STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

SUNCOAST WATERKEEPER, INC.; FLORIDA INSTITUTE FOR SALTWATER HERITAGE, INC.; AND JOSEPH MCCLASH,		
Petitioners,		
vs.	**OGC CASE Nos.**	**17-0002**
		17-0012
LONG BAR POINT, LLLP, and DEPARTMENT OF ENVIRONMENTAL PROTECTION,	**DOAH CASE Nos.**	**17-0795**
		17-0796
Respondents.		

FINAL ORDER

An Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH) on March 6, 2018, 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. DEP and the Petitioner Joseph McClash (McClash) timely filed Exceptions on March 12, 2018, and March 19, 2018, respectively.[1] Respondent Long Bar Pointe, LLLP filed responses to McClash's exceptions on March 29, 2018. DEP filed responses to McClash's exceptions on April 4, 2018. This matter is now before the Secretary of the Department for final agency action.

[1] On March 26 and 27, 2018, DEP timely filed a Motion for Extension of Time and an Amended Motion for Extension of Time, respectively, requesting a ten (10) day extension of time to file responses to the exceptions, and the agency's final order. The permit applicant Long Bar Point and petitioner McClash had no objection to either extension of time. Petitioners Suncoast Waterkeeper, Inc., and Florida Institute for Saltwater Heritage, Inc., advised DEP that they took no position on DEP's amended motion. DEP granted the motion on March 28, 2018.

BACKGROUND

By letter dated December 16, 2017, the Department of Environmental Protection (Department) issued its Notice of Intent to Issue Mitigation Bank Permit No. 0338349-002 (Notice) authorizing Long Bar to establish the Long Bar Pointe Mitigation Bank on a 260.80-acre site in Manatee County. The Notice indicates that a total of 18.01 potential mitigation bank credits will be awarded.

Petitioners, Suncoast Waterkeeper, Inc. (Suncoast), and Florida Institute for Saltwater Heritage, Inc. (FISH), timely filed a Verified Petition challenging the agency action. After the initial pleading was dismissed by the Department, an Amended Verified Petition was filed. The matter was referred to the Division of Administrative Hearings (DOAH) and assigned Case No. 17-0795. Petitioner, Joseph McClash (McClash), also timely filed a Verified Petition challenging the same action. After his initial pleading was dismissed by the Department, a First Amended Verified Petition for Formal Administrative Hearing was filed. This filing was referred to DOAH and assigned Case No. 17-0796. The two cases were then consolidated.

At the hearing, Petitioners jointly presented the testimony of seven witnesses, including Mr. McClash. Also, Petitioners' Exhibits 1 through 47, 55 (treated as hearsay only), 63, 67 (Land Use Map only), 78, and 81 (except the Key West photograph) were accepted in evidence. The remainder of Exhibit 67 and Exhibits 68, 69, and 75 were accepted on a proffer basis only. Long Bar presented the testimony of two witnesses. Long Bar Exhibits 1 through 12 were accepted in evidence. The Department presented no witnesses; however, Department Exhibit 1 was accepted in evidence. Finally, Joint Exhibit 1 was accepted in evidence.

A two-volume Transcript of the hearing was prepared. Proposed findings of fact and conclusions of law were filed by the parties on February 16 and 19, 2018, and they have been considered in the preparation of this Recommended Order.

SUMMARY OF THE RECOMMENDED ORDER

On December 16, 2017, the Department of Environmental Protection (Department) issued its Notice of Intent to Issue Mitigation Bank Permit No. 0338349-002 (Notice) authorizing Long Bar to establish the Long Bar Pointe Mitigation Bank on a 260.80-acre site in Manatee County. The Notice specifies that a total of 18.01 potential mitigation bank credits will be awarded. In the RO, the ALJ recommended that the Department enter a final order issuing the proposed Mitigation Bank Permit No. 0338349-002 (the Project) to Long Bar. (RO at page 26).

The Project Site

The location of the proposed mitigation bank is a 260.80-acre site in western Manatee County, west of El Conquistador Parkway and 75th Street West, and an adjacent unsurveyed portion of Sarasota Bay, an Outstanding Florida Water (OFW), Class II Waters. Around half of the site is adjacent to agricultural lands that may be developed with a mixed use residential/commercial project. The other half is contiguous with Sarasota Bay and/or existing conservation lands. The project site has more than two miles of shoreline making it the largest continuous mangrove shoreline along Sarasota Bay. The site is near other properties with high ecological value, such as Emerson Point, Robinson Preserve, Neal Preserve, Tidy Island, Sister Keys, and Legends Bay. All these properties are conservation lands. Long Bar has a sufficient real property interest to conduct the proposed activities. (RO ¶ 10).

Based on historic aerial photography, the area encompassing the Project site has remained essentially undeveloped since 1944, except for mosquito ditching conducted in the northwestern portion of the property from the 1940s to the 1970s, and agricultural ditching adjacent to and within some portions of the site. (RO ¶ 11).

The site is dissected by four, approximately 30-foot-wide strips of land owned by Manatee Fruit Company (MFC), which are excluded from the credit assessment. However, Long Bar has sufficient ownership interest in the MFC strips of land and will be required to maintain the area free of debris and nuisance and exotic vegetation. (RO ¶ 12).

The Town of Longboat Key also has a 30-foot-wide easement in the southeastern portion of the site, which will be preserved, enhanced, and maintained similar to the adjacent area of the project site, but is excluded from the credit assessment. (RO ¶ 13).

The project site consists of privately-owned submerged Sarasota Bay bottomlands that are dominated by seagrasses, mangrove swamps, mangrove hedges, areas of salt marsh/saltern, coastal freshwater herbaceous wetlands, and areas of coastal uplands. (RO ¶ 14).

The seagrass areas are dominated by shoal grass with patches of turtle grass in deeper pockets. The mangrove areas are predominately black mangroves, mixed with red mangroves closer to the shoreline and with white mangroves in the more landward mangrove areas. The salt marsh/saltern area is generally open and sandy, but supports some herbaceous vegetation, such as buttonwood, glasswort, and saltwort. The coastal freshwater herbaceous wetlands and much of the coastal uplands are currently dominated by a near monoculture of invasive exotic Brazilian Pepper, though areas of intact maritime hammock remain. Brazilian Pepper is present in the ecotone areas (the transition area between two communities) between the freshwater herbaceous

and mangrove swamp assessment areas. There are also spoil mounds within the mangrove swamp assessment areas. (RO ¶ 15).

Mitigation Bank Permits

Section 373.403(19), Florida Statutes, defines a mitigation bank as "a project permitted under Section 373.4136 undertaken to provide for the withdrawal of mitigation credits to offset adverse impacts authorized" by an environmental resource permit (ERP) issued under Part IV, chapter 373. A mitigation bank permit is a type of ERP. *See* Fla. Admin. Code R. 62-330.301(3). (RO ¶ 16).

Section 373.4136(1) authorizes the Department and water management districts to require an ERP to establish, implement, and operate a mitigation bank. A bank acts as a repository for wetland mitigation credits that can be used to offset adverse impacts to wetlands that occur as the result of future ERP projects. A bank is designed to "enhance the certainty of mitigation and provide ecological value due to the improved likelihood of environmental success associated with their proper construction, maintenance, and management," often within larger, contiguous, and intact ecosystems. (RO ¶ 17).

The Department and the water management districts are directed to participate in and encourage the establishment of mitigation banks. § 373.4135(1), Fla. Stat. (2017). Mitigation banks are intended to "emphasize the restoration and enhancement of degraded ecosystems and the preservation of uplands and wetlands as intact ecosystems." *Id.* [2] (RO ¶ 18).

