STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

MATLACHA CIVIC ASSOCIATION, INC., J. MICHAEL HANNON, KARL R. DEIGERT, YOLANDA OLSEN, ROBERT S. ZARRANZ, DEBRA HALL, MELANIE HOFF, AND JESSICA BLANKS,	)	
Petitioners,	)	
v.	)	**OGC CASE NO. 18-1443**
	)	**DOAH CASE NO. 18-6752**
CITY OF CAPE CORAL AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
Respondents.	)	

/

FINAL ORDER

An Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH) on December 12, 2019, 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.

This matter is now before the Secretary of the Department for final agency action.

BACKGROUND

On November 7, 2018, the Department announced its intent to issue an Environmental Resource Permit Number 244816-005 (ERP) to the City of Cape Coral for removal of the Chiquita Boat Lock (Lock) and associated uplands, and installation of a 165-foot linear seawall in the South Spreader Waterway in Cape Coral, Florida (the Project).

On December 14, 2018, the Petitioners, Matlacha Civic Association, Inc. (Association), Karl Deigert, Debra Hall, Melanie Hoff, Robert S. Zarranz, Yolanda Olsen, Jessica Blanks, and

Joseph Michael Hannon, (the Petitioners) timely filed a joint petition for administrative hearing. On December 21, 2018, the Department referred the petition to DOAH to conduct an evidentiary hearing and submit a recommended order.

On February 28 and March 1, 2019, the Department gave notice of revisions to the intent to issue and draft permit.

DOAH held the final hearing on April 11 and 12, 2019, and on May 10, 2019. At the final hearing, Joint Exhibit 1 was admitted into evidence. The Petitioners offered the fact testimony of Anthony Janicki, Ph.D., Karl Deigert, Melanie Hoff, Robert S. Zarranz, Yolanda Olsen, Jessica Blanks, Michael Hannon, Frank Muto, and Jon Iglehart, and the expert testimony of David Woodhouse, Kevin Erwin, and John Cassani. The Petitioners' Exhibits 18 (a time series video), 37, 40 (top page), 43, 44, 47, 48, 62 through 68, 76 (aerial video), 77 (aerial video), 78 (frame 5), 79 (eight images), 87, 112, 114, 115, 117, 118, 129, 132, 141 (not for truth), and 152 were admitted into evidence. The City presented the fact testimony of Oliver Clarke and Jacob Schrager, and the expert testimony of Anthony Janicki, Ph.D. The City's Exhibits 1, 2, 9, and 27 were admitted into evidence. The Department presented the fact testimony of Megan Mills. The Petitioners proffered Exhibits P-R1, P-R2, and P-R3, which were denied admission into evidence by Order dated June 21, 2019.

A three-volume transcript of the hearing was filed with DOAH on June 3, 2019. Proposed recommended orders (PRO) were filed by the parties on July 3, 2019. The ALJ granted the Petitioners' motion to exceed the page limit of its PRO. The City of Cape Coral (City) timely filed Exceptions to the RO on December 27, 2019. DEP also timely filed Exceptions on December 27, 2019. However, the Petitioners untimely filed Exceptions with DOAH the evening of December 27, 2019, which DOAH stamped as received on December 30,

2019. On December 30, 2019, the City filed with the Department's agency clerk a Motion to Strike the Petitioners' Exceptions to the RO. On January 6, 2020, DEP timely filed Responses to Petitioners' Exceptions. On January 6, 2020, the Petitioners timely filed Responses to the City's Exceptions. On January 7, 2020, the Petitioners untimely filed Responses to DEP's Exceptions. On January 6, 2020, the Petitioners filed with the Department a Motion for Leave to File Amended Exceptions to Recommended Order and Opposition to Cape Coral's Motion to Strike.[1]

SUMMARY OF THE RECOMMENDED ORDER

In the RO, the ALJ recommended that the Department enter a final order denying Environmental Resource Permit Number 244816-005 to the City of Cape Coral for removal of the Chiquita Boat Lock and denying the Petitioners request for an award of attorney fees and costs. (RO at p. 47). In doing so, the ALJ found the Petitioners met their ultimate burden of persuasion to prove that the Project does not comply with all applicable permitting criteria, particularly compliance with state surface water quality standards. (RO at ¶ 116). As to the Petitioners' request for an award of attorney fees and costs, the ALJ found that the City and DEP did not participate in this proceeding for an improper purpose as that term is defined in section

[1] On December 27, 2019, the Petitioners filed exceptions to DOAH's RO several hours after the deadline for filing exceptions. The Petitioners also incorrectly filed the exceptions with DOAH and not the Department's agency clerk. On December 30, 2019, the City filed with the Department's agency clerk a Motion to Strike the Petitioners' Exceptions to the RO. On January 6, 2020, the Petitioners filed with the Department a Motion for Leave to File Amended Exceptions to Recommended Order and Opposition to Cape Coral's Motion to Strike. In accordance with *Hamilton Cty. Bd. of Cty. Comm'rs v. Dep't of Envtl. Regulation*, 587 So. 2d 1378, 1390 (Fla. 2d DCA 1998), the Department must provide the Petitioners the opportunity to show inadvertence, mistake, or excusable neglect for filing the exceptions untimely. *See also Shaker Lakes Apartments Co. v. Dolinger*, 714 So. 2d 1040, 1042 (Fla. 1st DCA 1998). The City filed a response to each of the Petitioners' exceptions in the City's Motion to Strike. In addition, the Petitioners' Opposition to Cape Coral's Motion to Strike the Petitioners' exceptions for being untimely, filed an explanation for being untimely. The Department has concluded that neither the City nor the Department were prejudiced by the late filing of the Petitioners' exceptions. Therefore, the Department has chosen to deny the City's motion to strike, and rule on the merits of the Petitioners' exceptions in this Final Order.

120.595(1)(e), Florida Statutes (2019); and, thus the Petitioners are not entitled to attorney fees and costs. (RO at ¶¶ 113-115).

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. (2019); *Charlotte Cty. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1082 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So. 2d 61, 62 (Fla. 1st DCA 2007). The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value or weight of the evidence. Rather, "competent substantial evidence" refers to the existence of some evidence as to each essential element and as to its admissibility under legal rules of evidence. *See e.g., Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm'n*, 671 So. 2d 287, 289 n.3 (Fla. 5th DCA 1996); *Nunez v. Nunez*, 29 So. 3d 1191, 1192 (Fla. 5th DCA 2010).

A reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See, e.g., Rogers v. Dep't of Health*, 920 So. 2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep't of Envtl. Prot.*, 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands Cty. 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 Auth. 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, 1012 (Fla. 1st DCA 2001); *L.B. Bryan & Co. v. Sch. Bd. of Broward Cty.*, 746 So. 2d 1194, 1197 (Fla. 1st DCA 1999); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140 1141-142 (Fla. 2d DCA 2001). However, the agency should not label what is essentially an ultimate factual determination as a "conclusion of law" 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, 1225 (Fla. 1st DCA 2007). Furthermore, agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be the only reasonable interpretations. It is enough if such agency interpretations are "permissible" ones. *See, e.g., Suddath Van Lines, Inc. v. Dep't of Envtl. Prot.*, 668 So. 2d 209, 212 (Fla. 1st DCA 1996).

Agencies do not have jurisdiction, however, to modify or reject rulings on the admissibility of evidence. Evidentiary rulings of the ALJ that deal with "factual issues

susceptible to ordinary methods of proof that are not infused with [agency] policy considerations," are not matters over which the agency has "substantive jurisdiction." *See Martuccio v. Dep't of Prof'l Regulation*, 622 So. 2d 607, 609 (Fla. 1st DCA 1993); *Heifetz v. Dep't of Bus. Regulation*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). 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. (2019). The agency, however, 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 Cty.*, 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. (2019); *Barfield,* 805 So. 2d at 1012; *Fla. Pub. Emp. Council, v. Daniels,* 646 So. 2d 813, 816 (Fla. 1st DCA 1994).

RULINGS ON THE CITY'S EXCEPTIONS

City's Exception No. 1 regarding Paragraph No. 13

The City takes exception to portions of the findings of fact in paragraph 13 of the RO, which read:

> 13. . . . . The 125-foot wide upland area and the 20-foot wide Lock form a barrier separating the South Spreader Waterway from the Caloosahatchee River. The preponderance of the competent substantial evidence established that the South Spreader Waterway behind the Lock is not tidally influenced, but would become tidally influenced upon removal of the Lock.

RO ¶ 13. The City alleges that this portion of paragraph 13 is not supported by competent substantial evidence. Contrary to the City's exception, the findings of fact at issue are supported by competent substantial evidence in the form of testimony by Frank Muto, the harbor master for Cape Harbour Marina for the past eighteen (18) years. (Muto, T. Vol. II, p. 372). Mr. Muto testified that he has witnessed tidal changes in the Spreader Canal area, but that the marina location behind the Lock is not subject to tidal flows. (Muto, T. Vol. II. p. 380). He also testified that if the Lock is removed, he is concerned about tidal flow all along the Spreader Canal. (Muto, T. Vol. II. p. 383). Moreover, he testified that the Cape Harbour Marina was built after the Lock was installed; and the marina was designed for an area with no tidal flow. (Muto, T. Vol. II. p. 387). The City in its exception even acknowledged that lay opinion testimony is admissible under certain circumstances. The City quoted that "[l]ay opinion testimony is admissible only to help the jury or the court to understand the facts about which the witness is testifying and not to provide specialized explanations or interpretations that an untrained layman could not make if perceiving the same acts or events." *Johnson v. State*, 254 So. 2d 617 (Fla. 1st DCA 2018) (*citing United States v. Espino*, 317 F.3d 788, 797 (8th Cir. 2003)). The testimony from Mr. Muto was intended to help the ALJ understand the facts regarding flows in the area of the Lock

subject to removal by the proposed permit under challenge. The quote from *Johnson v. State* supports the admissibility of the testimony from Mr. Muto upon which the ALJ appears to have relied for paragraph 13 of the RO.

The City disagrees with the ALJ's findings and seeks to have the Department reweigh the evidence. However, the Department is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *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 Constr. Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623. For the abovementioned reasons, the City's exception to paragraph 13 of the RO is rejected.

Based on the foregoing reasons, the City's Exception No. 1 is denied.

City's Exception No. 2 regarding Paragraph Nos. 25 and 26

The City takes exception to portions of the findings of fact in paragraph Nos. 25 and 26 of the RO, which state:

> 25. Mr. Erwin testified that the Lock was designed to assist in retention of fresh water in the South Spreader Waterway. The fresh water would be retained, slowed down, and allowed to slowly sheet flow over and through the coastal fringe.
>
> 26. Mr. Erwin also testified that the South Spreader Waterway was not designed to allow direct tidal exchange with the Caloosahatchee River. In Mr. Erwin's opinion, the South Spreader Waterway appeared to be functioning today in the same manner as originally intended.

RO ¶¶ 25, 26. The City alleges that paragraphs 25 and 26 are not supported by competent substantial evidence. Contrary to the City's exception, the findings of fact in paragraphs 25 and 26 of the RO are supported by competent substantial evidence in the form of testimony by Kevin Erwin. Paragraph 25 of the RO is supported by the testimony of Kevin Erwin. (Erwin, T. Vol. II,

pp. 528, 588-89). Paragraph 26 of the RO is supported by the testimony of Kevin Erwin. (Erwin, T. Vol. II, pp. 528, 631). The City contends that Mr. Erwin's opinions are beyond the scope of his qualifications in this hearing as an expert in ecology. However, the City did not object to Mr. Erwin's testimony found in paragraphs 25 and 26 of the RO on the grounds that Mr. Erwin's field of expertise did not embrace the testimony in these two paragraphs.

Moreover, expert Kevin Erwin is qualified to testify about the original design of the South Spreader Waterway. Kevin Erwin served as an ecologist for the Department of Environmental Regulation (DER), the predecessor agency to the Department, from 1975 to 1980. During this time, he initiated and oversaw the Department's enforcement action against the developers of the City, collectively called "GAC." (Erwin, T. Vol. II, p. 516.) Mr. Erwin was personally involved in reviewing and implementing the design for the Spreader Waterway. (Erwin, T. Vol. II, pp. 521-26, 554-57). Mr. Erwin's opinions regarding how the South Spreader Waterway is functioning currently is supported by several inspections he conducted of the waterway by boat, plane, and review of drone video footage. (Erwin, T. Vol. II, pp. 557-69, 594).

The City seeks to have the Department judge the credibility of the witness and then reweigh the evidence. However, the Department is not authorized to reweigh evidence presented at a DOAH final hearing or judge the credibility of a witness. *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 Constr. Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623. For the abovementioned reasons, the City's exception to paragraphs 25 and 26 of the RO is rejected.

Based on the foregoing reasons, the City's Exception No. 2 is denied.

City's Exception No. 3 regarding Paragraph No. 27

The City takes exception to that portion of paragraph 27 of the RO, which states the "second amended notice of intent removed all references to mitigation projects that would provide a net improvement in water quality as part of the regulatory basis for issuance of the permit." See Joint Exhibit 1 at pp. 326-333." RO ¶ 27.

The City objects to this finding to the extent it may "suggest that a net improvement was necessary to meet the conditions for issuance of the Permit." City's Exception No. 3, p. 8. The City directs the Department to modify paragraph No. 27 of the RO to "state that the Department's second notice of intent 'removed all references to mitigation projects.'"

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. (2019); *Charlotte Cty.*, 18 So. 3d at 1082; *Wills,* 955 So. 2d at 62. Contrary to the City's exception, the Department finds that the ALJ's findings quoted above are supported by competent substantive evidence; and thus, must be accepted by the Department. In fact, paragraph 27 is a statement taken directly from DEP's second amended notice of intent. Joint Exhibit 1, pp. 329-30. For the abovementioned reasons, the City's exception to paragraph 27 of the RO is rejected.

Based on the foregoing reasons, the City's Exception No. 3 is denied.

