St. Johns River
Water Management District
Ann B. Shortelle, Ph.D., Executive Director

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January 14, 2021

Hon. Francine M. Ffolkes
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-3060

RE: Governing Board of the St. Johns River Water Management District, Petitioner, v. Christopher Douglas Leiffer, as Trustee of the C and K Family Trust Dated January 31, 2020, and Kirk Stephen Leiffer, as Trustee of the C and K Family Trust Dated January 31, 2020, Respondents; (DOAH Case No. 20-2471)

Dear Judge Ffolkes:

As required by section 120.57(1)(m) of the Florida Statutes, enclosed a CD containing copies of the following documents for the above-styled case:

1. Final Order
2. Petitioner's Exception to Recommended Order
3. Respondents' Exceptions to Recommended Order
4. Petitioner's Response to Respondents' Exceptions to Recommended Order
5. Respondents' Response to Petitioner's Exception to Recommended Order

Sincerely,

Erin H. Preston
Deputy General Counsel
Office of General Counsel

EHP/mbp

Enclosures

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DIVISION OF ADMINISTRATIVE HEARINGS

~~SJR-2021-002~~
SJR 2021-011

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

GOVERNING BOARD OF THE ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Petitioner,

vs.

DOAH CASE NO. 20-002471
SJRWMD F.O.R NO. 2020-12

CHRISTOPHER DOUGLAS LEIFFER, AS TRUSTEE OF THE C&K FAMILY TRUST DATED JANUARY 31, 2020, AND KIRK STEPHEN LEIFFER, AS TRUSTEE OF THE C&K FAMILY TRUST DATED JANUARY 31, 2020,

Respondents.

_____/

FINAL ORDER

The Division of Administrative Hearings, by its designated Administrative Law Judge, the Honorable Francine M. Ffolkes ("ALJ"), held a formal administrative hearing in this case on September 10, 2020. Petitioner St. Johns River Water Management District ("District") and Respondents Christopher Douglas Leiffer, as Trustee of the C&K Family Trust dated January 31, 2020, and Kirk Stephen Leiffer, as Trustee of the C&K Family Trust dated January 31, 2020 (collectively, "Respondents") submitted their respective Proposed Recommended Orders to the ALJ on October 8, 2020. The ALJ entered a Recommended Order on November 24, 2020. The Recommended Order contains findings of fact and conclusions of law regarding activity on Respondents' property.

Respondents' property ("Property") is located in Sorrento, Lake County, Florida, which is within the Wekiva River Protection Area as defined in section 369.303(9), Florida Statutes ("F.S."). Respondents leased the property to Whitewater Farms, Inc. Christopher Leiffer is the

president of Whitewater Farms, Inc., and Kirk Leiffer is the corporate representative of Whitewater Farms, Inc.

On April 28, 2020, the District filed an Administrative Complaint, alleging Respondents created a borrow pit and haul road on the Property, without obtaining an Environmental Resource Permit ("ERP"). Respondents disputed the facts, requested an administrative hearing, and asserted two affirmative defenses: that their activity was exempt from ERP requirements under the agricultural exemptions in sections 373.406(2) and (3), F.S. Respondents withdrew the affirmative defense for the section 373.406(2) exemption before the administrative hearing.

The ALJ's Recommended Order concludes that the Respondents constructed a borrow pit/sand mine and haul road on the Property without the necessary ERP, and that these activities were not exempt from ERP requirements under section 373.406(3), F.S. The Recommended Order recommends that the District adopt the findings, corrective actions, and timeframes in which to complete them, as set forth in the Administrative Complaint.

Once a recommended order is issued, the parties may file exceptions to it. §120.57(1)(k), F. S., Fla. Admin. Code R. 28-106.217(1). Exceptions may dispute findings of fact or conclusions of law in the Recommended Order. *Id*. If a party does not file exceptions to a recommended order, it waives its right to do so. *Envtl. Coal. of Fla., Inc. v. Broward County*, 586 So. 2d 1212, 1212 (Fla. 1st DCA 1991). If exceptions are filed, the other parties may file responses. *Id*. In this case, Attorneys for the District timely filed one exception, and Respondents timely filed 15 exceptions. Both the District and Respondents filed timely responses to the exceptions.

The District's Governing Board, in Policy 120(28), has delegated to the Chairman of the Governing Board ("Chairman"), or in the Chairman's absence, the Vice-Chairman, the authority

to rule on exceptions to recommended orders and to issue final orders resulting from administrative complaints.

Scope of Review

Each exception must clearly identify the disputed portion of the Recommended Order by page number or paragraph, identify the legal basis for the exception, and include appropriate and specific citations to the record. § 120.57(1)(k), F. S.

The Chairman has reviewed the record, which includes those matters identified in section 120.57(1)(f), F.S., the hearing transcript, the exhibits admitted into evidence, the ALJ's Recommended Order, the District's exception and Respondents' response thereto, and the Respondents' exceptions and District's responses thereto. The scope of this review is limited to accepting, rejecting, or modifying findings of fact and conclusions of law contained in the ALJ's Recommended Order.

Findings of Fact

The Chairman must accept findings of fact if supported by competent substantial record evidence. The Chairman may not consider evidence not contained in the record, make additional findings, or reweigh record evidence. *See* § 120.57(1)(k)-(*l*), F. S., *Walker v. Bd. of Prof'l Eng'rs*, 946 So. 2d 604, 605 (Fla. 1st DCA 2006) (weight of the evidence), *Fla. Power & Light v. State Siting Bd.*, 693 So. 2d 1025, 1026-27 (Fla. 1st DCA 1997) (additional findings). The ALJ's findings of fact may not be rejected or modified unless the Chairman, after a review of the entire record, states specifically that a finding was not based upon competent substantial evidence or that the proceedings on which the finding was based did not comply with essential requirements of law. *See* § 120.57(1)(*l*), F. S.

Competent evidence is "evidence sufficiently relevant and material to the ultimate determination 'that a reasonable mind would accept it as adequate to support the conclusion reached.'" *City of Hialeah Gardens v. Miami-Dade Charter Found., Inc.*, 857 So. 2d 202, 204 (Fla. 3d DCA 2003) (quoting *DeGroot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957)). Substantial evidence "provides a factual basis from which a fact at issue may reasonably be inferred." *City of Hialeah Gardens*, 857 So. 2d at 204. Thus, competent substantial evidence is record evidence that is sufficiently relevant and material, and adequately provides the factual bases to support the ALJ's findings of fact.

Failure to comply with the essential requirements of law means more than a mere mistake in law occurred. *Yang Enter., Inc. v. Georgalis*, 988 So. 2d 1180, 1182-83 (Fla. 1st DCA 2008). For a proceeding to depart from the essential requirements of law, it must violate a clearly established principle of law that results in a miscarriage of justice.[1] *Abbey v. Patrick*, 16 So. 3d 1051, 1053-54 (Fla. 1st DCA 2009).

Conclusions of Law

In considering the ALJ's legal conclusions, the Chairman may reject or modify only those conclusions or administrative rule interpretations over which the District has substantive jurisdiction. *See* § 120.57(1)(*l*), F. S., *State Contracting and Engineering Corp. v. Dept. of Transp.*, 709 So. 2d 607, 610 (Fla. 1st DCA 1998). Substantive jurisdiction in this context includes areas in which the District has expertise, including interpretation of District rules and provisions of the ERP Applicant's Handbook, and conclusions based on such interpretations. In contrast, technical matters of law generally resolved by judicial or quasi-judicial officers, such as

[1] For example, if an administrative law judge made a finding on her own, without the parties having an opportunity to present evidence or argument on the matter, the proceeding did not comply with the essential requirements of law because the parties were not afforded due process. *State, Dep't of Fin. Serv. v. Mistretta*, 946 So. 2d 79, 80 (Fla. 1st DCA 2006).

evidentiary rulings, application of affirmative defenses, and attorney fee awards are not within the District's substantive jurisdiction. *See G.E.L. Corp. v. Dept. of Environmental Protection*, 875 So. 2d 1257, 1263 (Fla. 5th DCA 2004) (attorney fees), *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140, 1141-42 (Fla. 2d DCA 2001) (affirmative defenses), *Barfield v. Dept. of Health*, 805 So. 2d 1008, 1011 (Fla. 1st DCA 2001) (evidentiary rulings).

If rejecting or modifying a conclusion of law or interpretation of an administrative rule, the Chairman must state the reasoning specifically and find that his substituted conclusion or interpretation is as or more reasonable than the one rejected or modified. *See* § 120.57(1)(*l*), F. S.