A mitigation bank is to be awarded mitigation credits by the permitting agency. § 373.4136(4), Fla. Stat. (2017). A mitigation credit is a "standard unit of measure which

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[2] The ALJ inadvertently cited to subsection 373.4135(1), when it appears he intended to cite to subsection 373.4136(1), Florida Statutes. This final order is modified to reflect this corrected statutory citation.

represents the increase in ecological value resulting from restoration, enhancement, preservation, or creation activities." Fla. Admin. Code R. 62-345.200(8). The number of credits must be "based upon the degree of improvement in ecological value expected to result from the establishment and operation of the mitigation bank as determined using a functional assessment methodology." § 373.4136(4), Fla. Stat. (2017). In this case, the Department is proposing to issue 18.01 credits. (RO ¶ 19).

Mitigation Service Area (MSA)

Rule 62-342.600 requires the establishment of a MSA for a mitigation bank. An MSA is a geographical area within which adverse impacts may be offset by the bank credits. A single MSA is proposed for the Project, covering both freshwater and saltwater credits. The MSA includes portions of Charlotte, Manatee, and Sarasota Counties within the South Coastal Drainage Basin and portions of the Manatee River Basin west of Interstate 75 and the portion of the Tampa Bay Drainage Basin located west of Interstate 75 and south and west of Interstate 275. Credits are not allowed for use outside the MSA, except as authorized by section 373.4136(6)(d), Fla. Stat. (2017). (RO ¶ 20).

Criteria for a Mitigation Bank

Besides statutory criteria in section 373.4136(1), several Department rules applies to the creation of a mitigation bank. Rule 62-342.400 sets forth criteria specifically applicable to a mitigation bank. Rule 62-330.301 sets forth criteria for the issuance of an ERP, while rule 62-330.302 establishes additional ERP criteria that form the basis for the public interest test. In the Joint Pre-hearing Stipulation, Petitioners agree that only the criteria in rule 62-330.301(1)(d) and (f), rule 62-330.302(1)(a)2., 4., and 5., and rule 62-342.400(1)(a)-(f) are at issue. Petitioners also

agree that Long Bar has provided reasonable assurance regarding all requirements of financial responsibility. (RO ¶ 21).

The Project

Most of the proposed mitigation bank Project site is mangrove swamp and privately owned submerged seagrass bottomlands that are proposed for preservation only. The site also contains areas of coastal freshwater marsh and coastal uplands that are currently degraded by invasive exotic vegetation which will be enhanced through removal of invasive exotic vegetation, planting of desirable vegetation, and implementation of a perpetual management plan. No wetland creation or dredging or filling activities are proposed for the Project. (RO ¶ 23).

The Project has the potential to generate several credit types, including seagrass, mangrove swamp, mangrove hedge, salt marsh/saltern, and freshwater herbaceous credits. The credit release schedule provides for an initial credit release upon recordation of a conservation easement and establishment of financial assurance mechanisms, followed by a series of potential credit releases based on satisfactory completion of specified mitigation activities, and a final credit release once all success criteria are met. (RO ¶ 24).

Prior to the release of credits, the site will be preserved by a conservation easement in favor of both the Department and Southwest Florida Water Management District. Long Bar will establish financial assurance performance bonds for construction, implementation and perpetual management. Financial assurance is required to ensure the Project reaches success, it remains in compliance, and perpetual management activities have a dedicated funding source. (RO ¶ 25).

In addition to protection provided by the conservation easement, Long Bar proposes implementing a Seagrass Informational Buoy Placement Plan (Plan) to provide additional

protection to the submerged seagrass beds within and near the Project. The Plan contemplates installation of non-regulatory seagrass information buoys at approximately the three-foot bathymetric contour along the Project site, which follows the traditional unmarked navigational channel where they can be readily seen. The buoys will inform boaters of the presence of seagrasses surrounding the Project site, which support significant estuarine habitats and can be harmed or destroyed from vessel groundings or prop scarring. Installation of the buoys will provide a significant public benefit in that it should significantly reduce or eliminate prop scars within the seagrass beds along the Project site. The ALJ found no credible evidence that signage would attract inexperienced boaters who will damage the seagrasses in the area. (RO ¶ 26).

No mangrove trimming is authorized by the permit. Pursuant to a Conceptual Mangrove Trimming Plan, attached to the permit as Attachment A, Long Bar has reserved the right to trim approximately 30 percent of the onsite mangrove acreage to a minimum height of 12 feet, as measured from the substrate. No trimming will be allowed within the Project's mangrove swamps that are greater than 500 feet in width from the shoreline, and no trimming can result in fragmentation of the remaining intact mangrove forest into more than four individual fragments. Prior to the initial release of credits, Long Bar must develop and submit a Final Mangrove Trimming Plan and modify the permit to substitute the final plan for the conceptual plan, adjust the assessment area configuration and acreages, and recalculate the total potential mitigation credits. (RO ¶ 28). Any future mangrove trimming must be conducted by a licensed professional mangrove trimmer in accordance with a mangrove trimming permit issued under section 373.327, Fla. Stat. (2017). Long Bar's reserved right to conduct limited mangrove trimming was accounted for in the credit scores. (RO ¶ 29).

Many of the current communities on the site are similar to the types of communities that would have been present historically but have been adversely affected by invasion of nuisance and exotic vegetation, including Brazilian Pepper and Australian Pine. Accordingly, the Project involves a number of enhancement activities on the site. Approximately 17.35 acres of degraded coastal freshwater marsh will be enhanced by removing invasive exotic vegetation and replanting with appropriate native vegetation. Approximately 13.13 acres of degraded coastal uplands will be enhanced by removing invasive exotic vegetation and replanting with appropriate native vegetation. Approximately 6.44 acres of relatively intact coastal uplands will be enhanced by removing nuisance vines and exotic vegetation. All areas of preserved mangroves and salt marsh/saltern will be treated to remove existing low levels of nuisance and invasive exotic vegetation. (RO ¶ 30).

Although the proposed activities are expected to maintain and enhance site conditions in perpetuity, Long Bar will employ other strategies, based on continual evaluation of environmental data collected from the site, to ensure the goals of the Project continue to be met in perpetuity. (RO ¶ 31).

Long Bar will implement a Security Plan to take all measures necessary to ensure the integrity of the Project is upheld in perpetuity. Large hole 50-inch high hog fencing will be installed at the Project boundary where it interfaces with offsite areas to ensure separation and protection from any future development on adjacent lands. Fencing will act as a barrier to deter trespassing, but will still allow wildlife to move across and into the Project site. Conservation easement signage will also be installed at a minimum of every 300 feet, and at every bank boundary turn along the fence line. Long Bar will conduct quarterly inspections of the fencing and signage, as well as Project site lands, and repair or replace fencing as soon as the need is

discovered. Any trash and other debris will be removed during site inspections either by hand or by a method that minimizes disturbances to Project lands. If habitat impacts are discovered during an inspection, adaptive management actions will be implemented. (RO ¶ 32)

After the Project's final success criteria are met, the Perpetual Management Plan will ensure that the Project is managed by Long Bar in a manner that ensures all permit conditions are maintained. The Perpetual Management Plan includes quarterly inspections of the Project site, and security measures. (RO ¶ 33).

The Calculation of Credits

The Department's chapter 62-345, known as the Uniform Mitigation Assessment Method (UMAM) rule, provides a standardized procedure to assess the functions provided by wetlands and other surface waters, the amount those functions are decreased by a proposed project, and the amount of mitigation necessary to offset that loss. UMAM is the sole means to determine the amount of mitigation credits to be awarded to mitigation banks, such as Long Bar. (RO ¶ 34).

When applying UMAM, reasonable scientific judgment must be used. Even though UMAM is a standardized procedure, UMAM is not a precise assessment, and in the exercise of reasonable scientific judgment, two scientists can arrive at different results. (RO ¶ 35).

In general terms, the UMAM analysis consists of two parts. Part I is a qualitative characterization of the property, which divides the property into assessment areas. Part II assigns mitigation bank credits to those areas based on scoring criteria established in UMAM. (RO ¶ 36).