City's Exception No. 4 regarding Paragraph Nos. 30 and 31

The City takes exception to the findings of fact in the first sentence of paragraph 30 and all the findings in paragraph 31 of the RO, which state:

> 30. The modeling reports and discussion that support the City's application showed these three breaches connect to Matlacha Pass Aquatic Preserve. . . . .
>
> 31. The Department's water quality explanation of "mixing," was rather simplistic, and did not consider that the waterbody in which the Project would occur has three direct connections with an OFW that is a Class II waters designated for shellfish propagation or harvesting. Such a consideration would require the Department to determine whether to apply the OFW permitting standards, and the Class II waters permitting criteria in section 10.2.5 of the Environmental Resource Permit Applicant's Handbook, Volume I. See Fla. Admin Code R. 62-330.302(1)(a); 62-4.242(2); and 62-302.400(17)(b)36.

RO ¶¶ 30, 31. The City alleges that the first sentence of paragraph 30 and all the findings in paragraph 31are not supported by competent substantial evidence.

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. (2019); *Charlotte Cty.*, 18 So. 3d at 1082; *Wills,* 955 So. 2d at 62. Contrary to the City's exception, the findings in the first sentence of paragraph 30 and all the findings in paragraph 31 of the RO are supported by competent substantial evidence in the form of expert testimony and Departmental rules.

Rule 62-302.400(17)(b)36, Florida Administrative Code, identifies that Matlacha Pass from Charlotte Harbor to San Carlos Bay is designated as a Class II waterbody. This rule also identifies that San Carlos Bay is a Class II water body. Moreover, rule 62-302.700, Florida Administrative Code, identifies that the following waters in Lee County near the proposed Project are Outstanding Florida Waters: Matlacha Pass Wildlife Refuge (rule 62-302.700(9)(b)18.); Matlacha Pass Aquatic Preserve (rule 62-302.700(9)(h)25.); and Pine Island Sound Aquatic Preserve (rule 62-302.700(9)(h)31.) These rule provisions identify that the

Matlacha Pass Aquatic Preserve is both an OFW and a Class II waterbody designated for shellfish propagation or harvesting.

Contrary to the City's exception, the first sentence of paragraph 30 of the RO is supported by competent substantial evidence. The modeling reports prepared by the City's engineers discuss the multiple breaches through the Spreader Waterway that connect to the Matlacha Pass. Joint Ex. No. 1, pp. 92-93.

Contrary to the City's exception, the majority of the findings in paragraph 31 of the RO are supported by competent substantial evidence. Kevin Erwin testified that the Matlacha Pass Aquatic Preserve is part of the ecosystem of the Spreader Waterways. (Erwin, T. Vol. II, pp. 551-53, 574). The Avalon Engineering Report submitted by the City in its permit application to the Department states that water from the South Spreader Waterway travels into the Matlacha Pass during tidal exchanges. (Joint Ex. No. 1, p. 48). In addition, the City's expert Dr. Janicki testified that canal water containing nitrogen is transmitted from the South Spreader Waterway to the Matlacha Pass. (Janicki, T. Vol. III, pp. 809-10).

The area where the Project is located connects to the Matlacha Pass Aquatic Preserve that is part of the Spreader Waterways ecosystem. Since the Matlacha Pass Aquatic Preserve is an OFW and a Class II waterbody designated for shellfish propagation or harvesting, the Department must determine whether to apply the OFW permitting standards, and the Class II waters permitting criteria in section 10.2.5 of the Environmental Resource Permit Applicant's Handbook, Volume I. *See* City Ex. No. 31.

Nevertheless, there is no evidence that the Department *did not consider* that the waterbody in which the Project would occur has three direct connections with an OFW that is a Class II waterbody designated for shellfish propagation or harvesting. To the extent paragraph

31 of the RO states that the Department did not consider the Project's impact to an OFW, the exception is granted, since Megan Mills testified that the Department considered whether the Project was located in an OFW or would significantly degrade an OFW. (Mills, T. Vol. I, pp. 124-25, 194-96).

Based on the foregoing reasons, the City's Exception No. 4 is granted in part and denied in part, as set forth above.

City's Exception No. 5 regarding Paragraph No. 32

The City takes exception to the first two sentences of paragraph 32 of the RO, which read as follows:

> 32. *The Caloosahatchee River, at its entrance to the South Spreader Waterway, is a Class III waters restricted for shellfish harvesting. The mouth of the Caloosahatchee River is San Carlos Bay, which is a Class II waters restricted for shellfish harvesting.* There was no evidence that the Department's regulatory analysis considered that the waterbody in which the Project would occur directly connects to Class III waters that are restricted for shellfish harvesting, and is in close proximity to Class II waters that are restricted for shellfish harvesting. See Fla. Admin. Code R. 62-302.400(17)(b)36. and 62-330.302(1)(c).

RO ¶ 32. (emphasis added). The City alleges that these two sentences in paragraph 32 of the RO are not supported by competent substantial evidence.

The Department concludes that a majority of the first two sentences in paragraph 32 of the RO are supported by competent substantial evidence. Rule 62-302.400(17)(b)36, Florida Administrative Code, identifies that a portion of the Caloosahatchee River is a Class I waterbody, but the remainder of the river is a Class III waterbody. In addition, rule 62-302.400(17)(b)36, Florida Administrative Code, identifies that San Carlos Bay is a Class II waterbody designated for shellfish harvesting and propagation. However, there is no competent substantial evidence that Class III waters are "restricted for shellfish harvesting." RO ¶ 32.

Section 120.57(1)(l), Florida Statutes, prescribes that an agency reviewing a recommended order may reject the ALJ's findings of fact if the agency 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. (2019); *Charlotte Cty.*, 18 So. 3d at 1082; *Wills*, 955 So. 2d at 62. Since the Department cannot find any competent substantial evidence to support the ALJ's finding that Class III waters are restricted for shellfish harvesting, this portion of paragraph 32 of the RO is rejected.

Based on the foregoing reasons, the City's Exception No. 5 to paragraph 32 of the RO is granted in part and denied in part as set forth above.

City's Exception No. 6 regarding Paragraph No. 34

The City takes exception to one sentence in paragraph 34 of the RO, which states "Dr. Janicki estimated that TN loading to the Caloosahatchee River, after removal of the Chiquita Lock, would amount to 30,746 pounds per year." RO ¶ 34. The City alleges that paragraph 34 is not supported by competent substantial evidence.

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. (2019); *Charlotte Cty.*, 18 So. 3d at 1082; *Wills*, 955 So. 2d at 62. Contrary to the City's exception, the statement above in paragraph 34 of the RO is supported by competent substantial evidence in the form of a memorandum authored by Dr. Janicki to the City in reference to removal of the Lock. Petitioners' Ex. No. 132. *See also* Janicki, T. Vol. II, pp. 218-19. For the abovementioned reasons, the City's exception to the above sentence in paragraph 34 of the RO is rejected.

Based on the foregoing reasons, the City's Exception No. 6 is denied.

City's Exception No. 7 regarding Paragraph No. 35

The City takes exception to the second sentence in paragraph 35 of the RO, which paragraph reads as follows:

> 35. Dr. Janicki opined that removing the Lock would not result in adverse impacts to the surrounding environment. *But the Petitioners obtained his concession that his opinion was dependent on the City's completion of additional water quality enhancement projects in the future as part of its obligations under the Caloosahatchee Estuary Basin Management Action Plan (BMAP) for achieving the TN TMDL.*

RO ¶ 35. (emphasis added). The City alleges that the second sentence in paragraph 35 of the RO is not supported by competent substantial evidence.

Contrary to the City's exception, the ALJ's findings of fact in paragraph 35 of the RO are supported by competent substantial evidence. Tony Janicki testified as follows:

> MR. HANNON: Now, your opinion that removal of the lock will not adversely impact the Caloosahatchee River is conditional: is it not?
> A. To a degree, yes.
> * * * *
> Q. You are prepared to testify that in your opinion removal of the Chiquita Boat Lock would probably not adversely affect the environment correct?
> A. That's correct.
> Q. And does that opinion depend upon Cape Coral completing certain projects that they've represented to you they intend to complete?
> A. Again, to some degree, yes.

Janicki, T. Vol. 1, pp. 219-21. The ALJ's findings are further explained in Tony Janicki's testimony from 217 through 221.

The City disagrees with the ALJ's findings and seeks to have the Department reweigh the evidence. However, the Department is not authorized to reweigh evidence presented at a DOAH final hearing or judge the credibility of a witness. *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 Constr. Co.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623. For the abovementioned reasons, the City's exception to paragraph 35 of the RO is rejected.

Based on the foregoing reasons, the City's Exception No. 7 is denied.

City's Exception No. 8 regarding Paragraph No. 37

The City takes exception to the findings in paragraph 37 of the RO, which state:

> 37. Thus, the Petitioners proved by a preponderance of the competent and substantial evidence that the Department and the City were not aligned regarding how the City's application would provide reasonable assurances of meeting applicable water quality standards.

RO ¶ 37. The City alleges that paragraph 37 is not supported by competent substantial evidence.

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. (2019); *Charlotte Cty.*, 18 So. 3d at 1082; *Wills*, 955 So. 2d at 62. There is no competent substantial evidence to support the ALJ's finding that the Department and City were not aligned about how the City would provide reasonable assurances regarding water quality standards.

Based on the foregoing reasons, the City's Exception No. 8 is granted.

City's Exception No. 9 regarding Paragraph No. 38

The City takes exception to the findings in paragraph 38 of the RO, which state:

> 38. The Petitioners proved by a preponderance of the competent and substantial evidence that the City relied on future projects to provide reasonable assurance that the removal of the Lock would not cause or contribute to violations of water quality standards in the Caloosahatchee River and the Matlacha Pass Aquatic Preserve.

RO ¶ 38. The City alleges that paragraph 38 is not supported by competent substantial evidence.

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. (2019); *Charlotte Cty.*, 18 So. 3d at 1082; *Wills*, 955 So. 2d at 62. Contrary to the City's exception, the statement above in paragraph 38 of the RO is supported by competent substantial evidence in the form of a memorandum authored by Dr. Janicki to the City in reference to removal of the Lock. Petitioners' Ex. No. 132. *See also* Janicki, T. Vol. II, pp. 218-19. For the abovementioned reasons, the City's exception to the above sentence in paragraph 38 of the RO is rejected.

The City incorporated the arguments made in its Exception Nos. 1 through 7. For the reasons cited in the Department's response to the City's Exceptions Nos. 1 through 7 and 9, the City's Exception No. 9 is denied.

City's Exception No. 10 regarding Paragraph No. 39

The City takes exception to the findings of fact in paragraph 39 of the RO, which reads:

> 39. The Petitioners proved by a preponderance of the competent and substantial evidence that the Department relied on a simplistic exchange of waters to determine that removal of the Lock would not cause or contribute to violations of water quality standards in the Caloosahatchee River and the Matlacha Pass Aquatic Preserve.

RO ¶ 39. The City alleges that paragraph 39 of the RO is not supported by competent substantial evidence. For the reasons cited in the Department's response to the City's Exception No. 4 above, the City's Exception No. 39 is denied.

City's Exception No. 11 regarding Paragraph No. 40

The City takes exception to the findings of fact in paragraph 40 of the RO, which reads:

> 40. The engineering report that supports the City's application stated that when the Lock is removed, the South Spreader Waterway behind the Lock will

> become tidally influenced. With the Lock removed, the volume of daily water fluxes for the South Spreader Waterway would increase from zero cubic meters per day to 63,645 cubic meters per day. At the location of Breach 20, with the Lock removed, the volume of daily water fluxes would drastically decrease from 49,644 cubic meters per day to eight cubic meters per day.

RO ¶ 40. The City alleges that paragraph 40 is not supported by competent substantial evidence.

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. (2019); *Charlotte Cty.*, 18 So. 3d at 1082; *Wills*, 955 So. 2d at 62. Contrary to the City's exception, the Department finds that the ALJ's findings quoted above are supported by competent substantive evidence; and thus, must be accepted by the Department.

The findings in paragraph 40 of the RO are a direct recitation from the engineering report included in the City's application to the Department. Joint Ex. No. 1, p. 124. The City's engineering report in support of its permit application concluded that when the Chiquita Lock is removed, the volume of daily water fluxes out of the canal system from the South Spreader Waterway would increase from zero cubic meters per day to 63,645 cubic meters per day. The engineering report also concluded that with the Chiquita Lock removed, the volume of daily water fluxes out of the canal system at the location of Breach 20, would decrease from 49,644 cubic meters per day to eight cubic meters per day. Joint Ex. No. 1, p. 124.

Based on the foregoing reasons, the City's Exception No. 11 is denied.

City's Exception No. 12 regarding Paragraph No. 41

The City takes exception to the second sentence in paragraph 41 of the RO, which states that "[t]he evidence demonstrated that the embayment is Punta Blanca Bay, which is part of the

Matlacha Pass Aquatic Preserve," alleging this statement is not supported by competent substantial evidence in the record. RO ¶ 41.

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. (2019); *Charlotte Cty.*, 18 So. 3d at 1082; *Wills*, 955 So. 2d at 62. Contrary to the City's exception, the Department finds that the ALJ's finding quoted above is supported by competent substantive evidence; and thus, must be accepted by the Department. Petitioners' Ex. No. 152, p. 2 (map).

Based on the foregoing reasons, the City's Exception No. 12 is denied.

City's Exception No. 13 regarding Paragraph Nos. 42, 43, and 44

The City takes exception to the findings of fact in paragraphs 42, 43, and 44 of the RO, which read:

> 42. Mr. Erwin testified that Breach 20 was not a "breach."3/ He described it as the location of a perpendicular intersection of the South Spreader Waterway with a small tidal creek, which connected to a tidal pond further back in the mangroves. Mr. Erwin testified that an "engineered sandbag concrete structure" was built at the shallow opening to limit the amount of flow into and out of this tidal creek system. But it was also designed to make sure that the tidal creek system "continued to get some amount of water." As found above, Lock removal would drastically reduce the volume of daily water fluxes into and out of Breach 20's tidal creek system.
>
> 43. Mr. Erwin also testified that any issues with velocities or erosion would be exemplified by bed lowering, siltation, and stressed mangroves. He persuasively testified, however, that there was no such evidence of erosion and there were "a lot of real healthy mangroves."
>
> 44. Mr. Erwin opined that removal of the Lock would cause the South Spreader Waterway to go from a closed, mostly fresh water system, to a tidal saline system. He described the current salinity level in the South Spreader Waterway to be low enough to support low salinity vegetation and not high enough to support marine organisms like barnacles and oysters.