District's Exception

The District filed one exception, in which the District suggests a revision to the ALJ's Finding of Fact 26. (Dist. Except. 1).[2] Finding of Fact 26 states, in part:

> 26. Thus, the Revised Mass Grading Plan does not match the Blueberry & Hay Production Farm Plan. The Revised Mass Grading Plan shows excavation of overburden down to 60 and 70 feet below the current existing ground surface, construction of a haul road, and erosion measures to control stormwater runoff. …

(R.O. ¶26). The District asserts that the portion of the sentence reading "[t]he Revised Mass Grading Plan shows excavation of overburden down to 60 to 70 feet below the current existing ground surface" is not supported by competent substantial evidence. (Dist. Except.). Respondents do not dispute the District's reasoning. (Resp. to Dist. Except.). The requirements for rulings on exceptions to findings of fact are provided by statute:

[2] Citations to the transcript will reflect the page number and take the form (T. 1). Citations to joint exhibits entered into evidence at the hearing will reflect the exhibit number and page number, if appropriate, in the form (Jt. Ex. 1, p. 1). Citations to Respondents' Proposed Recommended Order will cite the paragraph number and take the form (Resp. P.R.O. ¶1). Citations to District Exhibit 45 will take the form (Ex. 45). Citations to the Recommended Order will reflect the paragraph number and take the form (R.O. ¶1). Citations to District's exception will take the form (Dist. Except.). Citations to the Respondents' response to District's exception will reflect the exception number and take the form (Resp. to Dist. Except.). Citations to the Respondents' exceptions will take the form (Resp. Except. 1). Citations to the District's response to Respondents' Exceptions will take the form (Dist. Resp. 1).

> The agency may not reject or modify the findings of fact 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 upon competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law.

§ 120.57(1)(*l*), Fla. Stat. A review of the entire record finds no reference to the excavation of overburden at 60 to 70 feet below the current existing ground surface. Rather, the testimony and Joint Exhibit 11 both show that the bottom elevation of the borrow pit ranges from elevation 60 to 70 feet, while the excavation activity is described as ranging from 15 to 30 feet below ground surface. (Jt. Ex. 11, p. 5; T. 33, 39, 41). As it appears to have been an inadvertent error, the District's Exception is accepted, and Finding of Fact 26 is revised to read:

> 26. Thus, the Revised Mass Grading Plan does not match the Blueberry & Hay Production Farm Plan. The Revised Mass Grading Plan shows excavation of overburden down to 60 and 70 feet, construction of a haul road, and erosion measures to control stormwater runoff. Then, upon completion of construction and excavation, the Blueberry & Hay Production Farm Plan is implemented. For example, the Revised Mass Grading Plan shows a dry retention pond would be constructed, while the Blueberry & Hay Production Farm Plan shows a wet retention tailwater recovery pond would be constructed.

Respondents' Exceptions

Exception 1

Respondents' Exception 1 takes exception to a portion of the second sentence of the ALJ's Finding of Fact 4, which states "The Farm Plan, submitted to the Lake County Property Appraiser, is a narrative description of proposed clearing and mass grading of approximately 40 acres of the Property resulting in construction of six blueberry fields." Respondents claim the portion of the finding stating "submitted to the Lake County Property Appraiser" is not supported by competent substantial evidence because the ALJ did not also state that the Farm

Plan was submitted to the District. (Resp. Except. 1). The District maintains that by seeking to add the additional information about the receipt of the Farm Plan by the District to the ALJ's finding, Respondents are requesting an additional finding of fact. (Dist. Resp. 1).

The Chairman may not reject or modify a finding of fact unless a review of the entire record shows that the finding was not based upon competent substantial evidence. § 120.57(1)(l), F. S. The record reveals that the Farm Plan was submitted to the Lake County Property Appraiser. (Jt. Ex. 32, p. 24, Jt. Ex. 45, p. 2). Thus, the record contains evidence sufficiently relevant and material, and adequately provides the factual basis to support the ALJ's finding; therefore, it is supported by competent substantial evidence. *City of Hialeah Gardens*, 857 So. 2d at 204. Additionally, to the extent Respondents seek an additional finding of fact, the Chairman does not have authority to make additional findings of fact. *See Florida Power & Light Co. v. State*, 693 So.2d 1025 (Fla. 1st DCA 1997). Accordingly, Respondents' Exception 1 is rejected.

Exception 2

Respondents take exception to the portion of the ALJ's Finding of Fact 11 that states:

> 11. At the final hearing, Chris Leiffer admitted to giving an interview to a news reporter during the pendency of this administrative proceeding, and admitted to saying: "You can't pay $2 million for a property and plant blueberries on it and say, hey, I'm going to make money. You can't do it. The priority is the dirt."

(R.O. ¶11). Respondents assert that the first three sentences are not supported by competent substantial evidence because the statement by Christopher Leiffer was made as part of a television news interview given outside of the hearing, and the entire interview was not admitted into evidence. (Resp. Except. 2). Respondents argue that even if the ALJ admitted a portion of the interview, she should not have considered the portion unless the entire interview was

admitted into evidence, because considering only the portion would violate the evidentiary rule of completeness. *Id*.

The District points out that Respondents did not raise the rule of completeness objection during the hearing, did not request that any additional portions of the television news interview be admitted during Christopher Leiffer's direct testimony, and did not offer any additional evidence related to the interview during his cross examination testimony. (Dist. Resp. 2). Additionally, the statement was admissible as an admission against interest pursuant to section 90.803(18), F.S. *Id*.

The Chairman may not reject or modify a finding of fact unless a review of the entire record shows that the finding was not based upon competent substantial evidence. § 120.57(1)(l), F. S. A review of the transcript shows that the District called Christopher Leiffer as a witness. (T. 75). Respondents objected twice during the portion of his direct testimony related to the television news interview. (T. 82-85). The first objection was based on the statement having been untimely disclosed; the interview having been outside of the hearing, not probative, and highly prejudicial; and the questions could be asked of Christopher Leiffer during his testimony. (T. 83). The ALJ directed that District counsel could ask the questions that were asked in the interview. (T. 83-84). The second objection was based on the quoted portion of the interview being based on facts not in evidence. (T. 84). The ALJ overruled the second objection. *Id*.

During his direct testimony, District counsel asked Christopher Leiffer the following question:

> Did you tell the news reporter that—and I quote here—"You can't pay $2 million for a property and plant blueberries on it and say, hey, I'm going to make money. You can't do it. The priority is the dirt"?

(T. 84). Christopher Leiffer responded as follows:

> So yes, I did, but what they left out that was probably, I think the clip was maybe 30, 40 seconds. They left out—it was a total of about a five-minute interview. They left out a lot of what I said.

(T. 84-85). On cross examination, Respondents' counsel asked a follow up question about a contract and a question about Christopher Leiffer's intent to plant blueberries. (T. 85-86). Respondents' counsel did not ask any additional questions about the interview. *Id*.

The Chairman may reject or modify only those conclusions or administrative rule interpretations over which the District has substantive jurisdiction. *See* § 120.57(1)(*l*), F. S., *State Contracting and Engineering Corp.*, 709 So. 2d at 610. Substantive jurisdiction in this context does not extend to the ALJ's evidentiary rulings or include a ruling on an evidentiary objection raised in an objection. *Barfield*, 805 So. 2d at 1011. Additionally, the record, including Christopher Leiffer's testimony, is sufficiently relevant and material, and adequately provides the factual basis to support the portion of the ALJ's Finding of Fact 11 to which Respondents take exception. Accordingly, the finding is supported by competent substantial evidence. *City of Hialeah Gardens*, 857 So. 2d at 204. Respondents' Exception 2 is rejected.

Exception 3

Respondents take exception to the last sentence of the ALJ's Finding of Fact 15, which states as follows: "At the hearing Mr. Prather testified: 'I don't know what else it could be, other than a borrow pit operation.'" (R.O. ¶15). Respondents assert that this sentence is not based on competent substantial evidence because Mr. Prather was qualified and testified as an expert in Environmental Resource Permitting and Compliance, but not as an expert in Agriculture, and his opinion that the activities at issue constituted a borrow pit was personal opinion rather than expert opinion. (Resp. Except. 3).