The mitigation proposal for the Long Bar Mitigation Bank was assessed by the Department using UMAM. The Department determined that the Project had the potential to generate a total of 18.01 credits. These credits are differentiated as 7.38 for seagrass-dominated

submerged bottomlands, 0.23 for salt marsh/saltern, 7.07 for mangrove swamps, 0.68 for trimmed mangrove hedge, and 2.65 for coastal freshwater marsh. (RO ¶ 37).

The environmental communities present at the site are subdivided into 47 different assessment areas. The assessment areas were established by Long Bar's expert, Mr. Hoffner, who has worked on the Project since 2014 and has spent hundreds of hours evaluating the site. The assessment areas were generally grouped into seagrass, mangrove, saltwater, salt marsh, freshwater marsh, and uplands, and then sub-assessed based on their proximity to different habitats and different activities within the bank. (RO ¶ 38).

Assessment area boundaries were based upon aerial photography interpretation, the Florida Land Use, Cover and Forms Classification System, habitat maps, Natural Resources Conservation Service soil maps, site inspections, a formal wetlands jurisdiction determination, surveys performed by professional land surveyors, field verification, and reasonable scientific judgment. The record shows that ecotone community boundaries in the environment do not often have distinct lines of demarcation. Two adjacent communities can be identified as unique assessment areas and yet have ecotone areas that share characteristics of both communities. (RO ¶ 39).

The Department's expert, Mr. Rach, verified the boundaries of the bank and assessment areas both in the field and through aerial photographs and descriptions provided by the applicant. Mr. Rach reiterated that the determination of assessment areas is not an exact science and requires the use of scientific judgment. He determined that Long Bar provided sufficient information for each assessment area to be evaluated under the second part of the UMAM analysis and they provided an appropriate frame of reference to use in the Part II evaluation. (RO ¶ 40).

While Petitioners' expert, Mr. Hull, disagreed with the assessment area boundaries, he agreed that UMAM is not an exact science. He conceded that he was not sure whether he visited every assessment area on the site, and he was unable to provide an explanation of where he believed each specific boundary should be located. (RO ¶ 41).

The ALJ found that the Petitioners did not establish by a preponderance of the evidence that the assessment areas are in contravention of Department rules. (RO ¶ 42).

The Department's scoring of the Project was determined by review of the UMAM scores provided by Long Bar, review of available information provided, numerous discussions with Long Bar, and field work. The Department's summary of the credit evaluation for each of the 47 assessment areas is contained in Condition 11 of the permit and was accepted by the ALJ as being the most persuasive on this issue. The actual scores for each assessment area are contained in Exhibit H of the draft permit. (RO ¶ 43).

While Mr. Hull disagreed with the scoring of the project, the ALJ found that the difference between Mr. Hull's and Long Bar's numbers are a reflection in the difference in the application of reasonable scientific judgment. (RO ¶ 44).

The ALJ found that the Petitioners failed to prove by a preponderance of the evidence that the Department's determination that the project could generate 18.01 credits was incorrect. (RO ¶ 45).

Petitioners' Objections

Petitioners raise three broad objections in their PROs. First, they contend no credits should be awarded to Long Bar for seagrasses, or that a much smaller number is appropriate. Second, they contend fewer credits should be awarded for areas where mature mangroves that are 40 to 50 feet in height could be trimmed to 12 feet simply to provide a view for future

residents of the adjacent upland residential development conceptually proposed by Long Bar. Finally, they contend the site is bisected by a 100-foot gap that is excluded from the bank because Long Bar intends to allow future access from the planned adjacent upland residential development to the shoreline. They argue that by creating this gap, Long Bar fails to maintain an intact ecosystem. Given these considerations, Suncoast and FISH contend that no more than 4.18 mitigation credits should be awarded, while Mr. McClash argues that the application should be denied. (RO ¶ 46).

As to the first issue, Petitioners generally contend that in the seagrass areas, the bank is focused on preservation only, and not restoration, and therefore no additional protection or functional lift will be provided for any seagrass assessment areas. To begin with, preservation is a goal expressly included in the UMAM rule, which emphasizes preservation of undegraded areas and restoration of degraded systems over alteration of existing landscapes to create artificial wetlands. The proposed conservation easement increases protection to the wetlands and other surface waters in the site by preventing structures (such as docks or piers) within the seagrass assessment areas. As previously found, there will also be enhancement activities in adjacent assessment areas. In short, the steps being proposed by Long Bar provide additional protection to the seagrasses. Consequently, the ALJ found that the proposed UMAM seagrass score is appropriate. (RO ¶ 47).

As to the second issue, no mangrove trimming is authorized by the permit. Long Bar has, however, reserved the right to modify the permit to trim approximately 30 percent of the onsite mangrove acreage to a minimum height of 12 feet, as measured from the substrate. The potential trimming was properly accounted for in the UMAM scores. If Long Bar chooses not to implement the proposed trimming, it would likely receive more credits. Notably, no trimming

can fragment the remaining intact mangrove forest into more than four individual fragments. Also, prior to the release of credits, Long Bar must develop and submit a final mangrove trimming plan, modify the permit, adjust the assessment area configuration and acreages, and recalculate the total potential mitigation credits. The ALJ found the Petitioners did not prove by a preponderance of the evidence that mangrove trimming affects the Department's assessment of the number of credits to be awarded. (RO ¶ 48).

Finally, the exclusion of a 100-foot gap from the conservation easement does not diminish the value of the bank as an intact system as a whole. While this area will not be included in the recorded plans, this will not fragment an intact ecosystem. No construction is proposed in the gap, and current Manatee County regulations do not allow for dredging in this area. Therefore, wildlife using the site will be able to continue to use the excluded area and traverse the gap, regardless of the lines drawn on a set of plans. The net effect of the Project is to preserve approximately two miles of intact shoreline. The ALJ found that the more persuasive evidence supports a finding that the 100-foot wide strip does not affect the overall suitability of the site as a mitigation bank. The ALJ also found the Petitioners did not prove by a preponderance of the evidence that the so-called "gap" impacts the number of credits to be awarded. (RO ¶ 49).

Compliance with Applicable Criteria

The ALJ found that the preponderance of the evidence supports a finding that Long Bar has satisfied all criteria in rule 62-330.301 for the issuance of an ERP. (RO ¶ 50).

The ALJ also found that the preponderance of the evidence supports a finding that Long Bar has established that the Project is clearly in the public interest, as required by rule 62-330.302(1), Florida Statutes. (RO ¶ 51).

The ALJ furthermore found that the preponderance of the evidence supports a finding that Long Bar has satisfied all criteria for establishing a mitigation bank, as required by rule 62-342.400, Florida Statutes. (RO ¶ 52).

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. (2017); *Charlotte County v. IMC Phosphates Co.*, 18 So. 3d 1089 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So. 2d 61 (Fla. 1st DCA 2007). The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value or weight of the evidence. Rather, "competent substantial evidence" refers to the existence of some evidence 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 County School Bd.*, 652 So. 2d 894, 896 (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 Constr. Co. v. Dyer*, 592 So. 2d 276, 280 (Fla. 1st DCA 1991); *Conshor, Inc. v. Roberts*, 498 So. 2d 622, 623 (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 Reg'l 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 County*, 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

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. (2017). 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.*

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. Coal. of Fla., Inc. v. Broward County*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Med. 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. (2017); *Barfield v. Dep't of Health*, 805 So. 2d 1008 (Fla. 1st DCA 2001); *Fla. Public Employee Council, v. Daniels,* 646 So. 2d 813, 816 (Fla. 1st DCA 1994).

RULINGS ON MCCLASH'S EXCEPTIONS

The ALJ concluded that McClash's objections to the mitigation bank permit are "too speculative to give rise to standing under chapter 120." (RO ¶ 55). However, the Department is ruling on McClash's exceptions in accordance with the requirements of Section 120.57(1)(k), Florida Statutes. *See* the Department's ruling on McClash's Exception No. 7 below.