RO ¶¶ 42, 43, 44. The City alleges that paragraphs 42, 43, and 44 of the RO and the associated footnote are not supported by competent substantial evidence. They base this opinion on their allegation that Mr. Erwin testified beyond the scope of his qualifications as an expert in ecology in the subject hearing.

Contrary to the City's exception, the findings of fact in paragraphs 42 through 44 of the RO are supported by competent substantial evidence in the form of testimony by Kevin Erwin. While the City contends that Mr. Erwin's opinions are beyond the scope of his qualifications in this hearing, the City did not object to Mr. Erwin's testimony found in paragraphs 42 through 44 of the RO on the grounds that his field of expertise did not embrace the testimony in these paragraphs. Nor did the City move to strike this testimony.

The findings in paragraph 42 of the RO are supported by Mr. Erwin's testimony. (Erwin, T., Vol. II, pp. 558, 594). The findings in paragraph 43 of the RO are also supported by Mr. Erwin's testimony. (Erwin, T., Vol. II, pp. 530-33, 539-41, 554, 559 and 615). Lastly, the findings in paragraph 44 of the RO are supported by Mr. Erwin's testimony. (Erwin, T., Vol. II, pp. 573, 605, and 610).

Moreover, expert Kevin Erwin is qualified to testify about the original design of the South Spreader Waterway. Kevin Erwin served as an ecologist for the Department of Environmental Regulation (DER), the predecessor agency to the Department, from 1975 to 1980. During this time, he initiated and oversaw the Department's enforcement action against the developers of the City, collectively called "GAC." (Erwin, T. Vol. II, p. 516.) Mr. Erwin was personally involved in reviewing and implementing the design for the Spreader Waterway. (Erwin, T. Vol. II, pp. 521-26, 554-57). Mr. Erwin's opinions regarding how the South Spreader

Waterway is functioning currently is supported by several inspections he conducted of the waterway by boat, plane, and review of drone video footage. (Erwin, T. Vol. II, p. 557-69, 594).

The City seeks to have the Department judge the credibility of the witness and then reweigh the evidence. However, the Department is not authorized to reweigh evidence presented at a DOAH final hearing or judge the credibility of a witness. *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 Constr. Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623. For the abovementioned reasons, the City's exception to paragraphs 25 and 26 of the RO is rejected.

Furthermore, 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). As noted by the ALJ in endnote No. 3 to the RO, "[t]he sufficiency of the facts required to form the opinion of an expert must normally reside with the expert, and any purported deficiencies in such facts relate to the weight of the evidence, a matter also exclusively within the province of the ALJ as the trier of the facts. *See Gershanik v. Dep't of Prof'l Regulation*, 458 So. 2d 302, 305 (Fla. 3rd DCA 1984), *rev. den.*, 462 So.2d 1106 (Fla. 1985).

For the abovementioned reasons, the City's exception to paragraphs 42 through 44 of the RO is rejected.

Based on the foregoing reasons, the City's Exception No. 13 is denied.

City's Exception No. 14 regarding Paragraph Nos. 45 and 46

The City takes exception to the findings of fact in paragraphs 45 and 46 of the RO, which read:

45. The City's application actually supports this opinion. Using the Environmental Fluid Dynamics Code (EFDC) model developed by Dr. Janicki for this Lock removal project, comparisons were made describing the salinity distribution within the South Spreader Waterway. The model was run with and without the Lock, for both a wet and dry year.

46. Dr. Janicki testified, and the model showed, that removal of the Lock would result in increased salinity above the Lock and decreased salinity downstream of the Lock. However, he generally opined that the distribution of salinities was well within the normal ranges seen in this area. The City's application also concluded that the resultant salinities did not fall outside the preferred salinity ranges for seagrasses, oysters, and a wide variety of fish taxa. However, Dr. Janicki did not address specific changes in vegetation and encroachment of marine organisms that would occur with the increase in salinity within the South Spreader Waterway.

RO ¶¶ 45 and 46. The City alleges that "[p]etitioners did not provide any expert testimony to support a finding that specific changes in vegetation and encroachment of marine organisms would occur within the South Spreader Waterway." City's Exception No. 14, p. 18. The City does not identify any objections to paragraph 45 of the RO, nor to any other sentence in paragraph 46 of the RO other than the last sentence.

The ALJ's findings of fact in the last sentence of paragraph 46 are supported by competent substantial evidence in the form of expert testimony by John Cassani. The City acknowledges that Petitioners' expert witness John Cassani, testified about adverse impacts on vegetation and encroachment of marine organisms with the increase of salinity if the Lock is removed. City's Exception No. 14, p. 19. The City objects that Mr. Cassani was accepted as an expert in water quality; however, the City's counsel did not object to Mr. Cassani's testimony regarding the smalltooth sawfish or move to strike this testimony. (Cassani, T. Vol. pp. 656-58). As a result, Mr. Cassani's testimony regarding the smalltooth sawfish is part of the record of the hearing upon which the ALJ may rely. Specifically, Mr. Cassani testified as follows:

Q. Did you also formulate an opinion as to whether removal of the Lock would have an adverse impact on plants, fish, and manatees?

A. I did.

Q. And could you tell the Court what that opinion is.

A. My professional opinion about the impact of removing the lock on downstream biota, either plants or animals, was from my experience with the North Spreader.

So there was very significant sediment transport shoaling as a result of [re]moving the Ceitus boat lift.

I thought it was reasonable to assume something similar would happen if the Chiquita Lock was removed.

And so as you heard Mr. Erwin testify this morning that sedimentation and shoaling as a result of that can damage seagrass and oysters.

I'm also concerned that one of the most critically endangered species on the planet right now is the smalltooth sawfish. And the smalltooth sawfish has an exclusion zone just downstream of the mouth of the Chiquita Lock.

And so it's considered a pupping area. And so we thought that *rapid salinity fluctuations might create an impact to that critically endangered species.*

(Cassani, T. Vol. II, pp. 656-57) (emphasis added). *See also* Joint Ex. No. 1, p. 57-59. Moreover, Mr. Cassani's resume, admitted as Petitioner's exhibit 117, provides ample evidence that he has the qualifications to testify about salinity changes and its potential impacts to the sawtooth sawfish. Mr. Cassani received a bachelor's degree in Fisheries and Wildlife from Michigan State University, and a master's degree in biology, with a concentration in aquatic ecology, from Central Michigan University. He also teaches limnology and watershed science at the Florida Gulf Coast University in its Department of Marine and Ecological Sciences. Petitioners' Ex. No. 117.

Based on the foregoing reasons, the City's Exception No. 14 is denied.

City's Exception No. 15 regarding Paragraph No. 48

The City takes exception to the second sentence in paragraph 48 of the RO, which states that "Mr. Erwin credibly and persuasively testified that a drop in water level of only a few inches would have negative effects on the health of mangroves, and that a drop of a foot could result in substantial mangrove die-off." RO ¶ 48. The City alleges this statement is not supported by competent substantial evidence. City Exception No. 15, p. 19.

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. (2019); *Charlotte Cty.*, 18 So. 3d at 1082; *Wills,* 955 So. 2d at 62. Contrary to the City's exception, the Department finds that the ALJ's finding quoted above is supported by competent substantive evidence; and thus, must be accepted by the Department. Kevin Erwin explained how a permanent drop in water level from only a few inches to 1 or 1.5 feet negatively impacts mangroves. (Erwin, T. Vol. II, pp. 552-54). Mr. Erwin compared the negative impacts to the mangroves in the North Spreader System after removal of the Ceitus Boat Lift was removed in 2008 with the proposed removal of the Chiquita Lock. Erwin, T. Vol. II, pp. 552-54.

Based on the foregoing reasons, the City's Exception No. 15 is denied.

City's Exception No. 16 regarding Paragraph No. 49

The City takes exception to the last sentence in paragraph 49 of the RO, which states that "[t]hus, the mangrove wetlands on the western and southern borders of the South Spreader Waterway serve to filter nutrients out of the water discharged from the Waterway before it reaches Matlacha Pass and the Caloosahatchee River."

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. (2019); *Charlotte Cty.*, 18 So. 3d at 1082; *Wills,* 955 So. 2d at 62. Contrary to the City's exception, the Department finds that the ALJ's finding quoted above is supported by competent substantive evidence; and thus, must be accepted by the

Department. Kevin Erwin's testimony was clearly about the status of the South Spreader Waterway prior to removal of the Lock. *See* Mr. Erwin's testimony regarding comparison of the north and south mangroves. (Erwin, T. Vol. II, pp. 530-33, 539-41, 551-52, 554, 559, 598-99, 605-06, 614-15, 631).

Based on the foregoing reasons, the City's Exception No. 16 is denied.

City's Exception No. 17 regarding Paragraph No. 50

The City takes exception to the findings of fact in paragraph 50 of the RO, which states "Mr. Erwin's credible and persuasive testimony was contrary to the City's contention that Lock removal would not result in adverse impacts to the mangrove wetlands adjacent to the South Spreader Waterway." RO ¶ 50. The City alleges that Paragraph 50 is not supported by competent substantial evidence.

Contrary to the City's exception, the ALJ's findings of fact in paragraph 50 of the RO are supported by competent substantial evidence in the form of expert testimony by Kevin Erwin. Kevin Erwin testified regarding impacts from removal of the Chiquita lock that will cause adverse impacts to the mangrove wetlands adjacent to the South Spreader Waterway. (Erwin, T. Vol. II, pp. 539-41, 598-99, 605-06, 615 and 631; Erwin, T. Vol. III, pp. 901-03 and 907-08).

The City disagrees with the ALJ's findings and seeks to have the Department reweigh the evidence. However, the Department is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *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 Constr. Co.,* 592 So. 2d at 280; *Conshor,*

Inc., 498 So. 2d at 623. For the abovementioned reasons, the City's exception to paragraph 50 of the RO is rejected.

Based on the foregoing reasons, the City's Exception No. 17 is denied.

City's Exception No. 18 regarding Paragraph No. 51

The City takes exception to the findings of fact in paragraph 51 of the RO, which state that "[t]he City and the Department failed to provide reasonable assurances that removing the Lock would not have adverse secondary impacts to the health of the mangrove wetlands community adjacent to the South Spreader Waterway." RO ¶ 51. The City alleges that paragraph 51 of the RO is not supported by competent substantial evidence.

Contrary to the City's exception, the ALJ's findings of fact in paragraph 51 of the RO are supported by competent substantial evidence in the form of expert testimony by Kevin Erwin. Kevin Erwin testified regarding impacts from removal of the Chiquita Lock that will cause adverse impacts to the health of the mangrove wetlands community adjacent to the South Spreader Waterway. Specifically, Mr. Erwin testified as follows:

> Q. In the [permit] application, it's represented that there will be no adverse impact on wetlands or mangrove[s].
>
> Do you have an opinion as to whether the application and the granting of the application would have had an adverse impact on wetlands and mangroves?
>
> A. Yes.
>
> Q. And what is that opinion?
>
> A. I believe there would be significant secondary impacts as a result of the removal of that structure and opening that system directly to tide.
>
> Q. Why do you believe that?
>
> A. Well, there's a number of similarities between the system that I was just discussing, the North Spreader System in Ceitus and this one.
>
> While they're not identical, they're exactly the same – same concepts to provide that fresh water source to the coastal wetlands in the area.
>
> And it's not – in this case, it's not just the source of the fresh water, but its's the change in elevation that will occur in that system when you move that foot (sic).
>
> Mangroves are extremely sensitive to a lot of different things, one of which is water levels. So if those water levels drop, even just a few inches, okay,

what could very well happen is what you had happen in the North Spreader System with those mangroves becoming drier and those systems turning from mangroves to something else because they no longer can flourish as mangroves or even salt marsh possibly.

Q. Do you have an opinion as to whether the Department should have considered these secondary effects?

A. Yes.

Q. What is that opinion?

A. That they absolutely should have considered them. There's so much wetland habitat that's part of this ecosystem now, to make that kind of a significant change and not at least give cause to enough to study those areas to determine what the impacts would be is inexcusable especially when you look at the record and what's happened in the North Spreader System.

Erwin, T. Vol. II, pp. 551-53.

The City disagrees with the ALJ's findings and seeks to have the Department reweigh the evidence. However, the Department is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *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 Constr. Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623. For the abovementioned reasons, the City's exception to paragraph 51 of the RO is rejected.

Based on the foregoing reasons, the City's Exception No. 18 is denied.

City's Exception No. 19 regarding Paragraph No. 55

The City takes exception to the findings of fact in paragraph 55 of the RO, which states that "the Petitioner's expert witness, John Cassani, who is [employed by] the Calusa Waterkeeper, testified that there is a smalltooth sawfish exclusion zone downstream of the Lock. He testified that the exclusion zone is a pupping area for smalltooth sawfish, and that rapid

salinity fluctuations could negatively impact their habitat." RO ¶ 55. The City alleges that paragraph 55 of the RO is not supported by competent substantial evidence.