The District responds with citations to the record showing that Mr. Prather is the District's Director of the Division of Regulatory Services, overseeing permitting and compliance operations, that he has worked in the field of environmental permitting for more than 20 years, and he observed excavation equipment and dirt hauling activities at the Property. (Dist. Resp. 3). The rules of evidence permit experts to provide opinion testimony, and it is the role of the ALJ to weigh the evidence. *Id*. The District may not reject the ALJ's findings unless there is no competent substantial evidence from which the finding could reasonably be inferred. *Id*.

The Chairman may not reject or modify a finding of fact unless a review of the entire record shows that the finding was not based upon competent substantial evidence. § 120.57(1)(l), F. S. The record shows that District counsel tendered Mr. Prather as an expert in Environmental Resource Permit regulation and compliance. (T. 65). Respondents did not object, and the ALJ accepted Mr. Prather as an expert in those areas. (T. 65-66). Mr. Prather explained in his direct testimony that he had visited the Whitewater Farms property twice in April 2020 after receipt of several complaints regarding dump truck traffic to and from the property, hauling sand, and that he had observed several dump trucks entering the property empty and leaving full of sand. (T. 66, 67-68). On one of the visits, he saw one of the dump trucks leave the property and travel to a site where the Wekiva Parkway was being constructed, near Wekiva Road. (T. 68-69).

Mr. Prather explained that he made an inspection report that includes photographs and documents the visit and the observations at the time, and that while not typical, he had visited the property because staff had recently left the office to telework and been asked not to make trips into the field while COVID-19 was being addressed. (T. 70). Mr. Prather has worked in the field of environmental permitting for more than 20 years. (T. 63-64, Jt. Ex. 20). Mr. Prather's current and most recent job duties, totaling the last approximately eight years, include running efficient,

effective permitting and compliance operations. (T. 63-64). He has discussed borrow pits with staff frequently because there are "quite a few" in Lake County and other areas within the District. (T. 72). Based on his own observations, complaints from residents and the local municipality, and information and analysis provided to him by staff, he concluded that the activity of taking sand out of the area and to a construction site is consistent with borrow pit operations and not consistent with District rules.[3] (T. 70-71, 72-73, Jt. Ex. 3).

Thus, the record shows that Mr. Prather, in reaching his conclusion, relied on his own observations of activities at the site, general discussions with staff about borrow pit operations in Lake County and in other areas of the District, review of complaints from residents and the local municipality, and information and analysis provided to him by staff. Experts may testify in terms of opinion or inference and may be required to specify the facts or data upon which the opinion is based. § 90.705(1), F. S. *See also Booker v. Sumter Cty. Sheriff's Office*, 166 So. 3d 189, 194 (Fla. 2d DCA 2015) (doctors, who relied on multiple published medical studies, their examinations of the patient, and review of the patient's medical records, provided testimony that was based on more than their clinical experience and was not "pure opinion" testimony). It is the ALJ's function to consider the evidence presented, resolve conflicts, and judge witness credibility. *See Heifetz*, 475 So. 2d at 1281. The Chairman may not reweigh record evidence. *Id*. *See also Walker*, 946 So. 2d at 605.

The record contains evidence that is sufficiently relevant and material, and adequately provides the factual basis to support the last sentence of the ALJ's Finding of Fact 15.

[3] Cameron Dewey, a District Regulatory Division staff member, who was accepted as an expert in stormwater engineering and water resource engineering, also testified that the activities occurring on the Property consist of alteration and construction of a "large scale borrow excavation area" that exceeds permitting thresholds and requires an individual ERP. (T. 23-24, 32, 43).

Accordingly, competent substantial evidence supports the ALJ's finding. *City of Hialeah Gardens*, 857 So. 2d at 204. Respondents' Exception 3 is rejected.

Exception 4

Respondents take exception to the first sentence of the ALJ's Finding of Fact 19. The first sentence of Finding of Fact 19 states: "On May 28, 2020, Respondents applied for an ERP to authorize borrow pit operations ongoing on approximately 40 acres of the Property." (R.O. ¶19). Respondents assert that this sentence is not supported by competent substantial evidence because the application does not contain the phrase "borrow pit." (Resp. Except. 4).

The District maintains that ample record evidence shows that the ongoing operation is a borrow pit, including witness testimony from both District and Respondents' experts that the ongoing activities are consistent with a borrow pit operation, District witness testimony that the project exceeds three permitting thresholds, and Respondents' application for an individual ERP to authorize the activities. (Dist. Resp. 4).

The Chairman may not reject or modify a finding of fact unless a review of the entire record shows that the finding was not based upon competent substantial evidence. § 120.57(1)(l), F. S. The record includes a copy of the application. (Jt. Ex. 5, 8, 9, 10, 11). Testimony describes the plan sheets contained in the application as depicting the borrow pit activities at the Property. (T. 28-30, 33-34). Testimony by multiple witnesses, including District and Respondents' witnesses, also describes the activities occurring at the Property as those of a borrow pit activity or those that meet the definition of a borrow pit activity. (T. 30, 31, 71, 161, 197). A Binding Determination by the Florida Department of Agriculture and Consumer Services ("FDACS") also concludes that "[t]he extent of the excavation and alteration of the site's hydrology indicate that the activities undertaken are consistent with the occupation of sand mining, and not that of a

bona fide agricultural activity." (Jt. Ex. 45, p. 6) (emphasis in original). Thus, the record includes evidence that is sufficiently relevant and material and provides a factual basis from which the finding that an ERP application to authorize borrow pit activities had been submitted. Accordingly, competent substantial evidence supports the first sentence of the ALJ's Finding of Fact 19. *See City of Hialeah Gardens*, 857 So. 2d at 204. Respondents' Exception 4 is rejected.

Exception 5

Respondents' Exception 5 takes exception to the ALJ's Findings of Fact 30, 31, and 32. Finding of Fact 30 states:

> 30. The extent of the excavation and alteration of the Property's hydrology indicates that the activities undertaken are consistent with the occupation of sand mining. Alterations to the topography of the land are not for purposes consistent with the normal and customary practice of agriculture in the area.

(R.O. ¶30). Finding of Fact 31 states:

> 31. A massive excavation project is not the equivalent of leveling or contouring to prevent erosion for planting blueberry crops. Instead of excavating nearly 30 feet of soil to create a near-level ground surface for the proposed planting of blueberries, a normal and customary option would have been to design the blueberry rows to follow the land's natural contours.

(R.O. ¶31). Finding of Fact 32 states:

> 32. The landowner is not engaged in the occupation of agriculture as to the proposed blueberry production area of the property. The primary function of the significant excavation activities on the blueberry farm portion of the Property is for the mining activity itself.

(R.O. ¶32).

The gravamen of Respondents' argument in Exception 5 is that the ALJ erred in considering facts contained in the FDACS Binding Determination. (Resp. Except. 5)

Respondents assert that because the Binding Determination establishes whether the section 373.406(2), F.S., permit exemption applies to the Property, but Respondents only sought to have determined in this proceeding whether the section 373.406(3), F.S., permit exemption applies, the facts in the Binding Determination are irrelevant. *Id*. Respondents assert that the Binding Determination is only relevant to permit exemptions under section 373.406(2), F.S., because under this subsection, agricultural activities are "normal and customary," whereas under section 373.406(3), F.S., there is no reference to a normal and customary nature of the agricultural activities. *Id*. Therefore, consideration of the facts in the Binding Determination regarding the section 373.406(2), F.S., permitting exemption in the analysis of the section 373.406(3), F.S., permitting exemption is not supported by competent substantial evidence. *Id*.

The District asserts that Findings of Fact 30, 31, and 32 are supported by competent substantial evidence. (Dist. Resp. 5). Respondents did not challenge the Binding Determination, of which the ALJ took judicial notice, so the findings contained therein are deemed the facts of the case. *Id*. The Binding Determination is relevant to the three disputed issues of material fact Respondents identified in their Amended Request for Administrative Hearing, which they filed after FDACS issued the Binding Determination:

> (1) Whether the Trusts' activities as alleged in the Complaint are for purposes consistent with agriculture. The Trust contends that they are. (Amended Request, ¶5(a)).
>
> (2) Whether the Trust is engaged in the occupation of agriculture on the lands addressed in the Complaints. The Trust contends that it is. (Amended Request, ¶5(b)).
>
> (3) Whether the Trusts' activities as alleged in the Administrative Complaint are for the sole or predominant purpose of impounding or obstructing surface waters. The Trust contends that they were not. (Amended Request, ¶5(c)).