MCCLASH's Exception No. 1 regarding Paragraph 21

McClash takes exception to the findings of fact in paragraph 21, which states in pertinent part, that "[i]n the Joint Pre-hearing Stipulation, Petitioners agree that only the criteria in rule 62-330.301(1)(d) and (f), rule 62-330.302(1)(a)2., 4., and 5., and rule 62-342.400(1)(a) – (f) are at issue." McClash contends that rule Chapter 62-345, known as the Uniform Mitigation Assessment Method (UMAM) should have been included in the list of rules listed in RO paragraph 21. However, paragraph 21 of the RO is titled "Criteria for a Mitigation Bank." Upon reviewing the RO in its entirety, paragraph 21 appears intended to identify the rule criteria the Department applies to review a mitigation bank permit application, but it is not intended as an

exhaustive list of rules in dispute in the case. Contrary to McClash's assertions, the ALJ does address application of the UMAM rule in the RO under a subheading titled "Calculation of Credits" on pages 16-20.

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. (2017); *Charlotte County v. IMC Phosphates Co.*, 18 So. 3d 1089 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So. 2d 61 (Fla. 1st DCA 2007). Contrary to McClash's arguments, the ALJ's findings of fact in paragraph 21 are supported by competent substantial record evidence. Joint Pre-Hearing Stipulation, ¶¶ 35-49, 54-55, 57, 60-96).

Based on the foregoing reasons, including the ALJ's findings of fact, McClash's Exception No. 1 is denied.

MCCLASH's Exception Nos. 2, 2a, 2b, 2c, and 2d regarding Paragraphs 43, 44, and 45

McClash takes exception to findings of fact in paragraphs 43, 44, and 45, in what he has identified as Exception Nos. 2, 2a, 2b, 2c, and 2d.

Paragraphs 43, 44, and 45 read as follows:

> 43. The Department's scoring of the Project was determined by review of the UMAM scores provided by Long Bar, review of available information provided, numerous discussions with Long Bar, and field work. The Department's summary of the credit evaluation for each of the 47 assessment areas is contained in Condition 11 of the permit and is accepted as being the most persuasive on this issue. The actual scores for each assessment area are contained in Exhibit H of the draft permit.
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> 44. While Mr. Hull disagreed with the scoring of the project, the difference between his and Long Bar's numbers are a reflection in the difference in the application of reasonable scientific judgment.

45. Petitioners failed to prove by a preponderance of the evidence that the Department's determination that the project could generate 18.01 credits was incorrect.

RO ¶¶ 43-45. Exception No. 2 appears to be a heading summarizing McClash's arguments for Exception Nos. 2a through 2d. Consequently, the Department incorporates its responses to Exception Nos. 2a through 2e herein. Moreover, McClash fails to identify the legal basis for Exception No. 2 and fails to include any citations to the record in accordance with Section 120.57(1)(k), F.S. and Rule 28-106.217, F.A.C.

Based on the foregoing reasons, including the ALJ's findings of fact, McClash's Exception No. 2 is denied.

MCCLASH's Exception No. 2a. regarding Paragraphs 43, 44, and 45

McClash's exception No. 2a takes exception to the ALJ's findings of fact in paragraph 43. McClash takes exception with the ALJ's finding that "The Department's summary of the credit evaluation for each of the 47 assessment areas is contained in Condition 11 of the permit and is accepted as being the most persuasive on this issue. The actual scores for each assessment area are contained in Exhibit H of the draft permit." (RO ¶ 43). Specifically, McClash takes exception that the permit applicant did not submit any Part II UMAM forms as part of the application. However, Part II UMAM forms are not required to be submitted as part of a mitigation bank permit application, either by the UMAM rules, or other applicable mitigation bank rules. *See* Chapter 242, Fla. Admin. Code and Chapter 245, Fla. Admin. Code.

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. (2017); *Charlotte County v. IMC Phosphates Co.*, 18 So. 3d 1089 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So. 2d 61 (Fla. 1st DCA 2007).

Contrary to McClash's arguments, the ALJ's findings in paragraph 43 are supported by competent substantial evidence. The UMAM scores were provided by Long Bar as part of its application (Joint Exhibit 1J, p. 2). The Department reviewed these scores and additional available information, had numerous discussions with Long Bar, and conducted field inspections. (Rach, T. Vol. I, pp. 158-238). The summary of the Department's credit evaluation is contained in Condition 11 of the Permit (Joint Exhibit 1N, pp. 23-27), which the ALJ stated in paragraph 43 "is accepted as being the most persuasive on this issue." The actual UMAM scores are contained in Exhibit H of the draft permit. (Hoffner, T. Vol. I, pp. 81-106; Rach, T. Vol. I, pp. 166-67, Joint Exhibit 1N, pp. 80-81).

McClash seeks to have the Department reweigh the evidence. However, 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*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307; *Dunham*, 652 So. 2d at 896. 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.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623. Since the findings of fact disputed by McClash in Exception 2a are based on competent substantial evidence, the Department may not reject the ALJ's findings of fact.

Based on the foregoing reasons, including the ALJ's findings of fact, McClash's Exception No. 2a. is denied.

MCCLASH's Exception No. 2b. regarding Paragraphs 43, 44, and 45

McClash's exception No. 2b takes exception to the ALJ's findings of fact in paragraphs 44 and 45, which provide:

> 44. While Mr. Hull disagreed with the scoring of the project, the difference between his and Long Bar's numbers are a reflection in the difference in the application of reasonable scientific judgment."
>
> 45. Petitioners failed to provide by a preponderance of the evidence that the Department's determination that the project could generate 18.01 credits was incorrect.

RO ¶¶ 44, 45.

McClash disagrees with the ALJ's findings of fact regarding the UMAM scoring of the project for the mitigation bank, and with the ALJ's finding that the petitioner failed to prove that the Department's determination that the project could generate 18.01 credits was incorrect.

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. (2017); *Charlotte County v. IMC Phosphates Co.*, 18 So. 3d 1089 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So. 2d 61 (Fla. 1st DCA 2007).

The ALJ's findings of fact in paragraph 44 are supported by competent substantial evidence. While the Petitioners' own expert, Clark Hull, disagreed with the scoring of the project, he acknowledged that determining UMAM scores is not a precise assessment and requires reasonable scientific judgment. (Pre-Hearing Stipulation ¶ 57; Joint Exhibit 1N, pp 80-81; Hoffner, T. Vol. I, pp. 76-77; Rach, T. Vol. I, pp. 165-166, 237-238; Hull, T. Vol. II, pp. 436-437).

Moreover, McClash mischaracterizes Alec Hoffner's testimony regarding how he scored the P-factor. Mr. Hoffner did not testify that he only considered one of the five preservation adjustment factor considerations when determining the P-factor. Instead, competent substantial evidence was provided at the hearing regarding how the Petitioner applied and the Department reviewed all five preservation adjustment factors. (Hoffner, T. Vol. I, pp. 62-65, 73-74, 77-78, 94; Joint Exhibit 1A, p. 1-292; Joint Exhibit 1N, p. 502).

The record also contains competent substantial evidence to support the ALJ's findings of fact in paragraph 45 regarding how many credits the project would generate. (Hoffner, T. Vol. I, pp. 81-106; Rach, T. Vol. I, pp. 166-167; Joint Exhibit 1J, p. 2; Joint Exhibit 1N, pp. 80-81).

McClash seeks to have the Department reweigh the evidence. However, 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*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307; *Dunham*, 652 So. 2d at 896. The ALJ is entitled to rely on the testimony of a single witness even if that testimony contradicts the testimony of a number of other witnesses. *Lantz v. Smith*, 106 So. 3d 518, 521 (Fla. 1st DCA 2013). 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.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623. Since the findings of fact disputed by McClash in Exception 2b are based on competent substantial evidence, the Department may not reject the ALJ's findings of fact.