Contrary to the City's exception, the ALJ's findings of fact in paragraph 55 of the RO are supported by competent substantial evidence in the form of expert testimony by John Cassani. The City objects that Mr. Cassani was accepted as an expert in water quality; however, the City's counsel did not object to Mr. Cassani's testimony regarding the smalltooth sawfish, nor move to strike this testimony. (Cassani, T. Vol. pp. 656-58). As a result, Mr. Cassani's testimony regarding the smalltooth sawfish is part of the record of the hearing upon which the ALJ may rely. Specifically, Mr. Cassani testified as follows:

> Q. Did you also formulate an opinion as to whether removal of the Lock would have an adverse impact on plants, fish, and manatees?
>
> A. I did.
>
> Q. And could you tell the Court what that opinion is.
>
> A. My professional opinion about the impact of removing the lock on downstream biota, either plants or animals, was from my experience with the North Spreader.
>
> So there was very significant sediment transport shoaling as a result of [re]moving the Ceitus boat lift.
>
> I thought it was reasonable to assume something similar would happen if the Chiquita Lock was removed.
>
> And so as you heard Mr. Erwin testify this morning that sedimentation and shoaling as a result of that can damage seagrass and oysters.
>
> I'm also concerned that one of the most critically endangered species on the planet right now is the smalltooth sawfish. And the smalltooth sawfish has an exclusion zone just downstream of the mouth of the Chiquita Lock.
>
> And so it's considered a pupping area. And so we thought that rapid salinity fluctuations might create an impact to that critically endangered species.

Cassani, T. Vol. II, pp. 656-57. *See also* Joint Ex. No. 1, pp. 57-59. Moreover, Mr. Cassani's resume admitted as Petitioners' Exhibit No. 117 provides ample evidence that he has the qualifications to testify about potential impacts to the sawtooth sawfish. Mr. Cassani received a bachelor's degree in Fisheries and Wildlife from Michigan State University, and a master's degree in biology, with a concentration in aquatic ecology, from Central Michigan University.

He also teaches limnology and watershed science at the Florida Gulf Coast University in its Department of Marine and Ecological Sciences. Petitioners' Ex. No. 117.

Based on the foregoing reasons, the City's Exception No. 19 is denied.

City's Exception No. 20 regarding Paragraph No. 57

The City takes exception to the findings of fact in paragraph 57 of the RO, which reads:

> 57. The City's literature review included a regional assessment by FWC's Fish and Wildlife Research Institute (FWRI) from 2006. Overall, the FWRI report concluded that the mouth of the Caloosahatchee River, at San Carlos Bay, was a "hot spot" for boat traffic coinciding with the shift and dispersal of manatees from winter refugia. The result was a "high risk of manatee-motorboat collisions." In addition, testimony adduced at the hearing from an 18-year employee of Cape Harbour Marina, Mr. Frank Muto, was that Lock removal would result in novice boaters increasing their speed, ignoring the no-wake and slow-speed zones, and presenting "a bigger hazard than the [L]ock ever has."

RO ¶ 57. The City alleges that paragraph 57 of the RO is not supported by competent substantial evidence. Contrary to the City's exception, the ALJ's findings of fact in paragraph 57 of the RO are supported by competent substantial evidence.

The City objected to the ALJ relying on a regional assessment by FWC's Fish and Wildlife Research Institute included in the City's own literature review that was contained in the City's permit application. The City's permit application containing this FWC assessment was admitted at hearing in Joint Exhibit No. 1. The City has no basis to object to the ALJ's reference to FWC's regional assessment, because it is a part of the hearing record.

The City also objects to the ALJ's findings in paragraph 57 regarding Mr. Frank Muto's testimony. Mr. Muto, has extensive knowledge of the boat traffic in the area where the Lock is located, because he has been the harbor master for Cape Harbour Marina for the past eighteen (18) years. (Muto, T. Vol. II, p. 372). Mr. Muto testified as follows:

> Q. Mr. Muto, I want to first thank you for acknowledging the issues that you've seen at the Lock.

You mentioned a couple of solutions to the problems.
Would removal of the Lock help reduce those problems?
A. Not at all. They would increase our problems by removing the Lock.
Q. Okay. Let me be more specific. The problem you said with the lock, people going through the lock. If the lock is removed, you believe they are going to be worse?
A. I really do believe they'd be worse because then you're gonna find people that are novice boaters increasing their speed.
It's still going to be a no wake zone and a slow speed zone. You're gonna find boats that are gonna try to go up and down that Spreader Canal at higher rate of speed because they're novice boaters and don't understand it.
And I think that could present a bigger hazard than the lock ever has.

Muto, T. Vol. II, pp. 399-400.

The City in its exception acknowledged that lay opinion testimony is admissible under certain circumstances. The City quoted the First District Court of Appeal in *Johnson v. State* that "[l]ay opinion testimony is admissible only to help the jury or the court to understand the facts about which the witness is testifying and not to provide specialized explanations or interpretations that an untrained layman could not make if perceiving the same acts or events." *Johnson v. State*, 254 So. 2d 617 (Fla. 1st DCA 2019) (*citing United States v. Espino*, 317 F.3d 788, 797 (8th Cir. 2003)). *See also Nat'l Commc'ns Indus., Inc. v. Tarlini*, 367 So. 2d 670 (Fla. 1st DCA 1979)(non-experts may testify on a subject about matters they themselves perceive). The testimony from the Mr. Muto was intended to help the ALJ understand Mr. Muto's 18 years of watching boaters operating in the subject area; and thus may form the basis for the ALJ's finding of fact.

Based on the foregoing reasons, the City's Exception No. 20 is denied.

City's Exception No. 21 regarding Paragraph Nos. 59, 60, 102 and 103

The City takes exception to the findings of fact in paragraphs 59 and 60 of the RO, which read:

59. Petitioners presented the testimony of Mr. Frank Muto, the general manager of Cape Harbour Marina. Mr. Muto has been at the Cape Harbour Marina for 18 years. The marina has 78 docks on three finger piers along with transient spots. The marina is not currently subject to tidal flows and its water depth is between six and a half and seven and a half feet. He testified that they currently have at least 28 boats that maintain a draft of between four and a half and six feet of water. If the water depth got below four feet, those customers would not want to remain at the marina. Mr. Muto further testified that the Lock was in place when the marina was built, and the marina and docks were designed for an area with no tidal flow.

60. Mr. Muto also testified that he has witnessed several boating safety incidents in and around the Lock. He testified that he would attribute almost all of those incidents to novice boaters who lack knowledge of proper boating operations and locking procedures. Mr. Muto additionally testified that there is law enforcement presence at the Lock twenty-four hours a day, including FWC marine patrol and the City's marine patrol

RO ¶¶ 59, 60. The City alleges that paragraphs 59 and 60 regarding Frank Muto's testimony are not supported by competent substantial evidence. Contrary to the City's exception, the ALJ's findings of fact in paragraphs 59 and 60 of the RO are supported by competent substantial evidence.

Mr. Muto has extensive knowledge of the boat traffic in the area where the Lock is located, because he has been the harbor master for the Cape Harbour Marina for the past eighteen (18) years. (Muto, T. Vol. II, p. 372). Each sentence in paragraphs 59 and 60 of the RO is supported by Mr. Muto's testimony. The ALJ's findings in paragraph 59 of the RO are supported by competent substantial evidence in the form of Mr. Muto's testimony. (Muto, T. Vol. II, pp. 372, 373, 378, 380, 379, 380 and 387). The ALJ's findings in paragraph 60 of the RO are also supported by competent substantial evidence in the form of Mr. Muto's testimony. (Muto, T. Vol. II, pp. 388-89, 391).

Mr. Muto was not tendered as an expert witness. However, lay opinion testimony is admissible under certain circumstances. *Nat'l Commc'ns Indus., Inc. v. Tarlini*, 367 So. 2d 670

(Fla. 1st DCA 1979) (non-experts may testify on a subject about matters they themselves perceive). The testimony by Mr. Muto in paragraphs 59 and 60 of the RO is all related to matters that he has seen or perceived; and thus, may constitute competent substantial evidence upon which the ALJ may rely.

The City also takes exception to the conclusions of law in paragraphs 102 and 103 of the RO, which read:

> 102. The preponderance of the evidence supports a finding that the City's claims of navigational public safety concerns have less to do with navigational hazards, and more to do with inexperienced and impatient boaters. Even so, the direct impact of Lock removal will be to increase navigational access from the Caloosahatchee River to the South Spreader Waterway.
>
> 103. In addition, the preponderance of the evidence also supports a finding under factor one that there will be adverse secondary impacts to the property of Cape Harbour Marina.

RO ¶¶ 102, 103. The City alleges that the conclusions of law in paragraphs 102 and 103 of the RO are not supported by the Department's ERP rules. *See* Environmental Resource Permit Applicant's Handbook, Vol. I, Section 10.2.3.1.

The Department concludes that paragraph 102 and 103 contain mixed questions of law and fact. 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. (2019); *Charlotte Cty.*, 18 So. 3d at 1082; *Wills,* 955 So. 2d at 62.

Findings of fact include "ultimate facts," sometimes termed mixed issues of law and fact, necessary to determine the issues in a case. *Costin v. Fla. A & M Univ. Bd. of Trs.*, 972 So. 2d 1084, 1086-1087 (Fla. 5th DCA 2008). Whether a given set of facts constitutes the violation of a

rule or statute has been held to be a question of ultimate fact that an agency may not reject if it is supported by competent substantial evidence. *Pillsbury v. State, Dep't of Health & Rehab. Serv.*, 744 So. 2d 1040, 1042 (Fla. 2d DCA 1999).

Contrary to the City's exception, the Department finds that the ALJ's findings quoted above in paragraphs 102 and 103 of the RO are supported by competent substantive evidence; and thus, must be accepted by the Department. (Muto, T. Vol. II, pp. 388-89, 399-400). Moreover, the ALJ's finding in paragraph 103 that the Project will cause adverse secondary impacts to the property of Cape Harbour Marina under factor one of the seven factors in section 373.414(1)(a), Florida Statutes, to be considered and balanced is supported by competent substantive evidence; and thus, must be accepted by the Department. (Muto, T. Vol. II. pp. 402-03). Specifically, Mr. Muto testified that water depths lower than five and a half feet to six feet would start to "cause a hazard on boat safety." *Id.* Under section 373.414(1)(a)1., Florida Statutes, the Department must consider "[w]hether the activity will adversely affect the public health, safety, or welfare or the property of others." § 373.414(1)(a)1. Fla. Stat. (2019). The Department concurs with the ALJ's mixed issues of law and fact, and the ALJ's interpretation of Section 373.414(1)(a)1., Florida Statutes.

Based on the foregoing reasons, the City's Exception No. 21 is denied.

City's Exception No. 22 regarding Paragraph Nos. 67 through 76

The City takes exception to each conclusion of law in the "Burden of Proof" section of the RO, with minimal explanation for its objection to the conclusions of law. The conclusions of law in paragraphs 67 through 76 of the RO each interpret section 120.569(2)(p), Florida Statutes. In paragraph 69 of the RO, the ALJ noted that on March 1, 2019, the Department filed a second amendment to its intent to issue and draft permit. The ALJ further noted that "[t]his second

amendment eliminated the Department's previous finding that the City demonstrated mitigation of adverse water quality impacts through its achievement of current *and future project credits* in the BMAP process. See Joint Exhibit 1 at pp. 329 and 330." (emphasis added). RO ¶ 69. The ALJ further explained that an "agency must offer proof in support of the agency's changed position during the evidentiary proceeding, in order for the new position to provide the potential basis for a recommended or final order. . . . The Department's changed position, therefore, was not part of the City's prima facie case as contemplated by section 120.569(2)(p)." RO ¶ 71. Thus, the ALJ concluded that the City did not met its burden under section 120.569(2)(p), Florida Statutes, to present a prima facie case of entitlement to the second amended ERP.

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*, 805 So. 2d at 1012; *L.B. Bryan & Co.*, 746 So. 2d at 1196-97; *Deep Lagoon Boat Club, Ltd.*, 784 So. 2d at 1141-42. However, DEP does not have authority to reject the ALJ's interpretation of Section 120.569(2)(p), Florida Statutes, since this statutory provision is not one over which it has substantive jurisdiction. Even if DEP disagreed with the ALJ's interpretation of Section 120.569(2)(p), Florida Statutes, it does not have the authority to reject the ALJ's interpretation of this statutory provision. For the abovementioned reasons, the City's exception to paragraphs 67 through 71 of the RO ("Burden of Proof") is rejected.

Based on the foregoing reasons, the City's Exception No. 22 is denied.

City's Exception No. 23 regarding Paragraph No. 79

The City takes exception to the conclusions of law in paragraph 79 of the RO, which state that the "Petitioners proved by a preponderance of the competent and substantial evidence that the City relied on future projects to provide reasonable assurance that the removal of the Lock

would not cause or contribute to violations of water quality standards in the Caloosahatchee River and Matlacha Pass Aquatic Preserve," alleging that the conclusion of law is either an improperly categorized finding of fact or a conclusion of law based on a non-existent finding of fact. City Exception No. 23, p. 29.

The Department concludes that the ALJ's statement above is in reality a finding of fact. 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. (2019); *Charlotte Cty.*, 18 So. 3d at 1082; *Wills,* 955 So. 2d at 62. Contrary to the City's exception, the Department finds that the ALJ's findings quoted above are supported by competent substantive evidence; and thus, must be accepted by the Department. For example, the City's expert, Dr. Janicki, concluded that the Chiquita boat lock removal relied upon the BMAP process to conclude that the Lock's removal "will not result in an increased load above that already estimated." Joint Ex. No. 1, p. 86. Similar statements appear in the City's application in Joint Ex. No. 1, pp. 120-124, 165, 182-84, 208-09, 215, 217, and 220. *See Hasselback v. Wentz and Dep't of Envtl. Prot.*, DOAH Case No. 07-5216)(Fla. DOAH January 28, 2010; DEP March 15, 2010).

Based on the foregoing reasons, the City's Exception No. 23 is denied.

City's Exception No. 24 regarding Paragraph Nos. 80 and 81

The City takes exception to the conclusions of law in paragraphs 80 and 81 of the RO, which state:

> 80. Such reliance on future projects does not satisfy the required upfront demonstration that there is a substantial likelihood of compliance with standards, or "a substantial likelihood that the project will be successfully implemented." See Metro. Dade Cnty. v. Coscan Florida, Inc., 609 So. 2d 644, 648 (Fla. 3d DCA

1992). Those future projects were part of the BMAP process under Section 403.067, Florida Statutes, which the Department had recognized and incorporated into its original intent to issue and draft permit. See Joint Exhibit 1 at pp. 329 and 330. The March 1, 2019, second amendment eliminated the Department's previous finding that the City demonstrated mitigation of adverse water quality impacts through its achievement of future project credits in the BMAP process.

