21, 586:3-18, 998:19-999:15, 1002:20-1003:7, 1050:20-1051:6. Finding of Fact 66 is supported by competent substantial evidence. TR.1005:24-1017:20, 1288:17-1289:21, 1316:20-1318:8. Finding of Fact 69 is supported by competent substantial evidence. TR. 144:2-146:25, 152:9-

[8] The City includes Finding of Fact 69 in the list of challenged findings in this exception, however makes no specific argument that the finding is not supported by competent substantial evidence. The City does not include Findings of Fact 62 and 73 in the list of challenged findings in this exception, but includes argument as to why they are not supported by competent substantial evidence. In an abundance of caution, Findings of Fact 62, 69 and 73 are addressed in this ruling.

153:22, 164:12-18, 561:20-587:18, 700:9-701:23,1051:8-13. Finding of Fact 70 is supported by competent substantial evidence. TR. 30:3-19, 159:12-161:9. Finding of Fact 71 is supported by competent substantial evidence. TR. 638:20-639:8, 643:10-12, 1015:9-1016:3. Finding of Fact 72 is supported by competent substantial evidence. TR. 141:20-172:20, 547:11-599:9, 616:17-712:18, 995:18-1048:10, 1159:23-1183:11, 1573:2-1708:11. Finding of Fact 73 is supported by competent substantial evidence. TR. 428:14-16, 681:5-15. Finding of Fact 74 is supported by competent substantial evidence. TR. 141:20-172:20, 547:11-599:9, 616:17-712:18, 995:18-1048:10, 1159:23-1183:11, 1573:2-1708:11.

Finally, Conclusions of Law 154, 159, and 160 are consistent with the ALJ's findings of fact. As explained in ruling on Staff's Exception paragraphs 26 through 31 and Applicants' Exception 2, supra, because Conclusion of Law 154 moots the issue addressed in Conclusion of Law 153, it is unnecessary to reject or clarify that conclusion.

Therefore, the City's Exception 5 is denied.

City's Exception 6 to Conclusions of Law 169, 170, 171, and 172

In Exception 6 the City alleges that the ALJ "erroneous[ly] consider[ed] and balanc[ed] . . . the public interest test factors required by Section 373.414(1)(a)" which states:

> (a) In determining whether an activity, which is in, on, or over surface waters or wetlands, as delineated in s. 373.421(1), and is regulated under this part, is not contrary to the public interest or is clearly in the public interest, the governing board or the department shall consider and balance the following criteria:
> 1. Whether the activity will adversely affect the public health, safety, or welfare or the property of others;
> 2. Whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;

3. Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;

4. Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;

5. Whether the activity will be of a temporary or permanent nature;

6. Whether the activity will adversely affect or will enhance significant historical and archaeological resources under the provisions of s. 267.061; and

7. The current condition and relative value of functions being performed by areas affected by the proposed activity.

§ 373.414(1)(a), Fla. Stat.

The ALJ concluded that the Project is not contrary to the public interest. *See* COL 172. However, it appears that the ALJ may have misnumbered the factors described in Conclusions of Law 169 and 170. Conclusion of Law 169 should refer to factors 3 (navigation) and 6 (historical and archaeological resources) which the parties stipulated were not in dispute.[9] Conclusion of Law 170 should refer to factors 2 (fish and wildlife), 4 (fishing or recreational values), and 7 (functions of the affected areas). This numbering should be corrected to avoid confusion but it does not change the ALJ's balancing of the public interest factors or ultimate conclusion that the Project is not contrary to the public interest. *See* COL 172.

The City is incorrect in its argument that the ALJ did not properly consider conservation of fish and wildlife (factor 2) and cites to findings of fact that there will be impacts. The ALJ considered both the impacts and the mitigation to offset those impacts. *See, e.g.,* FOFs 81, 85, 105, 124.

The City is incorrect in its argument that the ALJ failed to address impacts to fishing or recreational values or marine productivity (factor 4). The ALJ found the preservation

[9] The City acknowledged factors 3, 5, and 6 are not at issue. *See* Petitioner's Exceptions to Recommended Order at 35-36, Prehr'g Stip ¶¶ 47, 49.

of the areas included in DOT's conservation easements would benefit recreational values not only in Grassy Waters Preserve, but also Loxahatchee Slough Natural Area and Pond Cypress Natural Area. FOF 122.

The City is incorrect in its argument that the ALJ failed to address impacts to the current functions of the area affected (factor 7). The City points out that the ALJ found that Grassy Waters Preserve is an Everglades-like oligotrophic, high quality, pristine wetland. However, the ALJ also found that there are existing impacts in some of the areas affected by the Project and that mitigation will be provided to offset impacts. *See, e.g.*, FOFs 12, 13, 77, 91-107, 119-124.