Based on the foregoing reasons, including the ALJ's findings of fact, McClash's Exception No. 2b. is denied.

MCCLASH's Exception No. 2c. regarding Paragraphs 43, 44, and 45

McClash takes exception to the ALJ's findings of fact in paragraphs 43, 44, and 45 regarding assessment of the project to determine the project's UMAM score, and the lift generated for the water environment score.

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. (2017); *Charlotte County v. IMC Phosphates Co.*, 18 So. 3d 1089 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So. 2d 61 (Fla. 1st DCA 2007).

Contrary to McClash's arguments, the ALJ's findings in paragraph 43 are supported by competent substantial evidence. The UMAM scores were provided by Long Bar as part of its application. (Joint Exhibit 1N, pp. 80-81; Joint Exhibit 1J, p. 2). The Department reviewed these scores and additional available information, had numerous discussions with Long Bar, and conducted field inspections. (Rach, T. Vol. I, pp. 166). The summary of the Department's credit evaluation is contained in Condition 11 of the Permit (Joint Exhibit 1N, pp. 23-27), which the ALJ stated in paragraph 43 "is accepted as being the most persuasive on this issue." The actual UMAM scores are contained in Exhibit H of the draft permit. (Hoffner, T. Vol. I, pp. 81-106; Rach, T. Vol. I, pp. 166-167; Joint Exhibit 1N, pp. 80-81).

The ALJ's findings of fact in paragraph 44 are supported by competent substantial evidence in the form of testimony from all three experts: Alec Hoffner, Tim Rach, and Clark Hull. While the Petitioners' own expert, Clark Hull, disagreed with the scoring of the project, he acknowledged that determining UMAM scores is not a precise assessment and requires reasonable scientific judgment. (Hoffner, T. Vol. I, pp. 76-77; Rach, T. Vol. I, pp. 165-166,

237-238; Hull, T. Vol. II, pp. 436-437; Pre-Hearing Stipulation ¶ 57).

The record also contains competent substantial evidence to support the ALJ's findings of fact in paragraph 45 regarding how many credits the project could generate. (Hoffner, T. Vol. I, pp. 81-106; Rach, T. Vol. I, pp. 166-167; Joint Exhibit 1J, p. 2; Joint Exhibit 1N, pp. 80-81).

McClash seeks to have the Department reweigh the evidence. However, 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*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307; *Dunham*, 652 So. 2d at 896. 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.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623. Since the findings of fact disputed by McClash in Exception 2a are based on competent substantial evidence, the Department may not reject the ALJ's findings of fact.

The ALJ's findings of fact in paragraphs 43, 44, and 45 are supported by competent substantial evidence.

Based on the foregoing reasons, including the ALJ's findings of fact, McClash's Exception No. 2c. is denied.

MCCLASH's Exception No. 2d. regarding Paragraphs 43, 44, and 45

McClash's exception No. 2d again takes exception to the ALJ's findings of fact in paragraphs 44 and 45, which provide:

> 44. While Mr. Hull disagreed with the scoring of the project, the difference between his and Long Bar's numbers are a reflection in the difference in the application of reasonable scientific judgment."

45. Petitioners failed to provide by a preponderance of the evidence that the Department's determination that the project could generate 18.01 credits was incorrect.

RO ¶¶ 44, 45.

McClash disagrees with the ALJ's findings of fact regarding the UMAM scoring of the project for the mitigation bank, and with the ALJ's finding that the petitioner failed to prove that the Department's determination that the project could generate 18.01 credits was incorrect.

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. (2017); *Charlotte County v. IMC Phosphates Co.*, 18 So. 3d 1089 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So. 2d 61 (Fla. 1st DCA 2007).

The ALJ's findings of fact in paragraph 44 are supported by competent substantial evidence. While the Petitioners' own expert, Clark Hull, disagreed with the scoring of the project, he acknowledged that determining UMAM scores is not a precise assessment and requires reasonable scientific judgment. (Hoffner, T. Vol. I, pp. 76-77; Rach, T. Vol. I, pp. 165-166, 237-238; Hull, T. Vol. II, pp. 436-437; Pre-Hearing Stipulation ¶ 57; Joint Exhibit 1N, pp 80-81).

The record also contains competent substantial evidence to support the ALJ's findings of fact in paragraph 45 regarding how many credits the project would generate. (Hoffner, T. Vol. I, pp. 81-106; Rach, T. Vol. I, pp. 166-167; Joint Exhibit 1J, p. 2; Joint Exhibit 1N, pp. 80-81).

McClash seeks to have the Department reweigh the evidence. However, 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*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307; *Dunham*, 652 So. 2d at 896. Th ALJ is entitled to rely on the testimony of a single witness even if that testimony contradicts the testimony of a number of other witnesses. *Lantz v. Smith*, 106 So. 3d 518, 521 (Fla. 1st DCA 2013). 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.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623. Since the findings of fact disputed by McClash in Exception 2b are based on competent substantial evidence, the Department may not reject the ALJ's findings of fact.

Based on the foregoing reasons, including the ALJ's findings of fact, McClash's Exception No. 2d. is denied.

MCCLASH's Exception Nos. 3, 3a, 3b, 3c, 3d, and 3e regarding Paragraph 47

McClash takes exception to paragraph 47, in what he has identified as Exception Nos. 3, 3a, 3b, 3c, 3d, and 3e.

Paragraph 47 reads as follows:

> 47. As to the first issue, Petitioners generally contend that in the seagrass areas, the bank is focused on preservation only, and not restoration, and therefore no additional protection or functional lift will be provided for any seagrass assessment areas. To begin with, preservation is a goal expressly included in the UMAM rule, which emphasizes preservation of undegraded areas and restoration of degraded systems over alteration of existing landscapes to create artificial wetlands. The proposed conservation easement increases protection to the wetlands and other surface waters in the site by preventing structures (such as docks or piers) within the seagrass assessment areas. If the site is not preserved, it is likely to be used to access Sarasota Bay from the uplands. As previously found, there will also be enhancement activities in adjacent assessment areas. In short, the steps being proposed by Long Bar provide additional protection to the seagrasses. The UMAM seagrass score is appropriate.

RO ¶ 47. Exception No. 3 appears to be a heading summarizing McClash's arguments for Exception Nos. 3a through 3e. Consequently, the Department incorporates its responses to Exception Nos. 3a through 3e herein.

Based on the foregoing reasons, including the ALJ's findings of fact, McClash's Exception No. 3 is denied.

MCCLASH's Exception No. 3a. regarding Paragraph 47

McClash takes exception to the ALJ's findings in paragraph 47 that the "proposed conservation easement increases protection to the wetlands and other surface waters in the site by preventing structures (such as docks or piers) within the seagrass assessment areas" and that the "UMAM seagrass score is appropriate." (RO ¶ 47). In particular, McClash contends that the existing bottomlands are not all seagrasses and vary from sparse to dense seagrass beds, oyster reefs, and sand/silt bottom areas.

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. (2017); *Charlotte County v. IMC Phosphates Co.*, 18 So. 3d 1089 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So. 2d 61 (Fla. 1st DCA 2007).

Contrary to McClash's arguments, the ALJ's findings in paragraph 47 are supported by competent substantial evidence. Specifically, the ALJ's finding that the proposed conservation easement will increase protection to the wetlands and other surface waters in the site by preventing structures within the seagrass assessment areas is supported by competent substantial evidence. (Hoffner, T. Vol. I, pp. 62-65, 90-91; Rach, T. Vol. I, pp. 161-162). There is also competent substantial evidence and testimony that enhancement activities in adjacent assessment

areas will provide additional protection to seagrasses. (Hoffner, T. Vol. I, pp 90-106; Joint Exhibit 1A, pp. 125-128, 146-150; Joint Exhibit 1F, pp. 6-13, 22-26; Joint Exhibit 1N, pp. 23-28, 74-75, 80-81).