81. Dr. Janicki tried to avoid using the "BMAP" acronym because evidence and argument related to that final agency action were excluded from this proceeding at the behest of the Department without objection from the City. However, the BMAP implements, over approximately 20 years, the 2009 TN TMDL that Dr. Janicki testified was calculated with Lock removal as a consideration. But achievement of the 2009 TN TMDL depends on the BMAPs future projects, which Dr. Janicki conceded was the basis for his water quality opinion in this proceeding.

RO ¶¶ 80-81. The City alleges that the conclusions of law in paragraphs 80 and 81 of the RO are not supported by testimony from the City.

The Department concludes that paragraphs 80 and 81 of the RO contain mixed findings of fact and conclusions of law. Contrary to the City's exception, the ALJ's findings of fact in paragraphs 80 and 81 of the RO are supported by competent substantial evidence. Tony Janicki testified as follows:

MR. HANNON: Now, your opinion that removal of the lock will not adversely impact the Caloosahatchee River is conditional: is it not?

B. To a degree, yes.

* * * *

Q. You are prepared to testify that in your opinion removal of the Chiquita Boat Lock would probably not adversely affect the environment correct?

B. That's correct.

Q. And does that opinion depend upon Cape Coral completing certain projects that they've represented to you they intend to complete?

B. Again, to some degree, yes.

Q. Well, do you remember my asking you that very same question in your deposition?

A. I -- I don't recall.

Q. I'm showing you page 135, line 21, question: ["]And does that opinion depend upon Cape Coral completing certain projects that they've represented to you they intend to complete? Answer: Yes.["]

Janicki, T. Vol. I, pp. 219-21. *See also* Janicki, T. Vol. I, pp. 217-21.

The ALJ's findings in both paragraphs 80 and 81 of the RO are supported by competent substantial evidence in the form of Dr. Janicki's testimony. (Janicki, T. Vol. III, pp. 789-796). On cross-examination during his surrebuttal testimony, Dr. Janicki confirmed his prior testimony that the City must rely on Basin Management Action Plan (BMAP) projects to be completed in the future to meet the states' water quality standards for numeric nutrients. He admitted that in his expert opinion removal of the Lock would not cause a water quality violation *only* if the City completes certain projects for which it would receive credits under the Department's BMAP process. (Janicki, T. Vol. III, pp. 793-795).

The City disagrees with the ALJ's findings and seeks to have the Department reweigh the evidence. However, the Department is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *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 Constr. Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623. For the abovementioned reasons, the City's exception to paragraphs 80 and 81 of the RO is rejected.

Based on the foregoing reasons, the City's Exception No. 24 is denied.

City's Exception No. 25 regarding Paragraph No. 82

The City takes exception to the conclusions of law in paragraph 82 of the RO, which reads:

> 82. The City's reliance on the BMAP process to satisfy reasonable assurance for the ERP Permit was further exemplified by this argument in its proposed recommended order:
> "By operation of section 403.067(7)(b)2.i., Florida Statutes, the City is presumed to be in compliance with the TMDL requirements."

RO ¶ 82. The City alleges that paragraph 82 of the RO "shows the ALJ's lack of understanding of the statutes and rules which apply to this proceeding." City's Exception No. 25, p. 33.

The Department concludes that paragraph 82 of the RO is a mixed finding of fact and conclusion of law. 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. (2019); *Charlotte Cty.*, 18 So. 3d at 1082; *Wills,* 955 So. 2d at 62. Contrary to the City's exception, the Department finds that the ALJ's findings quoted above are supported by competent substantive evidence; and thus, must be accepted by the Department. For example, the City's expert, Dr. Janicki, concluded that the Chiquita boat lock removal relied upon the BMAP process to conclude that the Lock's removal "will not result in an increased load above that already estimated." Joint Ex. No. 1, p. 86. Similar statements appear in the City's application in Joint Ex. No. 1, pp. 120-124, 165, 182-84, 208-09, 215, 217, and 220. *See Hasselback v. Wentz and Dep't of Envtl. Prot.*, DOAH Case No. 07-5216)(Fla. DOAH January 28, 2010; DEP March 15, 2010).

The ALJ found that the City's expert Dr. Janicki conceded that his opinions on water quality are based entirely on the principles underlying the Department's TMDL modeling and the Department's BMAP process. (Janicki, T. Vol. III, pp. 790-91). Moreover, Dr. Janicki confirmed his prior testimony that the City must rely on the BMAP process to merit issuance of the ERP. He admitted that his opinion regarding removal of the Lock would not cause a water quality violation only if the City completes certain projects for which it would receive credits under DEP's BMAP process. (Janicki, T. Vol. III, pp. 793-95).

Based on the foregoing reasons, the City's Exception No. 25 is denied.

City's Exception No. 26 regarding Paragraph No. 84

The City takes exception to the conclusions of law in paragraph 84 of the RO, which reads:

> 84. Thus, the presumptive fact of compliance flows from the basic fact that a "responsible person" is "implementing applicable management strategies," i.e., actually implementing the future projects listed in the adopted BMAP. See § 90.301, Fla. Stat. The City sought to rely on the presumption of compliance but did not prove the basic factual predicate in this proceeding. See id. Contrary to the City's position, the mere existence of the BMAP final agency action did not satisfy its burden to prove the basic fact from which the presumption of compliance flows. See § 403.067(7)(b)2. i., Fla. Stat.

RO ¶ 84. The City alleges that the conclusions of law in paragraph 84 are "contrary to the testimony at the final hearing" and suggest that all future projects for BMAP compliance have been completed. City's Exception No. 26, p. 33.

The Department concludes that paragraph 84 of the RO is a mixed finding of fact and conclusion of law. The Department finds that paragraph 84 of the RO is supported by competent substantial evidence and must be accepted. Paragraph 84 is supported by competent substantial evidence in the form of Megan Mill's written questions to the City in Joint Exhibit 1, and the response from the City's engineer in Joint Exhibit 1.

Megan Mills sent a Request for Additional Information to the City during DEP's review of the City's permit application. She stated that "[r]egarding TN, the report of Janicki Environmental seems to defer to the Department's pending analysis of data to determine the best loading estimate from the South Spreader Waterway. It is unknown when this will be finalized." Ms. Mills then requests "reasonable assurance that removal of the Lock will not result in increased TN loading to the Caloosahatchee River." Joint Ex. No. 1, p. 119.

In response, the City's engineer identified projects that the City has completed and *will complete in the future* to meet BMAP requirements. Joint Ex. No. 1, pp. 120-23. The Department concurs with the ALJ's legal conclusions in paragraph 84 of the RO.

Based on the foregoing reasons, the City's Exception No. 26 is denied.

City's Exception No. 27 regarding Paragraph No. 85

The City takes exception to the conclusions of law in paragraph 85 of the RO, which reads:

> 85. Petitioners proved by a preponderance of the competent and substantial evidence that the Department's new position on water quality relied on a simplistic exchange of waters. The Department's water quality explanation did not consider that the waterbody in which the Project would occur has three direct connections with an OFW that is a Class II waterbody designated for shellfish propagation or harvesting, i.e. Matlacha Pass Aquatic Preserve. Such a consideration would require the Department to determine whether to apply the OFW permitting standards, and the Class II waters permitting criteria in section 10.2.5 of the Environmental Resource Permit Applicant's Handbook, Volume I. See Fla. Admin. Code R. 62-330.302(1)(a); 62-4.242(2); and 62-302.400(17)(b)36.

RO ¶ 85.

The Department concludes that paragraph 85 of the RO contains mixed findings of fact and conclusions of law.

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. (2019); *Charlotte Cty.*, 18 So. 3d at 1082; *Wills*, 955 So. 2d at 62. Contrary to the City's exception, the findings in paragraph 27 of the RO are supported by competent substantial evidence in the form of expert testimony and Departmental rules.

Rule 62-302.400(17)(b)36, Florida Administrative Code, identifies that Matlacha Pass from Charlotte Harbor to San Carlos Bay is designated as a Class II waterbody. This rule also

identifies that San Carlos Bay is a Class II water body. Moreover, rule 62-302.700, Florida Administrative Code, identifies that the following waters near the proposed Project are Outstanding Florida Waters: Matlacha Pass Wildlife Refuge (rule 62-302.700(9)(b)18.); Matlacha Pass Aquatic Preserve (rule 62-302.700(9)(h)25.); and Pine Island Sound Aquatic Preserve (rule 62-302.700(9)(h)31.) These rule provisions identify that the Matlacha Pass Aquatic Preserve is both an OFW and a Class II waters designated for shellfish propagation or harvesting.

Contrary to the City's exception, the majority of the findings in paragraph 85 of the RO are supported by competent substantial evidence. Kevin Erwin testified that the Matlacha Pass Aquatic Preserve is part of the ecosystem of the North and South Spreader Waterways. (Erwin, T. Vol. II, pp. 551-53, 574). The Avalon Engineering Report submitted by the City in its permit application to the Department states that water from the South Spreader Waterway travels into the Matlacha Pass during tidal exchanges. (Joint Ex. No. 1, p. 48). In addition, the City's expert Dr. Janicki testified that canal water containing nitrogen is transmitted from the South Spreader Waterway to the Matlacha Pass. (Janicki, T. Vol. III, pp. 809-10).

The area where the Project is located connects to the Matlacha Pass Aquatic Preserve that is part of the Spreader Waterways ecosystem. Since the Matlacha Pass Aquatic Preserve is an OFW and a Class II waterbody designated for shellfish propagation or harvesting, the Department must determine whether to apply the OFW permitting standards, and the Class II waters permitting criteria in section 10.2.5 of the Environmental Resource Permit Applicant's Handbook, Volume I. *See* City Ex. No. 85.

Nevertheless, there is no evidence that the Department *did not consider* that the waterbody in which the Project would occur has three direct connections with an OFW that is a

Class II waters designated for shellfish propagation or harvesting, i.e., Matlacha Pass Aquatic Preserve. To the extent paragraph 85 of the RO states that the Department did not consider the Project's impact to an OFW, the exception is granted, since Megan Mills testified that the Department considered whether the Project was located in an OFW or would significantly degrade an OFW. (Mills, T. Vol. I, pp. 124-25, 194-96).

Based on the foregoing reasons, the City's Exception No. 27 is granted in part and denied in part, as set forth above.

City's Exception No. 28 regarding Paragraph No. 87

The City takes exception to the conclusions of law in paragraph 87 of the RO, which reads:

> 87. There was no evidence that the Department's regulatory analysis considered that the waterbody in which the Project would occur directly connects to Class III waters that are restricted for shellfish harvesting, i.e., Caloosahatchee River and San Carlos Bay; and is in close proximity to Class II waters that are restricted for shellfish harvesting, i.e., Matlacha Pass Aquatic Preserve. See Fla. Admin. Code R. 62-302.400(17)(b)36. and 62-330.302.(1)(c). This omission, by itself, is a mandatory basis for denial of the Permit.

RO ¶ 87.

The Department concludes that paragraph 87 of the RO contains findings of fact misidentified as conclusions of law. The City alleges that paragraph 87 of the RO "is incorrect and not based upon any evidence in the record."

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. (2019); *Charlotte Cty.*, 18 So. 3d at 1082; *Wills,* 955 So. 2d at 62. Contrary to the City's exception, the Department finds that the ALJ's findings quoted

above are supported by competent substantive evidence; and thus, must be accepted by the Department.

The City admits in its exception No. 28 that the Caloosahatchee River is a Class III waterway and San Carlos Bay is a Class II waterbody. Moreover, rule 62-302.400(17)(b)36, Florida Administrative Code, supports the RO's finding that the Matlacha Pass Aquatic Preserve and San Carlos Bay are Class II waters designated for shellfish harvesting. Nevertheless, there is no evidence that the Department *did not consider* that the waterbody in which the Project would occur connects to the Caloosahatchee River and San Carlos Bay, and is in close proximity to the Matlacha Pass Aquatic Preserve. In addition, there is no competent substantial evidence that Class III waters are "restricted for shellfish harvesting." RO ¶ 87. *See* rule 62-302.400, Florida Administrative Code.

Based on the foregoing reasons, the City's Exception No. 28 is granted in part and denied in part, as set forth above.

City's Exception No. 29 regarding Paragraph No. 90

The City takes exception to the conclusions of law in paragraph 90 of the RO, which reads:

> 90. Since the City's position was that the decrease in flow volume and in velocity at Breach 20 would cure a perceived "erosion" problem, any potential adverse impacts to the tidal creek system and mangrove wetlands were not addressed. The undersigned's reasonable inferences from the record evidence are that the flow in the adjacent tidal creek system will be adversely impacted, and those "healthy mangroves" will also be adversely impacted. See Heifetz v. Dep't of Bus. Reg., 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985) ("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."); Berry v. Dep't of Envtl. Reg., 530 So. 2d 1019, 1022 (Fla. 4th DCA 1988) ("[T]he agency may reject the findings of the hearing officer only when there is no competent substantial evidence from which the finding could reasonably be inferred." (citations omitted)).

RO ¶ 90.

The Department concludes that paragraph 90 of the RO contains mixed findings of fact and conclusions of law. The City alleges that the ALJ had no underlying evidence to base her inference in paragraph 90 of the RO that "the flow in the adjacent tidal creek system will be adversely impacted, and those 'healthy mangroves' will also be adversely impacted." RO ¶ 90.