Id. (citing Respondents' Amended Request, ¶5). At the final hearing, Respondents alleged their activities were exempt from permit requirements because they meet the "agricultural closed system" exemption in section 373.406(3), F.S. *Id*. The District asserts that regardless of whether the "agricultural" exemption in section 373.406(2) or the "agricultural closed system" exemption in section 373.406(3) is applied, non-agricultural activities or aspirational agricultural activities do not qualify for either. *Id*. (citing *Suggs v. Southwest Fla. Water Management Dist.*, Case No. 08-3530 at ¶20 R.O. (Fla. DOAH Feb. 19, 2009) (Recommended Order), *adopted* (*Southwest Fla. Water Management Dist.* April 1, 2009)).

The Chairman may not reject or modify a finding of fact unless a review of the entire record shows that the finding was not based upon competent substantial evidence. § 120.57(1)(l), F. S. Additionally, the Chairman may not consider evidence not contained in the record, make additional findings, or reweigh record evidence. *See* § 120.57(1)(k)-(*l*), F. S., *Walker*, 946 So. 2d at 605 (weight of the evidence), *Fla. Power & Light*, 693 So. 2d at 1026-27 (additional findings). The ALJ took judicial notice of the Binding Determination, and it was admitted into evidence as Exhibit 45. (R.O. p. 4, T. 7-9). To the extent Respondents are making an evidentiary objection based on the relevance of the Binding Determination, the Chairman does not have authority to make such a ruling. *Barfield*, 805 So. 2d at 1011.

Regarding Finding of Fact 30, the record shows that activities on the Property are consistent with the occupation of sand mining, including large scale mass grading with large dump trucks observed exiting the property daily. (Ex. 45, pp.2, 6; T. 68, 71, 73). Testimony by both District and Respondents' witnesses also describes the activities occurring at the Property as those of a borrow pit activity or those that meet the definition of a borrow pit activity. (T. 30, 31, 71, 161, 197). District expert Ms. Dewey's testimony describes the plan sheets contained in the

application as depicting the borrow pit activities at the Property, and the ongoing activities at the Property, excavating and removing sand, are consistent with borrow pit activities (T. 28-30, 32-34, 44, 54, 198, 217, 218).

The Binding Determination also states that excavations similar to those FDACS staff observed on the Property are not normal and customary for typical agricultural practice or the specific geographic area of the Property. (Ex. 45, p. 7). Respondents' expert Mr. Ray's testimony describes excavation and grading on the Property as not normal and customary grading activity for a blueberry farm. (T. 158-159). Additionally, District expert Ms. Dewey stated that she had been to blueberry farms in Lake and Orange Counties, where blueberry plants have been planted on rolling or flat terrain, with minimal contouring, and she had not seen excavation activities for row crops or contour farming. (T. 27, 199-200).

Thus, the record includes evidence, found in the Binding Determination, other exhibits, and testimony, that is sufficiently relevant and material and provides a factual basis to support the ALJ's findings that the extent of excavation and alteration of the Property's hydrology indicates the activities are consistent with sand mining, and topographical alterations of the land are not for purposes consistent with the normal and customary practice of agriculture. Accordingly, competent substantial evidence supports Finding of Fact 30. *See City of Hialeah Gardens*, 857 So. 2d at 204.

Regarding Finding of Fact 31, the record shows that "[i]n the case of the blueberry production areas…[a] massive excavation project is not the equivalent of leveling or contouring to prevent erosion. Instead of excavating nearly 30 feet of soil to create a near-level ground surface for the proposed planting of blueberries, a normal and customary option would have been to design the blueberry rows to follow the land's natural contours." (Ex. 45, p.7). Contour

farming would have been consistent with the historical practice of blueberry farming in the state. *Id*. The published FDACS Best Management Practices for water quality do not support the excavation on the Property. *Id*. Most blueberry plantings are prepared using native soils and existing grades. (Ex. 45, p. 8).

Additionally, District expert Ms. Dewey opined that most blueberry farms use minimal contouring. (T. 27). Ms. Dewey noted the distinction between contouring, which was used where the hay field is depicted, and the removal of 15 to 30 feet of material involved in the excavation project. (T. 200). Respondents' expert Mr. Ray testified that the construction of a 30-foot-deep pit was not a normal and customary practice for a blueberry farm. (T. 158). Mr. Ray testified he was not aware of any blueberry activities where the site had been altered to the degree the Property had been. (T. 159).

Thus, the record includes evidence, found in the Binding Determination and testimony from both District and Respondents' witnesses that is sufficiently relevant and material and provides a factual basis to support the ALJ's findings that a massive excavation project is not the same as leveling or contouring to prevent erosion for planting blueberry crops, and instead, a normal and customary option would have been to design the blueberry rows to follow the land's natural contours. Accordingly, competent substantial evidence supports Finding of Fact 31. *See City of Hialeah Gardens*, 857 So. 2d at 204.

Regarding Finding of Fact 32, the Binding Determination shows that Respondents are not engaged in the occupation of agriculture as it relates to the "purported blueberry production areas." (Ex. 45, p. 6). "The primary function of the significant excavation activities on the blueberry farm portion of the Property – 30 feet of excavation when contour farming would require minimal grading – is for the mining activity itself." (Ex. 45, 8). Additionally, District

experts Mr. Prather and Ms. Dewey testified that the ongoing activities at the Property, excavating and removing sand, are consistent with borrow pit activities (T. 30, 32-33, 44, 54, 71, 198, 217, 218). Respondents' expert Mr. Ray also testified that the activities on the Property include grading with exported materials, and that any exporting of materials from a site would meet the definition of a borrow pit. (T. 161). Christopher Leiffer also indicated that excavation would be ongoing following blueberry planting, and he confirmed that he gave a television interview and stated that "the priority is the dirt." (T. 82, 84).

Thus, the record includes evidence, found in the Binding Determination and testimony from both District and Respondents' witnesses that is sufficiently relevant and material and provides a factual basis to support the ALJ's findings that Respondents were not engaged in the occupation of agriculture as to the proposed blueberry production area and the primary function of the significant excavation activities on the blueberry farm portion of the Property is for mining. Accordingly, competent substantial evidence supports Finding of Fact 32. *See City of Hialeah Gardens*, 857 So. 2d at 204.

For these reasons, competent substantial evidence supports the ALJ's Findings of Fact 30, 31, and 32. Accordingly, Respondents' Exception 5 is rejected.

Exception 6

Respondents take exception to the ALJ's Finding of Fact 33, which states:

> The District's expert, Ms. Dewey, persuasively testified that she has not seen excavation activities of this type for row crops, and the ongoing activities at the Property are consistent with a sand mining operation. Blueberry plants are typically planted at ground-level and very minimal contouring is needed. Ms. Dewey did agree that normal contouring was performed for the hay field, but planting blueberries at the bottom of a 30-foot pit was inconsistent with other blueberry farms in the area.

(R.O. ¶33).

Respondents assert that Finding of Fact 33 is not supported by competent substantial evidence because Ms. Dewey is not an agricultural expert. (Resp. Except. 6). Respondents' agricultural expert testimony was therefore unrebutted, and the ALJ may not reject unrebutted expert testimony unless she finds that it is incredible, illogical, or unreasonable, and the ALJ did not provide such an explanation in this case. *Id*.

The District maintains that competent substantial evidence supports the ALJ's finding because the ALJ accepted Ms. Dewey as an expert in stormwater engineering and water resource engineering, which necessarily includes engineered systems on agricultural land, and she has experience reviewing permit applications that include agricultural activities and borrow pits. (Dist. Resp. 6). Thus, Respondents' expert testimony was rebutted, and the Chairman does not have authority to reweigh evidence. *Id*. Further, the ALJ overruled Respondents' objection that Ms. Dewey was not qualified to testify about agricultural activities. *Id*. To the extent Respondents seek review of this ruling, the Chairman does not have authority to review evidentiary rulings. *Id*.

The Chairman may not reject or modify a finding of fact unless a review of the entire record shows that the finding was not based upon competent substantial evidence. § 120.57(1)(l), F.S. The Chairman is without authority to reweigh evidence or decide which expert testimony to accept. *See Walker*, 946 So. 2d at 605 (weight of the evidence), *Collier Med. Ctr. v. Dep't. of Health & Rehab Servs.*, 462 So. 2d 83, 85 (Fla. 1st DCA 1985) (expert testimony). Additionally, to the extent Respondents take exception to the ALJ's evidentiary ruling, the Chairman does not have authority to disturb that ruling. *See Barfield*, 805 So. 2d at 1011.