McClash seeks to have the Department reweigh the evidence. However, 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*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307; *Dunham*, 652 So. 2d at 896. 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.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623. Since the findings of fact disputed by McClash in Exception 3a are based on competent substantial evidence, the Department may not reject the ALJ's findings of fact.

Based on the foregoing reasons, including the ALJ's findings of fact, McClash's Exception No. 3a. is denied.

MCCLASH's Exception No. 3b. regarding Paragraph 47

McClash takes exception to the ALJ's finding in paragraph 47 that "[t]o begin with, preservation is a goal expressly included in the UMAM rule, which emphasizes preservation of undegraded areas and restoration of degraded systems over alteration of existing landscapes to create artificial wetlands." (RO ¶ 47).[3]

[3] After reviewing the RO, exceptions, and responses to exceptions, the Department concludes that the ALJ intended to cite to the Mitigation Banking rule in the second sentence of paragraph 47 and not to the UMAM rule, and that changing the reference from the UMAM rule to the Mitigation Banking rule in the Department's final order is merely a correction of a typographical error in the RO.

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. (2017); *Charlotte County v. IMC Phosphates Co.*, 18 So. 3d 1089 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So. 2d 61 (Fla. 1st DCA 2007).

McClash cites to subsection 62-342.100(3), Florida Administrative Code, which states that "Mitigation Banks shall be consistent with Agency endorsed watershed management objectives and emphasize restoration and enhancement of degraded ecosystems and the preservation of uplands and wetlands as intact ecosystems rather than alteration of landscapes to create wetlands." § 62-342.100(3), Fla. Admin. Code. Furthermore, McClash states that the RO's statement in paragraph 47 that the "UMAM seagrass score is appropriate" is not supported by evidence.

However, the ALJ's findings are a reasonable inference from rule language cited above from subsection 62-342.100(3) and the hearing testimony. The ALJ can "draw permissible inferences from the evidence." *Heifetz v. Dep't of Bus. Regulation*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). *See also Walker v. Bd. of Prof'l Eng'rs*, 946 So. 2d 604, 605 (Fla. 1st DCA 2006) ("It is the hearing officer's function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence.").

Specifically, the ALJ's finding that the seagrass score is appropriate is supported by competent substantial evidence. (Hoffner, T. Vol. I, pp. 62-65; Rach, T. Vol. I, pp. 161-162).

Based on the foregoing reasons, including the ALJ's findings of fact, McClash's Exception No. 3b. is denied.

MCCLASH's Exception No. 3c. regarding Paragraph 47

McClash takes exception to the ALJ's finding in paragraph 47 that "[t]he proposed conservation easement increases protection to the wetlands and other surface waters in the site by preventing structures (such as docks or piers) within the seagrass assessment areas." (RO ¶ 47).

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. (2017); *Charlotte County v. IMC Phosphates Co.*, 18 So. 3d 1089 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So. 2d 61 (Fla. 1st DCA 2007).

Contrary to McClash's arguments, the ALJ's findings in paragraph 47 are supported by competent substantial evidence. Specifically, the ALJ's finding that the proposed conservation easement will increase protection to the wetlands and other surface waters in the site by preventing structures within the seagrass assessment areas is supported by competent substantial evidence. (Hoffner, T. Vol. I, pp. 62-65, 90-91; Rach, T. Vol. I, pp. 161-162).

McClash seeks to have the Department reweigh the evidence. However, 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*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307; *Dunham*, 652 So. 2d at 896. 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.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623. Since the findings of fact disputed by McClash in Exception 3c are based on competent substantial evidence, the Department may not reject the ALJ's findings of fact.

Based on the foregoing reasons, including the ALJ's findings of fact, McClash's Exception No. 3c. is denied.

MCCLASH's Exception No. 3d. regarding Paragraph 47

McClash takes exception to the ALJ's finding in paragraph 47 that the UMAM seagrasss score is appropriate. (RO ¶ 47).

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. (2017); *Charlotte County v. IMC Phosphates Co.*, 18 So. 3d 1089 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So. 2d 61 (Fla. 1st DCA 2007).

Contrary to McClash's arguments, the ALJ's findings in paragraph 47 are supported by competent substantial evidence. Specifically, the ALJ's finding that the UMAM seagrass score is appropriate is supported by competent substantial evidence. (Hoffner, T. Vol. I, pp. 62-65; Rach, T. Vol. I, pp 161-162).

McClash seeks to have the Department reweigh the evidence. However, 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*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307; *Dunham*, 652 So. 2d at 896. 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.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623. Since the findings of fact disputed by McClash in Exception 3a are based on competent substantial evidence, the Department may not reject the ALJ's findings of fact.

Based on the foregoing reasons, including the ALJ's findings of fact, McClash's Exception No. 3d. is denied.

MCCLASH's Exception No. 3e. regarding Paragraph 47

McClash takes exception to the ALJ's finding in paragraph 47 that the proposed conservation easement increases protection to the wetlands and other surface waters in the site. (RO ¶ 47).

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. (2017); *Charlotte County v. IMC Phosphates Co.*, 18 So. 3d 1089 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So. 2d 61 (Fla. 1st DCA 2007).

Contrary to McClash's arguments, the ALJ's findings in paragraph 47 are supported by competent substantial evidence. Specifically, the ALJ's finding that the proposed conservation easement will increase protection to the wetlands and other surface waters in the site by preventing structures within the seagrass assessment areas is supported by competent substantial evidence. (Hoffner, T. Vol. I, pp. 62-65, 90-91; Rach, T. Vol. I, pp. 161-162).

McClash seeks to have the Department reweigh the evidence. However, 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*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307; *Dunham*, 652 So. 2d at 896. 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.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623. Since the findings of fact disputed by McClash in

Exception 3c are based on competent substantial evidence, the Department may not reject the ALJ's findings of fact.

Based on the foregoing reasons, including the ALJ's findings of fact, McClash's Exception No. 3e. is denied.

MCCLASH's Exception No. 4 regarding Paragraph 26

McClash takes exception to the last three sentences in paragraph 26. Paragraph 26 reads, in pertinent part, as follows:

> Installation of the [seagrass informational] buoys will provide a significant public benefit in that it should significantly reduce or eliminate prop scars within the seagrass beds along the project site. Good channel marking is one of the best ways to protect seagrasses from prop scarring. There is no credible evidence that signage will attract inexperienced boaters who will damage the seagrasses in the area.

RO ¶ 26.

Specifically, McClash takes exception to the ALJ's finding that installation of seagrass informational buoys will "significantly reduce or eliminate prop scars within the seagrass beds along the project site," and will provide a public benefit. (RO ¶ 26). Competent substantial evidence exists in the record that installation of seagrass informational buoys will protect seagrasses and reduce prop scars within the seagrass beds in the area. (Hoffner, T. Vol. I, pp. 85-87, 171; Joint Exhibit 1N, pp. 62-63; Long Bar Exhibits 5, 6, 7, 8, 9, 10, and 11).

McClash takes exception with the finding that "[g]ood channel marking is one of the best ways to protect seagrasses from prop scarring." (RO ¶ 26). However, competent substantial evidence and testimony in the record supports this finding, including testimony from Petitioners' own witness John Stevely. (Hoffner, T. Vol. I, p. 85-87; Stevely, T. Vol. I, p. 290; Long Bar Exhibit 5, pp. 25-26; Long Bar Exhibit 7, p. 203; and Long Bar Exhibit 8, pp. 1-4).

McClash also takes exception to the finding that "[t]here is no credible evidence that signage will attract inexperienced boaters who will damage the seagrasses in the area." McClash's Exceptions, p. 13. The ALJ explicitly determined that the testimony by Petitioner's witness John Stevely on this topic was not credible. Only the ALJ is in a position to weigh the credibility of witnesses; and thus, the Department may not reject the ALJ's finding on this topic. *See, e.g., Rogers*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307.