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. (2019); *Charlotte Cty.*, 18 So. 3d at 1082; *Wills,* 955 So. 2d at 62. The ALJ can "draw permissible inferences from the evidence." *Heifetz*, 475 So. 2d at 1281. *See Walker v. Bd. of Prof'l Eng'rs*, 946 So. 2d at 605 ("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."); *Berry v. Dep't of Envtl. Regulation*, 530 So. 2d 1019, 1022 (Fla. 4th DCA 1988) ("[T]he agency may reject the findings of the hearing officer only when there is no competent substantial evidence from which the finding could reasonably be inferred." (citations omitted)).

Contrary to the City's exception, the Department finds that the ALJ's findings quoted above are supported by competent substantive evidence and permissible inferences from the evidence; and thus, must be accepted by the Department.

The Department finds that the ALJ had competent substantive evidence in the testimony of expert witness Kevin Erwin to base her inference in paragraph 90 of the RO that "the flow in the adjacent tidal creek system will be adversely impacted, and those 'healthy mangroves' will

also be adversely impacted." RO ¶ 90. Kevin Erwin testified extensively about impacts from removal of the Chiquita lock that will cause adverse impacts to the mangrove wetlands adjacent to the South Spreader Waterway. (Erwin, T. Vol. II, pp. 530-33, 539-41, 551-52, 554, 559, 598-99, 605-06, 614-15, 631).

Based on the foregoing reasons, the City's Exception No. 29 is denied.

City's Exception No. 30 regarding Paragraph No. 93

The City takes exception to the conclusions of law in paragraph 93 of the RO, which states:

> 93. The preponderance of the competent and substantial evidence proved that the City failed to provide reasonable assurance that the secondary impact from construction, alteration, and intended or reasonably expected uses of the Project, will not cause or contribute to violations of water quality standards, or adverse impacts to the functions of wetlands or other surface waters as described in section 10.2.2 of the Environmental Resource Permit Applicant's Handbook, Volume 1.

RO ¶ 93.

The Department concludes that paragraph 93 of the RO contains mixed findings of fact and conclusions of law. The City alleges that the ALJ in paragraph 93 of the RO "attempts to improperly expand the secondary impacts analysis required under the environmental resource permitting rules." City's Exception No. 30, p. 40.

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. (2019); *Charlotte Cty.*, 18 So. 3d at 1082; *Wills,* 955 So. 2d at 62. Contrary to the City's exception, the Department finds that the ALJ's findings quoted above are supported by competent substantive evidence; and thus, must be accepted by the

Department. The ALJ's findings in paragraph 93 of the RO are supported by Kevin Erwin's testimony regarding impacts from removal of the Chiquita lock that will cause or contribute to violations of water quality standards or adverse impacts to the functions of wetlands or other surface waters, including the mangrove ecosystem adjacent to the South Spreader Waterway. (Erwin, T. Vol. II, pp. 539-41, 598-99, 605-06, 615 and 631; Erwin, T. Vol. III, pp. 901-03 and 907-08).

The City cites to *Pelican Island Audubon Soc'y, v. Indian River Cty.*, Case No. 13-3601 (Fla. DOAH Aug. 5, 2014; Fla. DEP Aug. 22, 2014), for its proposition that there is no evidence of adverse secondary impacts from removal of the Lock. Unlike the case at issue, the proposed permit in *Pelican Island Audubon Soc'y* did not trigger secondary impacts. In that case, the affected seagrass was in a highly contained area; and the applicant proposed mitigation that would not only protect the seagrass, it would protect the neighboring lagoon which was of concern to the petitioners.

In this case, the City's permit application did not address secondary impacts to the Matlacha Pass Aquatic Preserve, the mangroves adjacent to the Chiquita lock, and the adjacent Class II and III waters.

Based on the foregoing reasons, the City's Exception No. 30 is denied.

City's Exception No. 31 regarding Paragraph No. 95

The City takes exception to the conclusions of law in paragraph 95 of the RO, which states that "Mr. Erwin's credible and persuasive testimony regarding adverse secondary impacts to the ecological health of the mangrove ecosystem adjacent to the South Spreader Waterway was in stark contrast to the City's contention that Lock removal was not expected to result in impacts to those mangrove wetlands." RO. ¶ 95. The City alleges that "Mr. Erwin's testimony

was not credible or persuasive." The Department concludes that paragraph 95 of the RO contains mixed findings of fact and conclusions of law.

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. (2019); *Charlotte Cty.*, 18 So. 3d at 1082; *Wills*, 955 So. 2d at 62. Contrary to the City's exception, the Department finds that the ALJ's findings quoted above are supported by competent substantive evidence; and thus, must be accepted by the Department.

The ALJ's findings in paragraph 95 of the RO are supported by Kevin Erwin's testimony regarding impacts from removal of the Chiquita lock to the mangrove ecosystem adjacent to the South Spreader Waterway. (Erwin, T. Vol. II, pp. 539-41, 598-99, 605-06, 615 and 631; Erwin, T. Vol. III, pp. 901-03 and 907-08).

Based on the foregoing reasons, the City's Exception No. 31 is denied.

City's Exception No. 32 regarding Paragraph No. 96

The City takes exception to the conclusions of law in paragraph 96 of the RO, which states:

> 96. The credible and persuasive evidence demonstrated that Lock removal would adversely affect the smalltooth sawfish and its nursery habitat. The credible and persuasive evidence also demonstrated that Lock removal would increase the already high risk of manatee-motorboat collisions by inviting manatees into the South Spreader Waterway, a non-main-stem refuge, where notice boaters would present "a bigger hazard than the [L]ock ever has."

RO ¶ 96. The Department concludes that paragraph 96 of the RO contains mixed findings of fact and conclusions of law. The City filed its exception to paragraph 96 of the RO based on the reasons it identified in the City's Exceptions No. 19 and 20. City Exception No. 32, pp. 41-42.

For the reasons cited in the Department's response to the City's Exceptions No. 19 and 20 above, the City's Exception No. 32 is denied.

City's Exception No. 33 regarding Paragraph No. 97

The City takes exception to the conclusions of law in paragraph 97 of the RO, which states that "[t]the preponderance of the competent substantial evidence demonstrated that the City failed to provide reasonable assurances that the Project will not impact the values of wetland and other surface water functions." RO ¶ 97.

The City filed its exception to paragraph 97 of the RO based on the reasons it identified in the City's Exceptions No. 1 through 32. City Exception No. 33, p. 42.

For the reasons cited in the Department's response to the City's Exceptions No. 1 through 32 above, the City's Exception No. 33 is denied.

City's Exception No. 34 regarding Paragraph No. 100

The City takes exception to the conclusions of law in paragraph 100 of the RO, which reads:

> 100. As found above, the Department's exchange of waters position failed to consider the three direct connections to the Matlacha Pass Aquatic Preserve OFW. This is also important, not just for the water quality analysis, but for the public interest test. If the direct or secondary impacts of the Project are in, or significantly degrade an OFW, then the Project must be "clearly in the public interest," to obtain approval. Either review requires the Department to consider and balance the seven factors in rule 62-330.302(1)(a).

RO ¶ 100.

The City alleges that in paragraph 100 of the RO that:

> the ALJ expands the scope of the public interest test provided in statute via her expanded interpretation of secondary impacts. She also mischaracterizes the public interest test making it appear that the only way a project could obtain approval is if it meets the seven factors in the public interest test, ignoring the possibility of mitigation if such adverse impacts were actually going to occur.

City's Exception No. 34, pp. 43-44.

The Department concludes that paragraph 100 of the RO contains mixed findings of fact and conclusions of law. 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. (2019); *Charlotte Cty.*, 18 So. 3d at 1082; *Wills,* 955 So. 2d at 62. Contrary to the City's exception, the Department finds that portions of the ALJ's findings quoted above are supported by competent substantive evidence; and thus, must be accepted by the Department. The ALJ's findings in paragraph 100 of the RO are supported by Kevin Erwin's testimony regarding impacts from removal of the Chiquita lock that will cause or contribute to violations of water quality standards or adverse impacts to the functions of wetlands or other surface waters, including the mangrove ecosystem adjacent to the South Spreader Waterway. (Erwin, T. Vol. II, pp. 539-41, 598-99, 605-06, 615 and 631; Erwin, T. Vol. III, pp. 901-03 and 907-08).

There is no evidence that the Department *did not consider* that the waterbody in which the Project would occur has three direct connections with an OFW that is a Class II waterbody designated for shellfish propagation or harvesting. To the extent paragraph 100 of the RO states that the Department did not consider the Project's impact to an OFW, the exception is granted, since Megan Mills testified that the Department considered whether the Project was located in an OFW or would significantly degrade an OFW. (Mills, T. Vol. I, pp. 124-25, 194-96).

However, the City's permit application did not address secondary impacts to the Matlacha Pass Aquatic Preserve, the mangroves adjacent to the Chiquita lock, and the adjacent Class II and III waters. In addition, the Notice of Intent does not address secondary impacts to

the Matlacha Pass Aquatic Preserve OFW. Moreover, the Department disagrees with the City that the ALJ has expanded on the ERP program's secondary impacts analysis or misinterpreted the public interest test.

Based on the foregoing reasons, the City's Exception No. 34 is granted in part and denied in part as set forth above.

City's Exception No. 35 regarding Paragraph No. 102

The City takes exception to the conclusions of law in paragraph 102 of the RO, which reads:

> 102. The preponderance of the evidence supports a finding that the City's claims of navigational public safety concerns have less to do with navigational hazards, and more to do with inexperienced and impatient boaters. Even so, the direct impact of Lock removal will be to increase navigational access from the Caloosahatchee River to the South Spreader Waterway.

RO ¶ 102. The Department concludes that paragraph 102 of the RO contains mixed findings of fact and conclusions of law. The City filed its exception to paragraph 102 of the RO based on the reasons it identified in the City's Exception No. 20. City Exception No. 33, p. 44.

For the reasons cited in the Department's response to the City's Exception No. 20 above, the City's Exception No. 35 is denied.

City's Exception No. 36 regarding Paragraph No. 103

The City takes exception to the conclusions of law in paragraph 103 of the RO, which states that "[i]n addition, the preponderance of the evidence also supports a finding under factor one that there will be adverse secondary impacts to the property of Cape Harbour Marina." RO ¶ 103. The Department concludes that paragraph 103 of the RO contains mixed findings of fact and conclusions of law. The City filed its exception to paragraph 103 of the RO

based on the reasons it identified in the City's Exceptions No. 20 and 21. City's Exception No. 36, p. 44.

For the reasons cited in the Department's response to the City's Exceptions No. 20 and 21 above, the City's Exception No. 36 is denied.

City's Exception No. 37 regarding Paragraph No. 104

The City takes exception to the conclusions of law in paragraph 104 of the RO, which reads:

> 104. Based on the above findings and conclusions, the Project will adversely affect the public interest factors associated with wetlands, fish and wildlife, and their habitat (factors two, four, and seven). Because the Project will be of a permanent nature, factor five of the public interest test falls on the negative side of the balancing test. Factor six is neutral.

RO ¶ 104. The Department concludes that paragraph 104 of the RO contains mixed findings of fact and conclusions of law. The City filed its exception to paragraph 104 of the RO based on the reasons it identified in the City's Exceptions No. 1 through 36. City Exception No. 37, p. 45.

For the reasons cited in the Department's response to the City's Exceptions No. 1 through 36 above, the City's Exception No. 37 is denied.

City's Exception No. 38 regarding Paragraph No. 105

The City takes exception to the conclusions of law in paragraph 105 of the RO, which reads:

> 105. The adverse secondary impacts that fall under factors one, two, four, five, and seven outweigh any perceived benefits under factors one and three. Therefore, after balancing the public interest factors, it is concluded that the Project fails the public interest balancing test and should not be approved. Under either review, the Project is contrary to the public interest, and is not clearly in the public interest.

RO ¶ 105. The Department concludes that paragraph 105 of the RO contains mixed findings of fact and conclusions of law. The City filed its exception to paragraph 105 of the RO based on the reasons it identified in the City's Exceptions No. 1 through 37. City Exception No. 38, p. 45.

For the reasons cited in the Department's response to the City's Exceptions No. 1 through 37 above, the City's Exception No. 38 is denied.

City's Exception No. 39 regarding Paragraph Nos. 3, 5, 6, 7, 8, 9, 10, 64, 65, and 66

The City takes exception to paragraphs 3, 5, 6, 7, 8, 9, 10, 64, 65, and 66 of the RO, which find that the Petitioners had standing to participate in this hearing. The City contends that each Petitioner and the Matlacha Civic Association, Inc., did not present testimony to show that they will sustain actual or immediate threatened injury if the Lock is removed.

Paragraph No. 3 of the RO provides the findings to support the conclusion of law that the Matlacha Civic Association, Inc. (Matlacha Civic Assoc.) has standing to challenge the proposed Project. To demonstrate associational standing a petitioner must show: (1) that a substantial number of its members ... are "substantially affected" by the challenged agency action, (2) that the agency action it seeks to challenge is "within the association's general scope of interest and activity," and (3) that the relief it requests is "of the type appropriate for [such an] association to receive on behalf of its members." *Fla. Home Builders Assoc. v. Dep't of Labor & Emp't Sec.*, 412 So. 2d 351 (Fla. 1982); *Friends of the Everglades, Inc., v. Bd. of Trs. of the Internal Improvement Tr. Fund,* 595 So. 2d 186 (Fla. 1st DCA 1992). The testimony of Karl Deigert, the president of the Matlacha Civic Assoc., established the elements for associational standing under *Fla. Home Builders Assoc.* and *Friends of the Everglades* by showing that a substantial number of its members will be affected by issuance of the permit for the Project.

(Deigert, T. Vol. I, pp. 226-231). *See also St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist.*, 54 So. 3d 1051 (Fla. 5th DCA 2011).