The record shows that the ALJ accepted Ms. Dewey as an expert in the field of stormwater engineering and water resource engineering. (T. 24). Ms. Dewey has been a District

employee for 33 years, and she has reviewed over 1,000 ERPs, including 50 to 100 for borrow pits, and oversees review engineers that review projects involving agricultural activities. (T. 23, 25-26). Ms. Dewey has participated in the District's water quality monitoring program, which involved visiting reservoirs or stormwater ponds on agricultural land to collect samples and assess how the systems were operating and functioning. (T. 26). Ms. Dewey has also visited blueberry farms personally and professionally at the request of landowners to perform site visits or review permit applications. (T. 26-27). The ALJ overruled Respondents' objection to Ms. Dewey's testimony regarding the excavation activities at the Property and their relation to agricultural activities. (T. 199).

The first sentence of Finding of Fact 33 states, "The District's expert, Ms. Dewey, persuasively testified that she has not seen excavation activities of this type for row crops, and the ongoing activities at the Property are consistent with a sand mining operation." (R.O. ¶33). The record shows that Ms. Dewey testified that she has not seen excavation activities for row crops or contour farming. (T. 199-200). She also testified that the ongoing activities at the Property, excavating and removing sand, are consistent with borrow pit activities (T. 30, 32-33, 44, 54, 198, 217, 218). Additionally, Respondents' expert Mr. Ray, whom the ALJ accepted as an expert in environmental land use planning for agriculture, testified that he was not aware of any other blueberry farm in Lake County or central Florida for which the site had been altered to the extent of the site alteration in this case. (T. 131, 158-59). Respondents' expert Mr. Ray also testified that the activities at the Property include grading with exported materials, and that any exporting of materials from a site would meet the definition of a borrow pit. (T. 161). Thus, the record includes evidence that is sufficiently relevant and material and provides a factual basis to support the ALJ's finding that "Ms. Dewey[] persuasively testified that she has not seen

excavation activities of this type for row crops, and the ongoing activities at the Property are consistent with a sand mining operation." Accordingly, competent substantial evidence supports the first sentence of Finding of Fact 33. *See City of Hialeah Gardens*, 857 So. 2d at 204.

The second sentence of Finding of Fact 33 states, "Blueberry plants are typically planted at ground-level and very minimal contouring is needed." (R.O. ¶33). The record shows that Ms. Dewey testified that she has visited blueberry farms in Lake and Orange Counties, and the blueberry plants have been planted on rolling or flat terrain, with minimal contouring. (T. 27). Additionally, Ms. Dewey testified that she had not seen excavation activities for row crops or contour farming, (T. 199-200), and Mr. Ray testified that he was not aware of any other blueberry farm in Lake County or central Florida for which the site had been altered to the extent of the site alteration in this case. (T. 131, 158-59). Thus, the record includes evidence that is sufficiently relevant and material and provides a factual basis for the finding that blueberry plants are typically planted at ground level with minimal contouring. Accordingly, competent substantial evidence supports the second sentence of the ALJ's Finding of Fact 33. *See City of Hialeah Gardens*, 857 So. 2d at 204.

The third sentence of Finding of Fact 33 states, "Ms. Dewey did agree that normal contouring was performed for the hay field, but planting blueberries at the bottom of a 30-foot pit was inconsistent with other blueberry farms in the area." (R.O. ¶33). The record shows that Ms. Dewey testified that contouring had been performed in the areas shown on the plans as hay field, and the activity in the excavation area was not contouring, but excavation, "removal of 15 to 30 feet of material." (T. 200). Additionally, she stated that she had been to blueberry farms in Lake and Orange Counties, where blueberry plants have been planted on rolling or flat terrain, with minimal contouring, and she had not seen excavation activities for row crops or contour

farming. (T. 27, 199-200). Thus, the record includes evidence that is sufficiently relevant and material and provides a factual basis for the finding that Ms. Dewey agreed that normal contouring was performed for the hay field, but planting blueberries at the bottom of a 30-foot pit was inconsistent with other blueberry farms in the area. Accordingly, competent substantial evidence supports the third sentence of the ALJ's Finding of Fact 33. *See City of Hialeah Gardens*, 857 So. 2d at 204.

For these reasons, competent substantial evidence supports Finding of Fact 33. Respondents' Exception 6 is therefore rejected.

Exception 7

Respondents take exception to the ALJ's Finding of Fact 34, which states, "Respondents admit that the current priority is removal of fill dirt to fulfill the contract. The more persuasive evidence establishes that the ongoing excavation activities on the Property are not 'agricultural.'" (R.O. ¶34). Respondents assert that the finding is not supported by competent substantial evidence because the statement by Christopher Leiffer was made in a television news interview, which was not admitted into evidence at the hearing, and for the reasons supporting Respondents' Exception 6. (Resp. Except. 7).

The District counters that evidentiary rulings and weighing the evidence are not within the Chairman's authority. (Dist. Resp. 7). Additionally, the District notes that although Respondents did not raise a hearsay objection to Christopher Leiffer's statement at the hearing, rule 28-106.203(3), F.A.C., provides that hearsay is admissible in DOAH proceedings, provided that the hearsay statement alone is not sufficient to support a finding unless the evidence falls within an exception to the hearsay rule. *Id.*

The Chairman may not reject or modify a finding of fact unless a review of the entire record shows that the finding was not based upon competent substantial evidence. § 120.57(1)(l), F. S. The Chairman is without authority to reweigh evidence. *See Walker*, 946 So. 2d at 605. Regarding the first sentence of Finding of Fact 34, the transcript shows that the District called Christopher Leiffer as a witness. (T. 75). Respondents objected twice during the portion of his direct testimony related to the television news interview. (T. 82-85). The first objection was based on the statement having been untimely disclosed; the interview having been outside of the hearing, not probative, and highly prejudicial; and the questions could be asked of Christopher Leiffer during his testimony. (T. 83). The ALJ directed that District counsel could ask the questions that were asked in the interview. (T. 83-84). The second objection was based on the quoted portion of the interview being based on facts not in evidence. (T. 84). The ALJ overruled the second objection. *Id*.

During his direct testimony, District counsel asked Christopher Leiffer the following question:

> Did you tell the news reporter that—and I quote here—"You can't pay $2 million for a property and plant blueberries on it and say, hey, I'm going to make money. You can't do it. The priority is the dirt"?

(T. 84). Christopher Leiffer responded as follows:

> So yes, I did, but what they left out that was probably, I think the clip was maybe 30, 40 seconds. They left out—it was a total of about a five-minute interview. They left out a lot of what I said.

(T. 84-85). On cross examination, Respondents' counsel asked a follow up question about a contract and a question about Christopher Leiffer's intent to plant blueberries. (T. 85-86). Respondents' counsel did not ask any additional questions about the interview. *Id*.

Further, Christopher Leiffer stated that there was a $2,170,000.00 contract to sell approximately 700,000 cubic yards of fill material from the Property for the State Road 46, Wekiva Parkway Project; he had been in the trucking business his entire life; and he had not hired a blueberry planting consultant until after giving a deposition in this case. (Jt. Ex. 2, T. 75-76, 81, 98, 101-102). Kirk Leiffer indicated there was no written business plan for blueberry production, and blueberries had not been purchased. (T. 126, 127). Christopher Leiffer also indicated that excavation would be ongoing following blueberry planting. (T. 82).

The record, including Christopher Leiffer's and Kirk Leiffer's testimony, is sufficiently relevant and material, and adequately provides the factual basis to support the first sentence of Finding of Fact 34; thus, it is supported by competent substantial evidence. *City of Hialeah Gardens*, 857 So. 2d at 204. Additionally, the Chairman may reject or modify only those conclusions or administrative rule interpretations over which the District has substantive jurisdiction. *See* § 120.57(1)(*l*), F. S., *State Contracting and Engineering Corp.*, 709 So. 2d at 610. Substantive jurisdiction in this context does not extend to the ALJ's evidentiary rulings, so the Chairman does not have authority to disturb the ALJ's evidentiary ruling or rule on the evidentiary issue Respondents raised in this Exception. *Barfield*, 805 So. 2d at 1011.

Regarding the second sentence of Finding of Fact 34, the record shows that the ALJ accepted Ms. Dewey as an expert in the field of stormwater engineering and water resource engineering. (T. 24). Ms. Dewey has been a District employee for 33 years, and she has reviewed over 1,000 ERPs, including 50 to 100 for borrow pits, and oversees review engineers that review projects for agricultural activities. (T. 23, 25-26). Ms. Dewey has participated in the District's water quality monitoring program, which involved visiting reservoirs or stormwater ponds on agricultural land to collect samples and assess how the systems were operating and functioning.