McClash repeatedly seeks to have DEP reweigh the evidence associated with the findings of fact in paragraph 26. However, DEP is not authorized to reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See, e.g., Rogers*, 920 So. 2d at 30, *Belleau*, 695 So. 2d at 1307. If 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.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623.

Based on the foregoing reasons, including the ALJ's findings of fact, McClash's Exception No. 4 is denied.

MCCLASH's Exception No. 5 regarding Paragraph 26

McClash takes exception to the second sentence of the finding of fact in paragraph 26. The first two sentences in paragraph 26 read as follows:

> In addition to protection provided by the conservation easement, Long Bar proposes implementation of a Seagrass Information Buoy Placement Plan (Plan) in an effort to provide additional protection to the submerged seagrass beds within and in the vicinity of the Project. *The Plan contemplates the installation of non-regulatory seagrass information buoys at approximately the three-foot bathymetric contour along the Project site, and which follows the path of the traditional unmarked navigational channel where they can be readily seen.*

RO ¶ 26 (emphasis added).

McClash contends that the finding that the proposed location of the seagrass information buoys will be along the Project site and will "be readily seen" is not supported by competent substantial evidence. However, the ALJ's findings in the second sentence of paragraph 26 are supported by competent substantial evidence. (Hoffner, T. Vol. I, pp. 85-87; Joint Exhibit 1N, pp. 62-63; Long Bar Exhibit 11). Since the findings of fact disputed by McClash in Exception 5 are based on competent substantial evidence, the Department may not reject the ALJ's findings of fact.

Based on the foregoing reasons, including the ALJ's findings of fact, McClash's Exception No. 5 is denied.

MCCLASH's Exception No. 6 regarding Paragraphs 50, 51, and 52

McClash takes exception to the findings of fact in paragraphs 50, 51, and 52 which read as follows:

> 50. The preponderance of the evidence supports a finding that Long Bar has satisfied all criteria in rule 62-330.301 for the issuance of an ERP.
>
> 51. The preponderance of the evidence supports a finding that Long Bar has established that the Project is clearly in the public interest, as required by rule 62-330.302(1).
>
> 52. The preponderance of the evidence supports a finding that Long Bar has satisfied all criteria for establishing a mitigation bank, as required by rule 62-342.400.

RO ¶¶ 50-52.

McClash contends that the findings above are not supported by the evidence, culminating in his conclusion that "[t]here is not a preponderance of evidence to support the UMAM scores totaling 18.01 credits" for the mitigation bank. McClash's Exceptions, p. 32.

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. (2017); *Charlotte County v. IMC Phosphates Co.*, 18 So. 3d 1089 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So. 2d 61 (Fla. 1st DCA 2007).

Contrary to McClash's arguments, the ALJ's findings in paragraphs 50, 51, and 52 are supported by competent substantial evidence. (Hoffner, T. Vol. I, pp. 66-75; Rach, T. Vol. I, pp. 163-165; Pre-Hearing Stipulation ¶¶ 26, 29, 35-49, pp. 16-19; Joint Exhibit 1N, pp. 7-8). Since the findings of fact disputed by McClash in Exception 6 are based on competent substantial evidence, the Department may not reject the ALJ's findings of fact.

Based on the foregoing reasons, including the ALJ's findings of fact, McClash's Exception No. 6 is denied.

MCCLASH's Exception No. 7 regarding Paragraph 55

McClash takes exception to the conclusion of law in paragraph 55, in which the ALJ concluded that McClash's alleged injury is too speculative and remote, and thus does not give rise to standing under Chapter 120, Florida Statutes. Since McClash failed to demonstrate at the DOAH hearing that it will suffer injury to his substantial environmental interests as the result of the proposed permit, his standing to participate in this case should technically be denied at this stage of these proceedings under the *Agrico* rationale.[4] *See Agrico Chem. Co. v. Dep't of Envtl. Reg.*, 406 So. 2d 478, 481-82 (Fla. 2d DCA 1981).

Nevertheless, the DOAH record reflects that the ALJ afforded McClash all the rights provided by the Administrative Procedures Act (APA) to a party claiming his substantial

[4] The issue of whether a party's "substantial environmental interests" have been affected or determined by a proposed DEP permitting action so as to confer standing to participate as a party in an administrative proceeding challenging such action is a matter within DEP's "substantive jurisdiction" under section 120.57(1)(l), Florida Statutes. *See Parkinson v. Dep't of Envtl. Protection*, DOAH Case No. 06-2842 (Dep't of Envtl. Protection Final Order 2017), *affirmed by*, *Reily Enterprises, LLC v. Dep't of Envtl. Protection*, 990 So. 2d 1248 (Fla. 4th DCA 2008).

interests would be affected by the DEP action being challenged in this case. During the DOAH hearing, McClash presented arguments, testimony, and documentary evidence in support of the merits of his claims. Some of the same issues raised by McClash were also raised by the other petitioners Suncoast or FISH, which were considered by the ALJ. McClash filed a Proposed Recommended Order and Exceptions to the RO; and, these Exceptions have been addressed on their merits in this Final Order.

Consequently, since McClash's claims were litigated on their merits in the DOAH hearing and are addressed in this Final Order, the issue of his standing is essentially moot at this administrative stage of these proceedings. *See Hamilton Cty. Bd. Of Cty. Commissioners v. Dep't of Envtl. Reg.*, 587 So. 2d 1378, 1383 (Fla. 1st DCA 1991) (concluding that the issue of Hamilton County's standing to challenging a DER permitting action was moot on appellate review because the "issues were fully litigated in the proceedings below"); *Okaloosa Cty. v. Dep't of Envtl. Reg.*, ER F.A.L.R. 1992: 032, p. 6 (Fla. DER 1992) (concluding that, from a practical standpoint, the issue of Okaloosa County's standing was moot, because the County's substantive claims had been litigated on their merits at the DOAH final hearing).

Based on the foregoing reasons, including the ALJ's conclusions of law, McClash's Exception No. 7 is denied.

MCCLASH's Exception No. 8 regarding Paragraphs 59 and 60

McClash takes exception to the conclusions of law in paragraphs 59 and 60. In paragraph 59, the ALJ concluded that the "burden of ultimate persuasion is on Petitioners to prove their case in opposition to the permit by a preponderance of the competent and substantial evidence," and the Petitioners have failed to meet their burden. In paragraph 60, the ALJ concluded that the

permit applicant Long Bar had provided reasonable assurance that all relevant criteria for issuance of an ERP mitigation bank permit had been satisfied.

McClash summarily rejected the ALJ's conclusions of law in paragraphs 59 and 60 without any legal analysis or citation to the record. Specifically, he fails to identify the legal basis for Exception No. 8 and fails to include any citations to the record in accordance with Section 120.57(1)(k), F.S. and Rule 28-106.217, F.A.C.

Moreover, McClash is ultimately requesting the Department reweigh the evidence presented at the DOAH hearing and reject the ALJ's findings regarding expert opinion testimony. 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 the ALJ's decision. *See e.g.*, *Peace River/Manasota Regional Water Supply Authority v. IMC Phosphates Co.*, 18 So. 3d 1079, 1088 (Fla. 2d DCA 2009). However, the record is replete with competent substantial evidence to support the ALJ's conclusion that Long Bar has provided reasonable assurances for issuance of an environmental resource permit to establish the proposed mitigation bank. The Department incorporates its responses to McClash's Exception Nos. 1, 2, 2a, 2b, 2c, 2d, 3, 3a, 3b, 3c, 3d, 3e, 4, 5, 6, 7, 8, 9, 9a, 9b, 9c, and 9d herein.

Based on the foregoing reasons, including the ALJ's conclusions of law, McClash's Exception No. 8 is denied.