The City also contends that the individual Petitioners did not present testimony to show that they will sustain actual or immediate threatened injury if the Lock is removed. However, under the *Agrico* test, the Petitioners, except for Debra Hall, provided sufficient testimony to establish that their "substantial interests will be affected by the proposed agency action." *Agrico Chem. Co. v. Dep't of Envtl. Regulation*, 406 So. 2d 478, 481-82 (Fla. 2d DCA 1981). Petitioner Debra Hall did not attend the hearing, and thus failed to present testimony to demonstrate her individual standing. RO ¶ 64. (Deigert, T. Vol. I, pp. 236, 240-47; Hoff, T. Vol. I, pp. 254-58; Zarrranz, T. Vol. I, pp. 260, 261, 265-67, 268-69, 278-79, 282, 284-85, 292, 296-98; Olsen, T. Vol. I, pp. 300, 301-02, 305-06, 318-20; Blanks, T. Vol. I, pp. 329-30, 333, 341; Hannon, T. Vol. I, pp. 346-47, 351, 358).

Based on the foregoing reasons, the City's Exception No. 39 is denied

City's Exception No. 40 regarding Paragraph No. 116

The City takes exception to the conclusion of law in paragraph 116 of the RO, which states that "Petitioners met their ultimate burden of persuasion to prove that the Project does not comply with all applicable permitting criteria. The City failed to demonstrate its compliance with all applicable permitting criteria and its entitlement to the Permit." RO ¶ 116.

The City contends that the Department should modify paragraph 116 of the RO to read the exact opposite of paragraph 116, as follows: "Petitioners have not met their burden of persuasion to prove that the Project does not comply with all applicable permitting criteria. The City demonstrated its compliance with all applicable permitting criteria and its entitlement to the Permit."

The Department concludes that paragraph 116 of the RO contains mixed findings of fact and conclusions of law. The City filed its exception to paragraph 116 of the RO based on the reasons it identified in the City's Exceptions No. 1 through 39. City Exception No. 40, p. 49.

An agency has no authority to make independent or supplemental findings of fact, as requested by the City. *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). Moreover, for the reasons cited in the Department's response to the City's Exceptions No. 1 through 39 above, the City's Exception No. 40 is denied.

RULINGS ON DEP's EXCEPTIONS

DEP's Exception No. 1 regarding Paragraph No. 31

DEP takes exception to the findings of fact in paragraph 31 of the RO, which reads:

> 31. The Department's water quality explanation of "mixing," was rather simplistic, and did not consider that the waterbody in which the Project would occur has three direct connections with an OFW that is a Class II water designated for shellfish propagation or harvesting. Such a consideration would require the Department to determine whether to apply the OFW permitting standards, and the Class II waters permitting criteria in section 10.2.5 of the Environmental Resource Permit Applicant's Handbook, Volume I. See Fla. Admin. Code R. 62-330.302(1)(a); 62-4.242(2); and 52-302.400(17)(b)36.

RO ¶ 31. DEP alleges that paragraph 31 of the RO is not supported by competent substantial evidence.

For the reasons cited above in the Department's response to the City's Exception No. 4 to paragraphs 30 and 31 of the RO, DEP's Exception No. 1 is granted in part and denied in part.

DEP's Exception No. 2 regarding Paragraph No. 32

DEP takes exception to the findings of fact in paragraph 32 of the RO, which reads:

> 32. The Caloosahatchee River, at its entrance to the South Spreader Waterway, is a Class III waters restricted for shellfish harvesting. The mouth of the Caloosahatchee River is San Carlos Bay, which is a Class II waters restricted

> for shellfish harvesting. There was no evidence that the Department's regulatory analysis considered that the waterbody in which the Project would occur directly connects to Class III waters that are restricted for shellfish harvesting, and is in close proximity to Class II waters that are restricted for shellfish harvesting. See Fla. Admin. Code R. 62-302.400(17)(b)36. and 62-330.302(1)(c).

RO ¶ 32. DEP alleges that paragraph 32 of the RO is not supported by competent substantial evidence.

The Department concludes that a majority of the findings in paragraph 32 of the RO are supported by competent substantial evidence. Rule 62-302.400(17)(b)36, Florida Administrative Code, identifies that a portion of the Caloosahatchee River is a Class I waterbody, but the remainder of the river is a Class III waterbody. In addition, rule 62-302.400(17)(b)36, Florida Administrative Code, identifies that San Carlos Bay is a Class II waterbody designated for shellfish harvesting and propagation. However, there is no competent substantial evidence that Class III waters are "restricted for shellfish harvesting." RO ¶ 32.

Section 120.57(1)(l), Florida Statutes, prescribes that an agency reviewing a recommended order may reject the ALJ's findings of fact if the agency 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. (2019); *Charlotte Cty.*, 18 So. 3d at 1082; *Wills,* 955 So. 2d at 62. Since the Department cannot find any competent substantial evidence to support the ALJ's finding that Class III waters are restricted for shellfish harvesting, this portion of paragraph 32 of the RO is rejected.

Based on the foregoing reasons, DEP's Exception No. 2 to paragraph 32 of the RO is granted in part and denied in part as set forth above.

DEP's Exception No. 3 regarding Paragraph No. 35

DEP takes exception to the findings of fact in paragraph 35 of the RO, which reads as follows:

> 35. Dr. Janicki opined that removing the Lock would not result in adverse impacts to the surrounding environment. But the Petitioners obtained his concession that his opinion was dependent on the City's completion of additional water quality enhancement projects in the future as part of its obligations under the Caloosahatchee Estuary Basin Management Action Plan (BMAP) for achieving the TN TMDL.

RO ¶ 35. DEP alleges that paragraph 35 of the RO is not supported by competent substantial evidence.

Contrary to DEP's exception, the ALJ's findings of fact in paragraph 35 of the RO are supported by competent substantial evidence. Tony Janicki testified as follows:

> MR. HANNON: Now, your opinion that removal of the lock will not adversely impact the Caloosahatchee River is conditional: is it not?
>
> A. To a degree, yes.
>
> * * * *
>
> Q. You are prepared to testify that in your opinion removal of the Chiquita Boat Lock would probably not adversely affect the environment correct?
>
> A. That's correct.
>
> Q. And does that opinion depend upon Cape Coral completing certain projects that they've represented to you they intend to complete?
>
> A. Again, to some degree, yes.
>
> Q. Well, do you remember my asking you that very same question in your deposition?
>
> A. I -- I don't recall.
>
> Q. I'm showing you page 135, line 21, question: ["]And does that opinion depend upon Cape Coal completing certain projects that they've represented to you they intend to complete? Answer: Yes.["]

Janicki, T. Vol. I, pp. 219-21. The ALJ's findings are further explained in Tony Janicki's testimony from pages 217 through 221.

The City's expert, Dr. Janicki, testified that removal of the Lock "would probably not adversely affect the environment." Janicki, T. Vol. I, p. 220. However, Dr. Janicki also testified that his opinion is dependent upon completing certain projects.

DEP disagrees with the ALJ's findings and seeks to have the Department reweigh the evidence. However, the Department is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *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 Constr. Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623. For the abovementioned reasons, DEP's exception to paragraph 35 of the RO is rejected.

Based on the foregoing reasons, DEP's Exception No. 3 is denied.

DEP's Exception No. 4 regarding Paragraph No. 71

DEP takes exception to the conclusions of law in paragraph 71 of the RO. DEP alleges that the conclusions of law in paragraph 71 of the RO incorrectly imply that the "Department's filed change in position was not entitled to section 120.569(2)(p)'s abbreviated presentation or presumptions in the applicant's prima facie case."

In paragraph 69 of the RO, the ALJ noted that on March 1, 2019, the Department filed a second amendment to its intent to issue and draft permit. The ALJ further noted that "[t]his second amendment eliminated the Department's previous finding that the City demonstrated mitigation of adverse water quality impacts through its achievement of current *and future project credits* in the BMAP process. *See* Joint Exhibit 1 at pp. 329 and 330." (emphasis added). RO

¶ 69. In paragraph 71 of the RO the ALJ explained that an "agency must offer proof in support of the agency's changed position during the evidentiary proceeding, in order for the new position to provide the potential basis for a recommended or final order. . . . The Department's changed position, therefore, was not part of the City's prima facie case as contemplated by section 120.569(2)(p)." RO ¶ 71. Thus, the ALJ concluded that the City did not meet its burden under section 120.569(2)(p), Florida Statutes, to present a prima facie case of entitlement to the second amended proposed permit.

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*, 805 So. 2d at 1012; *L.B. Bryan & Co.*, 746 So. 2d at 1196-97; *Deep Lagoon Boat Club, Ltd.*, 784 So. 2d at 1141-42. However, the Department does not have authority to reject the ALJ's interpretation of Section 120.569(2)(p), Florida Statutes, since this statutory provision is not one over which it has substantive jurisdiction. Even if the Department disagreed with the ALJ's interpretation of Section 120.569(2)(p), Florida Statutes, it does not have the authority to reject the ALJ's interpretation of this statutory provision. For the abovementioned reasons, DEP's exception to paragraph 71 of the RO is rejected.

Based on the foregoing reasons, DEP's Exception No. 4 is denied.

DEP's Exception No. 5 regarding Paragraph No. 79

DEP takes exception to paragraph No. 79 of the RO, stating that "[f]or reasons cited in paragraphs 5, 6, 7, 8, 9 above the COL #79 on RO#33 should be rejected." DEP Exception No. 5, p. 8.

For the reasons cited in the Department's response to DEP's Exceptions No. 1 through 4 above, DEP's Exception No. 5 is denied.

DEP's Exception No. 6 regarding Paragraph No. 80

DEP takes exception to paragraph No. 80 of the RO, stating that "[f]or reasons cited in paragraphs 5, 6, 7, 8, 9 above the COL #80 on RO#33 should be rejected." DEP Exception No. 6, p. 8.

For the reasons cited in the Department's response to DEP's Exceptions No. 1 through 4 above, DEP's Exception No. 6 is denied.

DEP's Exception No. 7 regarding Paragraph No. 81

DEP takes exception to paragraph No. 81 of the RO, stating that "[f]or reasons cited in paragraph 5 above the COL #81 on RO#34 should be rejected." DEP Exception No. 7, p. 8.

For the reasons cited in the Department's response to DEP's Exception Nos. 1 through 4 above, DEP's Exception No. 7 is denied.

DEP's Exception No. 8 regarding Paragraph No. 85

DEP takes exception to paragraph No. 85 of the RO, stating that "[f]or reasons cited in paragraphs 1 through 4 above the COL #85 on RO#35 should be rejected." DEP Exception No. 8, p. 8.

For the reasons cited in the Department's response to DEP's Exception Nos. 1 through 4 above, DEP's Exception No. 8 is denied.

DEP's Exception No. 9 regarding Paragraph No. 87

DEP takes exception to paragraph No. 87 of the RO, stating that "[f]or reasons cited in paragraphs 1 through 4 above COL #87 on RO#36 should be rejected." DEP Exception No. 9, p. 8.

For the reasons cited in the Department's response to DEP's Exception Nos. 1 through 4 above, DEP's Exception No. 9 is denied.

DEP's Exception No. 10 regarding Paragraph No. 100

DEP takes exception to paragraph No. 100 of the RO, stating that "[f]or reasons cited in paragraphs 1 through 4 above COL # 100 on RO#41 should be rejected." DEP Exception No. 10, p. 8.

For the reasons cited in the Department's response to DEP's Exception Nos. 1 through 4 above, DEP's Exception No. 10 is denied.

RULINGS ON PETITIONERS' AMENDED EXCEPTIONS

Petitioners' Exception No. 1 regarding Paragraph No. 106

The Petitioners take exception to a portion of the conclusion of law in paragraph 106 of the RO, which states that "Petitioners have maintained throughout this proceeding, the legal position that the doctrines of res judicata and collateral estoppel precluded the Department from considering the City's application to remove the Lock." RO ¶ 106. The Petitioners allege that they have also maintained throughout this hearing that they may enforce the terms of the Consent Order, and that the provisions of the Consent Order apply to anyone who violates its terms, including the City.

After reviewing the evidence and rulings by the ALJ, the Department concludes that the Petitioners position is inconsistent with the terms of the ALJ's Order dated April 9, 2019, which excluded certain issues from the final hearing. The ALJ concluded that:

> Also, this proceeding is not an enforcement action. Therefore, compliance with those final agency actions is not at issue in this [permitting] proceeding. A third party (who is not the agency charged with enforcement) is not authorized to bring an administrative cause of action for enforcement of agency action as part of challenging a separate agency action. See, e.g., Morgan v. Dep't of Envtl. Prot., 98 So. 3d 651 (Fla. 3d DCA 2012); Lane v. Int'l Paper Co. & Dep't of Envtl. Prot., 24 F.A.L.R. 262, 267 (Fla. Dep't of Envtl. Prot. 2001).

Amended Order Limiting Issues, p. 2, April 9, 2019. The Department does not have jurisdiction to modify or reject the ALJ's rulings on the admissibility of evidence. 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.

Moreover, the Petitioners improperly ask the Department to consider evidence that is outside the record. *See Walker v. Bd. of Prof'l Eng'r*, 946 So. 2d 604, 605 (Fla. 1st DCA 2006) (An agency is not permitted to consider evidence outside the record when reviewing exceptions to a recommended order). Specifically, the Petitioners ask the Department to reference three exhibits it proffered at the conclusion of the final hearing – PR-1, PR-2, and PR-3 – which the ALJ denied admission into evidence. *See* Order Denying Admission of Proffered Exhibits, June 21, 2019.

Based on the foregoing reasons, the Petitioners' Exception No. 1 is denied.

Petitioners' Exception No. 2 regarding Paragraph No. 108

The Petitioners take exception to a portion of the conclusion of law in paragraph 108 of the RO, which states that "before res judicata becomes applicable, there must have been a final judgement on the merits in a former suit." RO ¶ 108. The Petitioners allege that re judicata also applies with full force and effect to a Consent Order.

After reviewing the evidence and rulings by the ALJ, the Department concludes that the Petitioners' position is inconsistent with the terms of the ALJ's Order dated April 9, 2019, which excluded certain issues from the final hearing. The ALJ concluded that:

> Also, this proceeding is not an enforcement action. Therefore, compliance with those final agency actions is not at issue in this [permitting] proceeding. A third party (who is not the agency charged with enforcement) is not authorized to bring an administrative cause of action for enforcement of agency action as part of challenging a separate agency action. See, e.g., Morgan v. Dep't of Envtl. Prot., 98

So. 3d 651 (Fla. 3d DCA 2012); Lane v. Int'l Paper Co. & Dep't of Envtl. Prot., 24 F.A.L.R. 262, 267 (Fla. Dep't of Envtl. Prot. 2001).