The ALJ concludes that the Project will not adversely impact public health, safety, and welfare (factor 1). The City complains that in Conclusion of Law 171 the ALJ did not address adverse impacts that are already occurring in the Ibis Preserve and Grassy Waters Preserve owned by the City. However, factor 1 addresses whether the Project will cause adverse impacts, not whether adverse impacts are currently occurring. The ALJ's conclusion of law is consistent with the ALJ's findings of fact. *See* FOFs 75, 76; *see also* FOFs 6, 11, 29.

The City argues that the ALJ's conclusion, in Conclusion of Law 172, that the Project is not contrary to the public interest is not based on a full and adequate consideration of all of the factors, and refers back to their previous arguments. As explained above, Conclusions of Law 169 through 172 are adequately supported by findings of fact and the City's exception to public interest test factors 2, 4, 7, and 1 is nothing more than an attempt to reargue their case. Conclusions of Law 169 through 172 are consistent with the ALJ's findings of fact. These conclusions of law and associated

findings are consistent with the District's interpretation of its rules and criteria and its conclusion that, after balancing the all of the public interest test factors, the project is not contrary to the public interest. Exh. J-12.

Therefore, the City's Exception 6 is denied.

City's Exception 7 to Findings of Fact 72 and 74

The ALJ found that the City's expert's estimated total nutrient loading from all sources was not persuasive and it did not translate into physical effects in Grassy Waters. The City argues that the ALJ's findings lack the requisite amount of specificity to allow the District or a reviewing court to evaluate the findings. City Exception 7 overlaps City Exception 5 which also takes issue with the ALJ's findings about nutrient loads in Grassy Waters. The ALJ explains the credibility afforded the testimony of opposing experts in Findings of Fact 72 and 74 and explains the weight given to the testimony in Findings of Fact 66 through 69 and 73.[10] The ALJ is not required to address the testimony of every witness or every exhibit in his order or the weight given thereto, but should explain the weight and credibility he gives regarding the factual disputes that are relevant to the recommended disposition of the case. *Borges v. Dep't of Health*, 143 So. 32 1185 (Fla. 3d DCA 2014). This is what the ALJ does in these disputed findings of fact. The City requests the District overturn the ALJ's findings on the credibility of experts and weight of the evidence. These evidentiary-related matters are within the sole province of the ALJ as the fact-finder and the District may not disturb them. *See* Standard of Review section, supra.

[10] In their Exception 5, the City took exception to Findings of Fact 66, 69 through 71 and 73. Those findings are supported by competent substantial evidence as explained in the ruling on City's Exception 5, supra.

Therefore, the City's Exception 7 is denied.

City's Exception 8 to Findings of Fact 98, 115, 119, 120, 121, 122, 124 and 129; Conclusions of Law 147, 163, 164, 165, 166, and 167

The City takes exception to the ALJ's findings and conclusions that the Project will not cause a net adverse impact. The ALJ found that the proposed mitigation will offset the impacts to wetlands and other surface waters and ruled as a matter of law that the mitigation was sufficient to offset impacts from the Project. FOFs 119-122; COLs 163-167. The ALJ also found that the mitigation exceeds the District's rule requirements. FOF 124. The City argues that the ALJ is incorrect and that the conservation easements provided by DOT should not be considered to offset impacts because they were already restored and do not provide new mitigation.[11] The City is asking the District to reweigh the evidence on this issue.

The City also takes issue with the ALJ's Finding of Fact 115 that Pine Glades provides sufficient mitigation for Project impacts to snail kites. The ALJ's findings on this issue are based upon testimony provided by experts for the District and the City. The City is asking the District to judge the credibility of those witnesses and reweigh the evidence.

The City takes exception to Finding of Fact 98 which states, "The City did not challenge the UMAM scoring." However, the ALJ's finding is consistent with the City's expert's testimony.[12] Again, the City requests the District to reweigh the evidence on this issue.

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[11] The City did not challenge Finding of Fact 123 where the ALJ found that the conservation easement areas did not receive UMAM credits to reduce the acreage needed to offset wetland functional losses, but they were included in the mitigation credit for snail kites and other wildlife.

[12] *See* Lodge at TR. 329:22-331:3; Erwin at 813:22-814:22.

The City also takes issue with the ALJ's finding and conclusion, Finding of Fact 129 and Conclusion of Law 147, that the District was correct in determining that the Applicants met the "opt-out" test in District rules. This test allows an applicant to avoid design modifications to reduce or eliminate wetland impacts if the adversely affected area has low ecological value and the proposed mitigation provides greater long term ecological value, or when the mitigation implements all or part of a plan providing regional ecological value and greater long-term ecological value than the affected wetlands. The City requests the District to reweigh the evidence and reargues its position that the District and the ALJ erred in discounting the unique and pristine quality of Grassy Waters "by concluding that such run-of-the-mill mitigation can replace these impacts." Petitioner's Exceptions to Recommended Order at 43.