MCCLASH's Exception Nos. 9, 9a, 9b, 9c and 9d regarding Paragraphs 43, 44, 45, 50, 51, 52, 59 and 60

McClash takes exception to the findings of fact in paragraphs 43, 44, 45, 50, 51, and 52, and to the conclusions of law in paragraphs 59 and 60, arguing that the "ALJ did not have

evidence to support the UMAM score since this score did not meet the Essential Requirements of Law that requires a fact to support compliance with the UMAM rule(law)." McClash's Exceptions ¶ VII, p. 35.

McClash does not provide any citations to the record in support of Exception No. 9. *See* Section 120.57(1)(k), Fla. Stat. (2017), and Rule 28-106,217, Florida Administrative Code. Moreover, McClash refers to one case, *Chicken'N'Things v. Murray*, 329 So. 2d 302, 304 (Fla. 1976) in support of his exception, but does not provide any explanation of how that case applies to the findings of fact and conclusions of law identified in Exception No. 9.

Ultimately, McClash is requesting that the Department reweigh the evidence presented at the DOAH hearing and reject the ALJ's findings regarding expert opinion testimony. 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 the ALJ's decision. *See e.g., Peace River/Manasota Regional Water Supply Authority v. IMC Phosphates Co.*, 18 So. 3d 1079, 1088 (Fla. 2d DCA 2009).

McClash takes exception again to the conclusions of law in paragraphs 59 and 60. In paragraph 59, the ALJ concluded that the "burden of ultimate persuasion is on Petitioners to prove their case in opposition to the permit by a preponderance of the competent and substantial evidence," and the Petitioners have failed to meet their burden. In paragraph 60, the ALJ concluded that the permit applicant Long Bar had provided reasonable assurance that all relevant criteria for issuance of an ERP mitigation bank permit had been satisfied. McClash summarily rejected the ALJ's conclusions of law in paragraphs 59 and 60 without any legal basis for the exception or citation to the record. *See* § 120.57(1)(j) and (k), Fla. Stat. (2017).

The Department incorporates its responses to Exception Nos. 2, 2a, 2b, 2c, 2d, 6, and 8 herein.

Based on the foregoing reasons, including the ALJ's findings of fact and conclusions of law, McClash's Exception No. 9 is denied.

MCCLASH's Exception No. 9a.

In McClash's Exception No. 9a, he fails to identify *any* disputed findings of fact or conclusions of law in the RO with which he takes exception. He provides no legal basis for this exception, and does not include any citations to the record in support of his exception. The Department is not obligated to consider exceptions that do not clearly identify the disputed portion of the recommended order by page number or paragraph, that do not identify the legal basis for the exception, or that do not include appropriate and specific citations to the record. *See* § 120.57(1)(k), Fla. Stat.

To the extent that Exception No. 9a applies to findings of Fact Nos. 43, 44, 45, 50, 51, and 52, and conclusion of law Nos. 59 and 60, the Department incorporates its rulings to Exception Nos. 2, 2a, 2b, 2c, 2d, 6, 8, and 9 herein.

Based on the foregoing reasons, including the ALJ's findings of fact and conclusions of law, McClash's Exception Nos. 9a. is denied.

MCCLASH's Exception No. 9b.

In McClash's Exception No. 9b, he fails to identify *any* disputed findings of fact or conclusions of law in the RO with which he takes exception. He provides no legal basis for this exception, and does not include any citations to the record in support of his exception. The Department is not obligated to consider exceptions that do not clearly identify the disputed portion of the recommended order by page number or paragraph, that do not identify the legal

basis for the exception, or that do not include appropriate and specific citations to the record. *See* § 120.57(1)(k), Fla. Stat.

To the extent that Exception No. 9b applies to findings of Fact Nos. 43, 44, 45, 50, 51, and 52, and conclusion of law Nos. 59 and 60, the Department incorporates its rulings to Exception Nos. 2, 2a, 2b, 2c, 2d, 6, 8, and 9 herein.

Based on the foregoing reasons, including the ALJ's findings of fact and conclusions of law, McClash's Exception Nos. 9b. is denied

MCCLASH's Exception No. 9c.

In McClash's Exception No. 9c, he fails to identify *any* disputed findings of fact or conclusions of law in the RO with which he takes exception. He provides no legal basis for this exception, and does not include any citations to the record in support of his exception. The Department is not obligated to consider exceptions that do not clearly identify the disputed portion of the recommended order by page number or paragraph, that do not identify the legal basis for the exception, or that do not include appropriate and specific citations to the record. *See* § 120.57(1)(k), Fla. Stat.

To the extent that Exception No. 9c applies to findings of Fact Nos. 43, 44, 45, 50, 51, and 52, and conclusion of law Nos. 59 and 60, the Department incorporates its rulings to Exception Nos. 2, 2a, 2b, 2c, 2d, 6, 8, and 9 herein.

Based on the foregoing reasons, including the ALJ's findings of fact and conclusions of law, McClash's Exception Nos. 9c. is denied.

MCCLASH's Exception No. 9d.

In McClash's Exception No. 9d, he fails to identify *any* disputed findings of fact or conclusions of law in the RO with which he takes exception. He provides no legal basis for this exception, and does not include any citations to the record in support of his exception. The Department is not obligated to consider exceptions that do not clearly identify the disputed portion of the recommended order by page number or paragraph, that do not identify the legal basis for the exception, or that do not include appropriate and specific citations to the record. *See* § 120.57(1)(k), Fla. Stat.

To the extent that Exception No. 9d applies to findings of Fact Nos. 43, 44, 45, 50, 51, and 52, and conclusion of law Nos. 59 and 60, the Department incorporates its rulings to Exception Nos. 2, 2a, 2b, 2c, 2d, 6, 8, and 9 herein.

Based on the foregoing reasons, including the ALJ's findings of fact and conclusions of law, McClash's Exception Nos. 9d. is denied

RULINGS ON THE DEPARTMENT'S EXCEPTIONS

In the following two exceptions, DEP requests corrections to certain legal citations that appear from the context to constitute typographical errors.

DEP's Exception No. 1 regarding Paragraph 29

DEP takes exception to the reference to "section 373.327, Florida Statutes" contained in the first sentence of finding of fact paragraph 29, alleging that the citation is a typographical error. DEP contends that the correct reference is to "section 403.9327, Florida Statutes" (which addresses general permits for mangrove trimming). After reviewing the Recommended Order and the statutory references, the Department concludes that Paragraph 29 is a mixed Statement of Law and Fact. *See J.J. Taylor Companies v. Dep't of Business and Prof. Reg.*, 724 So. 2d 192,

193 (Fla. 1st DCA 1999), and *Battaglia Properties v. Fla. Land and Adjudicatory Commission*, 629 So. 2d 161, 168 (Fla. 5th DCA 1993). Furthermore, the Department agrees that the exception merely requests correction of a typographical error in a statutory citation.

Based on the foregoing reasons, DEP's Exception No. 1 is granted.

DEP's Exception No. 2 regarding Paragraph 53

DEP takes exception to the reference to "section 413.412(6), Florida Statutes" contained in the first sentence of conclusion of law paragraph 59, alleging that the citation is a typographical error. DEP contends that the correct reference is to "section 403.412(6), Florida Statutes" (which addresses standing criteria for non-profit corporations to bring suit under the Environmental Protection Act). After reviewing the Recommended Order and the statutory references, the Department agrees that the exception merely requests correction of a typographical error in a statutory citation.

Based on the foregoing reasons, DEP's Exception No. 2 is granted.

CONCLUSION

Having considered the applicable law in light of the rulings on the above Exceptions, and being otherwise duly advised, it is

ORDERED that:

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

B. Based on the ALJ's order and the Department's review, DEP Permit No. 0338349-002, authorizing the issuance of a Mitigation Bank to Long Bar Pointe, LLLP, is APPROVED.

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 the filing of a Notice of Appeal pursuant to Rule 9.110, 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 27th day of April 2018, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

NOAH VALENSTEIN
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.

Deputy CLERK

4/27/18
DATE

CERTIFICATE OF SERVICE

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

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this 27th day of April, 2018.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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