(T. 26). Ms. Dewey has also visited blueberry farms personally and professionally at the request of landowners to perform site visits or review permit applications. (T. 26-27). The ALJ overruled Respondents' objection to Ms. Dewey's testimony regarding the excavation activities at issue at the site and their relation to agricultural activities. (T. 199). As discussed above, the Chairman is without authority to reweigh evidence or decide which expert testimony to accept. *See Walker*, 946 So. 2d at 605 (weight of the evidence), *Collier Med. Ctr.*, 462 So. 2d at 83 (expert testimony). Additionally, to the extent Respondents take exception to the ALJ's evidentiary ruling regarding Ms. Dewey's testimony, the Chairman does not have authority to disturb that ruling. *See Barfield*, 805 So. 2d at 1011.

Additionally, the record shows that Ms. Dewey testified that she has visited blueberry farms in Lake and Orange Counties, and the blueberry plants have been planted on rolling or flat terrain, with minimal contouring. (T. 27). Ms. Dewey stated that she has not seen excavation activities for row crops or contour farming. (T. 199-200). She further stated that the ongoing activities at the Property, excavating and removing sand, are consistent with borrow pit activities (T. 30, 32-33, 44, 54, 198, 217, 218). She said that contouring had been performed in the areas shown on the plans as hay field, and the activity in the excavation area was not contouring, but excavation, "removal of 15 to 30 feet of material." (T. 200). The activities she observed at the site are borrow activities, which she does not consider to be agricultural. (T. 198-199). Additionally, Respondents' expert Mr. Ray testified that he was not aware of any other blueberry farm in Lake County or central Florida for which the site had been altered to the extent of the site alteration in this case. (T. 131, 158-59). Respondents' expert Mr. Ray also testified that any exporting of materials from a site would meet the definition of a borrow pit, and the activities on the Property include grading with exported materials. (T. 161). Thus, the record includes

evidence that is sufficiently relevant and material and provides a factual basis for the second sentence in Finding of Fact 34. Competent substantial evidence supports the second sentence. *See City of Hialeah Gardens*, 857 So. 2d at 204.

Accordingly, competent substantial evidence supports the ALJ's Finding of Fact 34. Respondents' Exception 7 is rejected.

Exception 8

Respondents take exception to the ALJ's Finding of Fact 43, which states, "Respondents did not prove by a preponderance of the evidence that the ongoing activities on the Property are exempt as an agricultural closed system." (R.O. ¶43). Respondents assert that competent substantial evidence does not support this finding because Respondents' expert testimony from Mr. Ray, who was the only expert qualified to testify regarding the agricultural nature of the activities at the site, was unrebutted and therefore must be accepted by the ALJ. (Resp. Except. 8). Additionally, Respondents assert that Ms. Dewey testified that the farm operations, once construction of the Farm Plan is completed, would be an exempt activity. *Id.*

The District maintains that competent substantial evidence supports the finding because the record contains testimony, including that of Ms. Dewey, whom the ALJ accepted as an expert, and exhibits demonstrating that the current activities on the site are not agricultural in nature and require a permit. (Dist. Resp. 8). The ALJ overruled Respondents' objection to Ms. Dewey testifying about whether the activities at the Property are agricultural. The District also points out that Respondents' expert agreed that the activities on the Property are not normal and customary grading activities and meet the definition of a borrow pit. *Id*. Additionally, the District notes that the Chairman may not reweigh evidence or judge witness credibility, and regardless of the eventual project on a site, whether a project needs a permit is based on the current activities

at the site. *Id*. (citing *A. Duda and Sons, Inc. v. St. Johns River Water Management Dist.*, 17 So. 3d 738 (Fla. 5th DCA 2009), *Suggs v. Southwest Fla. Water Management Dist.*, Case No. 08-3530 at ¶20 R.O. (Fla. DOAH Feb. 19, 2009) (Recommended Order), *adopted* (*Southwest Fla. Water Management Dist.* April 1, 2009).

The Chairman may not reject or modify a finding of fact unless a review of the entire record shows that the finding was not based upon competent substantial evidence. § 120.57(1)(l), F. S. The Chairman is without authority to reweigh evidence or decide which expert testimony to accept. *See Walker*, 946 So. 2d at 605 (weight of the evidence), *Collier Med. Ctr.*, 462 So. 2d at 85 (expert testimony).

As discussed previously, the record shows that the ALJ accepted Ms. Dewey as an expert in the field of stormwater engineering and water resource engineering. (T. 24). Ms. Dewey has been a District employee for 33 years, and she has reviewed over 1,000 ERPs, including 50 to 100 for borrow pits, and oversees review engineers that review projects for agricultural activities. (T. 23, 25-26). Ms. Dewey has participated in the District's water quality monitoring program, which involved visiting reservoirs or stormwater ponds on agricultural land to collect samples and assess how the systems were operating and functioning. (T. 26). Ms. Dewey has also visited blueberry farms personally and professionally at the request of landowners to perform site visits or review permit applications. (T. 26-27). The ALJ overruled Respondents' objection to Ms. Dewey's testimony regarding the excavation activities on the Property and their relation to agricultural activities. (T. 199). The Chairman is without authority to reweigh evidence or decide which expert testimony to accept. *See Walker*, 946 So. 2d at 605 (weight of the evidence), *Collier Med. Ctr. v. Dep't. of Health & Rehab Servs.*, 462 So. 2d 83, 85 (Fla. 1st DCA 1985) (expert testimony). Additionally, to the extent Respondents take exception to the ALJ's

evidentiary ruling, the Chairman does not have authority to disturb that ruling. *See Barfield*, 805 So. 2d at 1011.

The record also shows that Ms. Dewey testified that she has visited blueberry farms in Lake and Orange Counties, and the blueberry plants have been planted on rolling or flat terrain, with minimal contouring. (T. 27). Ms. Dewey stated that she has not seen excavation activities for row crops or contour farming. (T. 199-200). She further stated that the ongoing activities at the Property, excavating and removing sand, are consistent with borrow pit activities (T. 30, 32-33, 44, 54, 198, 217, 218). She said there are differences between the farm plan and the mass grading plans that had been submitted to the District. (T. 48-50). Contouring had been performed in the areas shown on the plans as hay field, and the activity in the excavation area is not contouring, but excavation, "removal of 15 to 30 feet of material." (T. 200). The activities she observed on the Property are borrow activities, which she does not consider to be agricultural. (T. 198-199).

The record also shows that Mr. Prather observed borrow pit activities occurring on the Property. He explained that he had visited the Property twice in April 2020 after receipt of several complaints regarding dump truck traffic to and from the Property, hauling sand, and he had observed several dump trucks entering the Property empty and leaving full of sand. (T. 66, 67-68). On one of the visits, he saw one of the dump trucks leave the Property and travel to a site where the Wekiva Parkway was being constructed, near Wekiva Road. (T. 68-69).

Additionally, Respondents' expert, Mr. Ray, whom the ALJ accepted as an expert in environmental land use planning for agriculture, testified that he was not aware of any other blueberry farm in Lake County or central Florida for which the site had been altered to the extent of the site alteration in this case. (T. 131, 158-59). Mr. Ray also testified that exporting materials

from the Property would meet the definition of a borrow pit, and the activities on the Property include grading with exported materials. (T. 161).

Further, Christopher Leiffer stated there is a contract to sell approximately 700,000 cubic yards of fill material from the site, for $2,170,000.00, for the State Road 46, Wekiva Parkway Project. (Jt. Ex. 2, T. 75-76, 81). He stated he had been in the trucking business his entire life and did not hire a consultant to assist with blueberry planting until after he gave a deposition in this case. (T. 98, 101-102). Kirk Leiffer stated he did not have a written business plan for blueberry production and that blueberries had not been purchased. (T. 126, 127). Christopher Leiffer also said excavation would be ongoing following blueberry planting, and he confirmed that he gave a television interview and stated that "the priority is the dirt." (T. 82, 84).