Amended Order Limiting Issues, p. 2, April 9, 2019. The Department does not have jurisdiction to modify or reject the ALJ's rulings on the admissibility of evidence. 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.

Moreover, the Petitioners improperly ask the Department to consider evidence that is outside the record. *See Walker v. Bd. of Prof'l Eng'r*, 946 So. 2d 604, 605 (Fla. 1st DCA 2006) (An agency is not permitted to consider evidence outside the record when reviewing exceptions to a recommended order). Specifically, the Petitioners ask the Department to reference three exhibits it proffered at the conclusion of the final hearing – PR-1, PR-2, and PR-3 – which the ALJ denied admission into evidence. *See* Order Denying Admission of Proffered Exhibits, June 21, 2019.

Based on the foregoing reasons, the Petitioners' Exception No. 2 is denied.

Petitioners' Exception No. 3 regarding Paragraph No. 109

The Petitioners take exception to the conclusion of law in paragraph 109 of the RO, which states that "even assuming a binding contract, it did not arise from an adjudication that led to a final judgment on the merits. See Hicks v. Hoagland, 953 So. 2d 695, 698 (Fla. 5th DCA 2007) ("For res judicata to apply, there must exist in the prior litigation a 'clear-cut former adjudication' on the merits.")". RO ¶ 109. The Petitioners allege that re judicata also applies with full force and effect to a Consent Order.

After reviewing the evidence and rulings by the ALJ, the Department concludes that the Petitioners position is inconsistent with the terms of the ALJ's Order dated April 9, 2019, which excluded certain issues from the final hearing. The ALJ concluded that:

> Also, this proceeding is not an enforcement action. Therefore, compliance with those final agency actions is not at issue in this [permitting] proceeding. A third party (who is not the agency charged with enforcement) is not authorized to bring an administrative cause of action for enforcement of agency action as part of challenging a separate agency action. See, e.g., Morgan v. Dep't of Envtl. Prot., 98 So. 3d 651 (Fla. 3d DCA 2012); Lane v. Int'l Paper Co. & Dep't of Envtl. Prot., 24 F.A.L.R. 262, 267 (Fla. Dep't of Envtl. Prot. 2001).

Amended Order Limiting Issues, p. 2, April 9, 2019. The Department does not have jurisdiction to modify or reject the ALJ's rulings on the admissibility of evidence. 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.

Moreover, the Petitioners improperly ask the Department to consider evidence that is outside the record. *See Walker v. Bd. of Prof'l Eng'r*, 946 So. 2d 604, 605 (Fla. 1st DCA 2006) (An agency is not permitted to consider evidence outside the record when reviewing exceptions to a recommended order). Specifically, the Petitioners ask the Department to reference three exhibits it proffered at the conclusion of the final hearing – PR-1, PR-2, and PR-3 – which the ALJ denied admission into evidence. *See* Order Denying Admission of Proffered Exhibits, June 21, 2019.

Based on the foregoing reasons, the Petitioners' Exception No. 3 is denied.

Petitioners' Exception No. 4 regarding Paragraph No. 110

The Petitioners take exception to the conclusion of law in paragraph 110 of the RO, which reads:

> 110. Even if, CO 15, as amended, was settlement of an enforcement action by DER against GAC, contrary to the Petitioners' claim, the parties were not the same. The parties to CO 15, as amended, were GAC and DER. The parties to the warranty deed were GAC and the State of Florida. Even if the former DER constitutes the same party as the Department, the City and the Petitioners were not parties to CO 15, as amended. See Palm AFC Holdings v. Palm Beach Cnty., 807 So. 2d 703 (Fla. 4th DCA 2002) (holding that the identity of parties test is not met

> because the prior decision was between appellants and Palm Beach County while this decision is between appellants and Minto Communities).

RO ¶ 110. The Petitioners allege that res judicata applies when the parties in the first action are privies of the parties to the current action. The Petitioners also allege that the City admits it is a privy to GAC, the principal party to the Consent Order.

After reviewing the evidence and rulings by the ALJ, the Department concludes that the Petitioners position is inconsistent with the terms of the ALJ's Order dated April 9, 2019, which excluded certain issues from the final hearing. The ALJ concluded that:

> Also, this proceeding is not an enforcement action. Therefore, compliance with those final agency actions is not at issue in this [permitting] proceeding. A third party (who is not the agency charged with enforcement) is not authorized to bring an administrative cause of action for enforcement of agency action as part of challenging a separate agency action. See, e.g., Morgan v. Dep't of Envtl. Prot., 98 So. 3d 651 (Fla. 3d DCA 2012); Lane v. Int'l Paper Co. & Dep't of Envtl. Prot., 24 F.A.L.R. 262, 267 (Fla. Dep't of Envtl. Prot. 2001).

Amended Order Limiting Issues, p. 2, April 9, 2019. The Department does not have jurisdiction to modify or reject the ALJ's rulings on the admissibility of evidence. 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.

Moreover, the Petitioners improperly ask the Department to consider evidence that is outside the record. *See Walker v. Bd. of Prof'l Eng'r*, 946 So. 2d 604, 605 (Fla. 1st DCA 2006) (An agency is not permitted to consider evidence outside the record when reviewing exceptions to a recommended order). Specifically, the Petitioners ask the Department to reference three exhibits it proffered at the conclusion of the final hearing – PR-1, PR-2, and PR-3 – which the ALJ denied admission into evidence. *See* Order Denying Admission of Proffered Exhibits, June 21, 2019.

Based on the foregoing reasons, the Petitioners' Exception No. 4 is denied.

Petitioners' Exception No. 5 regarding Paragraph No. 111

The Petitioners take exception to the conclusion of law in paragraph 111 of the RO, which reads:

> 111. Furthermore, the causes of action were not identical. The test for whether the causes of action are identical is whether the essential elements of facts necessary to maintain the suit are the same. See Leahy v. Batmasian, 960 So. 2d 14 (Fla. 4th DCA 2007). This case involved a third party challenge to the Department's notice of intent to issue the Permit for Lock removal. CO 15, as amended, involved resolving GAC's massive dredge and fill violation as described by Mr. Erwin during the hearing. The facts, issues, and causes of action were not the same. See Id.

RO ¶ 111. The Petitioners allege that where the causes of action are not identical, collateral estoppel applies to preclude relitigation of the same issues in a later proceeding. Moreover, the Petitioners conclude that Cape Coral is a privy to Consent Order 15, and bound by principles of res judicata and collateral estoppel.

After reviewing the evidence and rulings by the ALJ, the Department concludes that the Petitioners position is inconsistent with the terms of the ALJ's Order dated April 9, 2019, which excluded certain issues from the final hearing. The ALJ concluded that:

> Also, this proceeding is not an enforcement action. Therefore, compliance with those final agency actions is not at issue in this [permitting] proceeding. A third party (who is not the agency charged with enforcement) is not authorized to bring an administrative cause of action for enforcement of agency action as part of challenging a separate agency action. See, e.g., Morgan v. Dep't of Envtl. Prot., 98 So. 3d 651 (Fla. 3d DCA 2012); Lane v. Int'l Paper Co. & Dep't of Envtl. Prot., 24 F.A.L.R. 262, 267 (Fla. Dep't of Envtl. Prot. 2001).

Amended Order Limiting Issues, p. 2, April 9, 2019. The Department does not have jurisdiction to modify or reject the ALJ's rulings on the admissibility of evidence. 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.

Moreover, the Petitioners improperly ask the Department to consider evidence that is outside the record. *See Walker v. Bd. of Prof'l Eng'r*, 946 So. 2d 604, 605 (Fla. 1st DCA 2006) (An agency is not permitted to consider evidence outside the record when reviewing exceptions to a recommended order). Specifically, the Petitioners ask the Department to reference three exhibits it proffered at the conclusion of the final hearing – PR-1, PR-2, and PR-3 – which the ALJ denied admission into evidence. *See* Order Denying Admission of Proffered Exhibits, June 21, 2019.

Based on the foregoing reasons, the Petitioners' Exception No. 5 is denied.

Petitioners' Exception No. 6 regarding Paragraph No. 112

The Petitioners take exception to the conclusion of law in paragraph 112 of the RO, which reads:

> 112. In conclusion, the doctrines of res judicata and collateral estoppel did not apply to preclude the Department from considering the City's application to remove the Lock. Most importantly, there was no prior proceeding that led to a final judgment on the merits, which is required to invoke the doctrines in the first place. In addition, the elements were not met with regard to the identity of parties, causes of action, facts, and issues.

RO ¶ 112. The Petitioners allege that the "law of Florida clearly provides that res judicata and collateral estoppel are triggered by a Consent Order. The City of Cape Coral is in privity with GAC; therefore the principles of res judicata and collateral estoppel arising out of Consent Order 15 and the 1977 Warranty Deed apply to the City of Cape Coral." Petitioners' Amended Exceptions to Recommended Order, p. 6, January 6, 2020.

After reviewing the evidence and rulings by the ALJ, the Department concludes that the Petitioners position is inconsistent with the terms of the ALJ's Order dated April 9, 2019, which excluded certain issues from the final hearing. The ALJ concluded that:

> Also, this proceeding is not an enforcement action. Therefore, compliance with those final agency actions is not at issue in this [permitting] proceeding. A third party (who is not the agency charged with enforcement) is not authorized to bring an administrative cause of action for enforcement of agency action as part of challenging a separate agency action. See, e.g., Morgan v. Dep't of Envtl. Prot., 98 So. 3d 651 (Fla. 3d DCA 2012); Lane v. Int'l Paper Co. & Dep't of Envtl. Prot., 24 F.A.L.R. 262, 267 (Fla. Dep't of Envtl. Prot. 2001).

Amended Order Limiting Issues, p. 2, April 9, 2019. The Department does not have jurisdiction to modify or reject the ALJ's rulings on the admissibility of evidence. 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.

Moreover, the Petitioners improperly ask the Department to consider evidence that is outside the record. *See Walker v. Bd. of Prof'l Eng'r*, 946 So. 2d 604, 605 (Fla. 1st DCA 2006) (An agency is not permitted to consider evidence outside the record when reviewing exceptions to a recommended order). Specifically, the Petitioners ask the Department to reference three exhibits it proffered at the conclusion of the final hearing – PR-1, PR-2, and PR-3 – which the ALJ denied admission into evidence. *See* Order Denying Admission of Proffered Exhibits, June 21, 2019.

Based on the foregoing reasons, the Petitioners' Exception No. 6 is denied.

Petitioners' Exception No. 7 regarding Paragraph No. 115

The Petitioners take exception to the conclusion of law in paragraph 115 of the RO, which reads:

> 115. Although the findings and conclusions of this Recommended Order are not favorable to the City and the Department, no "improper purpose" under section 120.595(1)(e) is found. Simply losing a case at trial is insufficient to establish a frivolous purpose in the non-prevailing party, let alone an improper purpose. See Schwartz v. W-K Partners, 530 So. 2d 456, 458 (Fla. DCA 1988) (For an award of attorney's fees, the trial court must make a finding that there was a complete absence of a justiciable issue raised by the losing party).

RO ¶ 115. The Petitioners allege that the City's application was filed for an improper purpose under Section 120.595(1)(d), Florida Statutes.

The ALJ recommended that the Department's Final Order deny the Petitioners' request for an award of attorney's fees and costs. Section 120.595(1)(b), Florida Statutes., states that the "final order in a proceeding pursuant to s. 120.57(1) shall award reasonable costs and a reasonable attorney's fee to the prevailing party only where the nonprevailing adverse party has been determined by the administrative law judge to have ***participated in the proceeding for an improper purpose.***" (emphasis added).

The ALJ in the RO concluded that DEP and the City did not participate in the proceeding for an improper purpose as that term is defined in section 120.595(1)(e), Florida Statutes (2019). (RO at ¶¶ 113-115). Consequently, the Petitioners are not entitled to an award of attorney's fees and costs pursuant to section 120.595(1), Florida Statutes.

Moreover, DEP has no authority to grant Petitioners' Exception No. 7. Section 120.595(1)(b), Florida Statutes, states that "[t]he final order in a proceeding pursuant to s. 120.57(1) shall award costs and a reasonable attorney's fees to the prevailing party ***only*** where the nonprevailing adverse party ***has been determined by the administrative law judge*** to have participated in the proceeding for an improper purpose." § 120.595(1)(b), Fla. Stat. (2019) (emphasis added). The ALJ's Recommended Order did not include a determination that the Petitioner had participated in the proceeding for an improper purpose. Moreover, DEP has no authority to make independent or supplemental findings of fact, such as a finding of improper purpose. *See, e.g., City of North Port, Fla.*, 645 So. 2d at 487 ("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.*, 545 So. 2d at 441, *citing Friends of*

Children, 504 So. 2d at 345 (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).

Based on the foregoing reasons, the Petitioners' Exception No. 7 is denied.

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

B. Environmental Resource Permit No. 244816-005 to the City of Cape Coral for removal of the Chiquita Boat Lock is DENIED; and

C. The Petitioners' Request for Attorney's Fees and Costs pursuant to section 120.595(1), Florida Statutes, is DENIED.

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 11th day of March, 2020, 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

3/11/20
DATE

CERTIFICATE OF SERVICE

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

Craig D. Varn, Esq. Manson Bolves Donaldson Varn, P.A. 106 East College Avenue Suite 820 Tallahassee, Florida 32301 cvarn@mansonbolves.com	Steven D. Griffin, Esq. City of Cape Coral Post Office Box 150027 Cape Coral, Florida 33915 sgriffin@capecoral.net cyoung@capecoral.net
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this 11th day of March, 2020.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

Stacey D. Cowley

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