The City generally argues there is no competent substantial evidence in the record to support the ALJ's findings of fact and conclusions of law because he ignored, misapprehended, or failed to credit the testimony of various witnesses. These evidentiary-related matters are within the sole province of the ALJ as the fact-finder and the District may not disturb them. *See* Standard of Review section, supra.

Finding of Fact 98 is supported by competent substantial evidence. TR. 329:22-331:3, 813:22-814:22. Finding of Fact 115 is supported by competent substantial evidence. TR. 901:21-903:11, 908:23-909:4. Finding of Fact 119 is supported by competent substantial evidence. Exh. J-9; TR. 192:16-193:6, 226:9-17, 239:13-20, 1368:2-9. Finding of Fact 120 is supported by competent substantial evidence. Exh. J-9; TR. 192:16-193:6, 226:9-17, 239:13-20, 1356:11-15, 1368:2-9. Finding of Fact 121 is supported by competent substantial evidence. Exh. J-9; TR. 192:16-193:6, 226:9-17,

239:13-20, 1368:2-9. Finding of Fact 122 is supported by competent substantial evidence. Exh. J-9; TR. 239:21-25, 1368:23-1369:1. Finding of Fact 124 is supported by competent substantial evidence. Exh. J-9; Tr. 1134:1-1136:3, 1352:4-1355:10, 1361:1-24, 1369:6, 1378:4-15, 1381:25-1382:9, 1388:4-23. Finding of Fact 129 is supported by competent substantial evidence. Exh. J-9; TR. 1109:11-1111:14, 1113:5-1118-15, 1371:20-1373:1.

Conclusions of Law 147, 163, 164, 165, 166, and 167 are consistent with the ALJ's findings of fact and are correct interpretations of District rules and criteria for issuance of an ERP.

Therefore, the City's Exceptions 8 is denied.

City's Exception 9

In Exception 9, the City invites the District to use its discretion to look beyond its ERP criteria and deny the subject permit based on overarching policy considerations. This is an improper exception which essentially asks the District to overlook its statutes, rules, criteria and the findings of the ALJ and rule in the City's favor. *See* § 120.57(1)(k), Fla. Stat. The District declines the invitation.

Therefore, the City's Exception 9 is denied.

V. CORRECTIONS AND MODIFICATIONS TO THE RECOMMENDED ORDER

As explained in ruling on Staff Exception paragraphs 32 and 33, The following sentence is added to the end of Conclusion of Law 157: "The District defers to DEP on its substantive rules."

As explained in ruling on Staff Exception paragraphs 34 through 41, Conclusion of Law 162 is deleted.

As explained in ruling on Staff Exception paragraph 42, the lists of District admitted exhibits on page 4 is revised by adding "26" to the list.

As explained in ruling on Applicants' Exception 3, the contents of Endnotes 3 and 4 are switched. Therefore, the Recommended Order is corrected to reflect Endnote 3 is renumbered 4 and Endnote 4 is renumbered 3.

As explained in ruling on City's Exception 6, Conclusion of Law 169 is corrected to substitute the reference to factors 1 and 2 with 3 and 6, respectively. Conclusion of Law 170 is corrected to delete reference to factor 3, and add factors 4 and 7 to the parenthetical reference to the factor numbers.

Additionally, there are some corrections to the Recommended Order not specifically requested by the parties. In Finding of Fact 45, the ALJ cites to Rule 62-302.530(48)(b), Florida Administrative Code, for the narrative nutrient standard rule language. However, that rule was modified effective November 16, 2016, which resulted in the renumbering of the rule provision to 62-302.530(90)(b), Florida Administrative Code. Therefore, the last sentence of Finding of Fact 45 is modified to substitute the correct rule citation.

Also, in Finding of Fact 130 there is a scrivener's error in the first sentence where the ALJ appears to have inadvertently left out the word "water" after "surface" which should be corrected to make the sentence clear. Therefore, the first sentence of Finding of Fact 130 is modified to state "[t]he ecological value of the functions provided by the affected wetlands and surface water is low . . .."

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. Staff's exceptions are granted in part and denied in part for the reasons set forth above.

B. Applicants' exceptions are granted in part and denied in part for the reasons set forth above.

C. City's exceptions are denied for the reasons set forth above.

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

E. Issuance of Permit Number 50-05422-P to Applicants on the terms and conditions set forth in the Staff Report, as modified in the August 19, 2016 proposed revisions to the Staff Report, and the complete Application for the Permit, is approved.

F. 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.

DONE AND ORDERED this 21 day of May, 2017, in West Palm Beach, Florida.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT

Peter Antonacci, Executive Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by electronic mail on this 9th day of May, 2017, to all counsel of record listed below.

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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, 3301 Gun Club Road, West Palm Beach, Florida 33406.

- 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.