Additionally, FDACS concluded, in the portion of its analysis in which it determined whether "the landowner engaged in the occupation of agriculture, silviculture, floriculture, or horticulture," that the hay field was agriculture, but the potential blueberry production areas were separate from the hay, and the blueberry areas were not agriculture. Specifically:

> **YES.** FDACS finds that White Water Farms is engaged in the occupation of agriculture as it relates to the hay fields. This finding is based on the landowner having an agricultural classification for the property from the Lake County Property Appraiser's office, recently conducting a silvicultural harvest, and having planted bermudagrass sprigs to develop a permanent hay field. This finding is limited to the areas of the property where bermudagrass has been planted.
>
> **NO.** FDACS finds that White Water Farms is not engaged in the occupation of agriculture as it relates to the purported blueberry production areas. This finding is based on current and ongoing sand mining activities in this area, the fact that no Consumptive Use Permit has been issued by the District, and that no blueberry plants were evident on the site in preparation for planting. Further, the existing agricultural classification as timber does not support the proposed production scheme. The extent of the excavation and alteration of the site's hydrology indicate that the activities

> undertaken are consistent with the occupation of sand mining, and not that of a *bona fide* agricultural activity.

(Ex. 45, p. 6) (emphasis in original).

Thus, the record includes evidence that is sufficiently relevant and material and provides a factual basis for the ALJ's finding that Respondents did not prove by a preponderance of the evidence that the ongoing activities at the site are exempt as an agricultural closed system. Accordingly, competent substantial evidence supports Finding of Fact 43. *See City of Hialeah Gardens*, 857 So. 2d at 204.

To the extent Respondents take exception to examination of the current activities on the Property versus future intended activities, Respondents have not proposed an alternative conclusion or rule application that is as or more reasonable than that of the ALJ.

Accordingly, Respondents' Exception 8 is rejected.

Exception 9

Respondents take exception to the portion of the ALJ's Conclusion of Law 46 that states, "Respondents' commencement of the activities without first obtaining the required District ERP permit violates chapter 373 and rule 62-330.020." (R.O. ¶46). Respondents assert that the sentence is not supported by competent substantial evidence because their expert, Mr. Ray, who was the only expert qualified to testify about the agricultural nature of the activities, testified that the activities were agricultural, and their expert, Mr. Wicks, testified that the temporary dry pond constructed to support the ongoing activities was to be replaced by a permanent system containing a tailwater pond. (Resp. Except. 9). Mr. Wicks explained that the activities described in the Farm Plan meet the requirements of a closed system under section 373.406(3), F.S. *Id*. Therefore, the ALJ could not have concluded that Respondents do not meet the "agricultural

closed system" exemption under section 373.406(3), F.S., and were required to obtain an ERP. *Id*.

The District maintains that the facts underlying the ALJ's conclusion are supported by competent substantial evidence because the ALJ accepted Ms. Dewey's expert testimony that the activities at the Property are not agricultural in nature, the ongoing operation is a borrow pit that exceeds three permitting thresholds under rule 62-330.020, F.A.C., and Respondents' expert, Mr. Ray, admitted that the ongoing activities are a borrow pit (Dist. Resp. 9).

Respondents do not suggest an alternative conclusion or rule interpretation that is as or more reasonable than that of the ALJ.

Notwithstanding, to the extent Respondents seek rejection or modification of Conclusion of Law 46 because the facts underlying it are not supported by competent substantial evidence, the Chairman may not reject or modify a finding of fact unless a review of the entire record shows that the finding was not based upon competent substantial evidence. § 120.57(1)(l), F. S. The Chairman is without authority to reweigh evidence or decide which expert testimony to accept. *See Walker*, 946 So. 2d at 605 (weight of the evidence), *Collier Med. Ctr.*, 462 So. 2d at 85 (expert testimony).

The record shows that the ALJ accepted Ms. Dewey as an expert in the field of stormwater engineering and water resource engineering. (T. 24). Ms. Dewey has been a District employee for 33 years, and she has reviewed over 1,000 ERP, including 50 to 100 for borrow pits, and oversees review engineers that review projects for agricultural activities. (T. 23, 25-26). Ms. Dewey has participated in the District's water quality monitoring program, which involved visiting reservoirs or stormwater ponds on agricultural land to collect samples and assess how the systems were operating and functioning. (T. 26). Ms. Dewey has also visited blueberry farms

personally and professionally at the request of landowners to perform site visits or review permit applications. (T. 26-27). The ALJ overruled Respondents' objection to Ms. Dewey's testimony regarding the excavation activities at the Property and their relation to agricultural activities. (T. 199). To the extent Respondents take exception to the ALJ's evidentiary ruling, the Chairman does not have authority to disturb that ruling. *See Barfield*, 805 So. 2d at 1011.

Regarding whether the nature of the activities at the Property are agriculture, the record shows that Ms. Dewey testified that she has not seen excavation activities for row crops or contour farming. (T. 199-200). The record also shows that Ms. Dewey testified that the ongoing activities at the Property, excavating and removing sand, are consistent with borrow pit activities (T. 30, 32-33, 44, 54, 198, 217, 218). Additionally, Respondents' expert Mr. Ray testified that he was not aware of any other blueberry farm in Lake County or central Florida for which the site had been altered to the extent of the site alteration in this case. (T. 131, 158-59). Respondents' expert Mr. Ray also testified that any exporting of materials from a site would meet the definition of a borrow pit, and the activities on the Property include grading with exported materials (T. 161).

Additionally, FDACS found, in the portion of its analysis regarding whether the landowner was engaged in the occupation of agriculture, that the Property had two "separate and distinct" active operations—a hay field and an approximately 30-acre large scale, mass grading and excavation area with six separate fields of approximately five acres each. (Ex. 45, p. 6.) The excavation work included large dump trucks entering and exiting the Property. *Id*. No blueberry plants were observed on the site, no consumptive use permit had been issued, and the existing agricultural classification was timber. *Id*. As to the "purported blueberry production areas" FDACS concluded that "the extent of excavation and alteration of the site's hydrology indicate

that the activities undertaken are consistent with the occupation of sand mining, and not that of a *bona fide* agricultural activity." *Id*. (emphasis in original).

Further, Christopher Leiffer stated that there is a contract to sell approximately 700,000 cubic yards of fill material from the site, for $2,170,000.00, for the State Road 46, Wekiva Parkway Project. (Jt. Ex. 2, T. 75-76, 81). He stated he had been in the trucking business his entire life and did not hire a consultant to assist with blueberry planting until after he gave a deposition in this case. (T. 98, 101-102). Kirk Leiffer stated he did not have a written business plan for blueberry production and indicated that blueberries had not been purchased. (T. 126, 127). Christopher Leiffer also said that excavation would be ongoing following blueberry planting, and he confirmed that he gave a television interview and stated, "the priority is the dirt." (T. 82, 84).

Regarding the closed system, Mr. Wicks read the statutory definition of "closed system" from section 373.403(6), F.S.: "The title closed system means any reservoir or works located entirely within agricultural land owned or controlled by the user and which requires water only for the filling, replenishing, and maintaining the water level thereof." (T. 175). Mr. Wicks explained that the grading plan and the farm plan define the activities on the Property. (T. 177). The "initial mass grading project" provides a dry retention. *Id*. For the hay and blueberry production, the dry retention will be converted to a tailwater recovery pond "as part of developing the beds for the planting areas." (T. 177-178). Mr. Wicks opined that the farm plan establishes a closed system once construction is completed. (T. 175).

Ms. Dewey explained the difference between mass grading and a borrow pit. (T. 191). Mass grading generally involves moving dirt around within a site, and a borrow pit involves the excavated material being removed from the site. *Id*. She also explained that a dry retention pond

is not a closed system. (T. 205-206). Applying the statutory definition, she explained that there are two prongs – the first is that it is located entirely within agricultural land, and the second is that water is required only for filling, replenishing, and maintaining the water level. (T. 206). As to the first prong, she stated that the current activity is a borrow pit, so the system is not on agricultural land. *Id*. As to the second prong, she stated that the pond does not continue water; it is designed to be a dry pond and recover the water. *Id*.

Regarding permit requirements, Ms. Dewey explained that the District looks at current ongoing activities to determine whether a permit is required. (T. 220). She explained that the current excavation activities on the Property exceed three thresholds in rule 62-330.020, F.A.C. (T. 35-36). Specifically to the activities at issue, rule 62-330.020, F.A.C., requires a permit before construction, alteration, operation, maintenance, removal, or abandonment of any project that by itself or in combination with an activity conducted after October 1, 2013 cumulatively results in more than 4,000 square feet of impervious surface area subject to vehicular traffic, a total project area of more than five acres, or the capability of impounding more than 40 acre feet of water. *Id*. Ms. Dewey continued, stating that the haul roads being used at the Property exceed the 4,000-square foot area threshold; the excavation area is approximately 35 acres, which exceeds the five acre threshold; and the 30 to 35-acre excavation area, based upon the depth, would have the capability of impounding more than 40 acre feet of water. *Id*.

Thus, the record includes evidence that is sufficiently relevant and material and provides a factual basis to support a factual finding that the Property did not contain an agricultural closed system, which underlies the ALJ's conclusion that "Respondents' commencement of the activities without first obtaining the required District ERP permit violates chapter 373 and rule 62-330.020." Accordingly, competent substantial evidence supports the ALJ's findings necessary

to reach the conclusion in the excepted portion of Conclusion of Law 46. *See generally City of Hialeah Gardens*, 857 So. 2d at 204.

For the foregoing reasons, Respondents' Exception 9 is rejected.

Exception 10

Respondents' Exception 10 states, "The Leiffers take exception to the Conclusion in Paragraph 52 that it is 'Petitioner's position' that the Section 373.406(2), F.S. exemption requires the agricultural practice to be 'normal and customary' and the Section 373.406(3), F.S. exemption does not because it is not supported by competent substantial evidence." (Resp. Except. 10). It appears that Respondents take issue with the second sentence of the ALJ's Conclusion of Law 52, which states, "Respondents' position is that subsection 373.406(2) requires the agricultural activity to be 'normal and customary,' while subsection 373.406(3) does not."[4] (R.O. ¶52). Respondents also take issue with the fourth sentence of the ALJ's Conclusion of Law 52, which states, "It would be incongruous to ignore the finding of the state agriculture agency about what constitutes the practice of agriculture. *See, e.g. Meeks ex rel. Estate of Meeks v. Fla. Power & Light Co.*, 816 So. 2d 1125, 1131 (Fla. 5th DCA 2002) (reflecting that sections of a statute be considered together and interpreted in such a way as to bring them in harmony with one another); *WFTV, Inc. v. Wilken*, 675 So. 2d 674, 679 (Fla. 4th DCA 1996) (reflecting that in determining the legislative intent of a specific subsection, other subsections of a statute may be considered)." (R.O. ¶52).

It appears that Respondents' argument is that the ALJ erred because the plain language of the statute shows that the section 373.406(2) exemption requires the agricultural practice to be

[4] Respondents stated in their Proposed Recommended Order, "Further, the tests for the determination if an activity is agriculture is different under Florida Statutes Sections 373.406(2) and (3). Subsection (2) requires the agricultural activity to be 'normal and customary' while Subsection (3) does not." (Resp. P.R.O. ¶56).

"normal and customary," but the section 373.406(3) exemption does not. (Resp. Except. 10). Because the tests are different, the ALJ should have applied the principle of statutory construction providing that the mention of one thing implies the exclusion of another, to exclude as irrelevant the facts and conclusions in the FDACS Binding Determination from her consideration of whether Respondents are exempt from permit requirements under section 373.406(3), F.S. *Id*. To the extent the ALJ relied on facts and conclusions related to the 373.406(2), F.S., exemption determination for her consideration of the section 373.406(3), F.S., exemption, the conclusion that Respondents are not exempt is in error because it is not based on facts supported by competent substantial evidence. *Id*.

The District asserts that the Chairman can only reject or modify conclusions of law if the revision is as or more reasonable than the ALJ's conclusion of law. (Dist. Resp. 10). The District contends that Conclusion of Law 52 is not erroneous for two reasons. *Id*. First, to the extent it is based on Findings of Fact 30, 31, and 32, those findings are supported by competent substantial evidence, which the Chairman may not reweigh. *Id*. Second, while sections 373.406(2) and (3), F.S., are worded differently, both contain the term "agricultural," and the ALJ's application of the statutory interpretation principle requiring that sections of a statute be read together to bring harmony and avoid an unreasonable or absurd result is correct. *Id*. The District also cites a previous case in which the same set of facts was used to support findings related to both the "agricultural exemption" in section 373.406(2), F.S., and the "agricultural closed system" exemption in section 373.406(3), F.S. *Id*. (citing *Suggs v. Southwest Fla. Water Management Dist.*, Case No. 08-3530 at ¶20 R.O. (Fla. DOAH Feb. 19, 2009) (Recommended Order), *adopted* (*Southwest Fla. Water Management Dist.* April 1, 2009).

As discussed in the ruling on Respondents' Exception 5 above, Findings of Fact 30, 31, and 32 are supported by competent substantial evidence. To the extent Respondents are making an evidentiary objection based on the relevance of the Binding Determination, including the facts and conclusions contained therein, the Chairman does not have the authority to make such a ruling. *Barfield*, 805 So. 2d at 1011.

The Chairman may only reject or modify an ALJ's conclusion of law or rule interpretation by stating with particularity the reasons for rejecting or modifying it, and must make a finding that the substituted conclusion of law or rule interpretation is as or more reasonable than the ALJ's. *See* § 120.57(1)(l), F. S.

Section 373.406(2), F.S., states in pertinent part:

> Notwithstanding s. 403.927, nothing herein, or in any rule, regulation, or order adopted pursuant hereto, shall be construed to affect the right of any person engaged in the occupation of agriculture, silviculture, floriculture, or horticulture to alter the topography of any tract of land, including, but not limited to, activities that may impede or divert the flow of surface waters or adversely impact wetlands, for purposes consistent with the normal and customary practice of such occupation in the area. However, such alteration or activity may not be for the sole or predominant purpose of impeding or diverting the flow of surface waters or adversely impacting wetlands.

A plain reading of this subsection shows three requirements for an activity to be exempt. First, the person must be engaged in the occupation of agriculture, silviculture, floriculture, or horticulture. *Id*. Second, proposed topography alterations must be for purposes consistent with the normal and customary practice of such occupation in the area. *Id*. Third, alterations or proposed alterations must not be for the sole or predominant purpose of impeding or diverting the flow of surface waters or adversely impacting wetlands. *Id. See also* Fla. Admin. Code R.

5M-15.005(1) (implementing section 373.406(2), F.S., and setting forth the three-part test applied to exemption claims pursuant thereto).

Neither the first nor the third requirement of this subsection make any reference to "normal and customary." Thus, analysis of the first requirement, whether someone is engaged in the occupation of agriculture, can be made without considering normal and customary practices. The FDACS Binding Determination confirms this. The Binding Determination shows that FDACS evaluated the first requirement, whether someone is engaged in the occupation of agriculture, without any reference to "normal and customary," or generally accepted practices for the type of operation and the region. (Ex. 45, p. 6). *See also* Fla. Admin. Code R. 5M-15.001(1) (defining "normal and customary practice in the area"). Specifically, in its analysis of the first requirement, FDACS found two "separate and distinct" active operations on the Property—one hay and one sand mining. (Ex. 45, p. 6). Regarding the sand mining, FDACS applied the first requirement to the facts it observed on site:

> FDACS finds that White Water Farms is not engaged in the occupation of agriculture as it relates to the purported blueberry production areas. This finding is based on current and ongoing sand mining activities in this area, the fact that no Consumptive Use Permit has been issued by the District, and that no blueberry plants were evident on the site in preparation for planting. Further, the existing agricultural classification as timber does not support the proposed production scheme. The extent of the excavation and alteration of the site's hydrology indicate that the activities undertaken are consistent with the occupation of sand mining, and not that of a *bona fide* agricultural activity.

Id. (emphasis in original). FDACS made no reference to or analysis of normal and customary, or generally accepted practices for blueberry farming or blueberry farming practices in the geographic area. *Id*.

Section 373.406(3), F.S., states in pertinent part:

> Nothing herein, or in any rule, regulation, or order adopted pursuant hereto, shall be construed to be applicable to construction, operation, or maintenance of any agricultural closed system. However, part II of this chapter shall be applicable as to the taking and discharging of water for filling, replenishing, and maintaining the water level in any such agricultural closed system.

As in the first requirement under section 373.406(2), F.S., this subsection does not reference "normal and customary." Thus, a determination of whether something is "agricultural" under this subsection can similarly be made without consideration of what is "normal and customary." In *Suggs*, an ALJ analyzed claims for exemptions under both sections 373.406(2) and (3), F.S., using the same body of evidence. *Suggs v. Southwest Fla. Water Management Dist.*, Case No. 08-3530 at ¶20 R.O. (Fla. DOAH Feb. 19, 2009) (Recommended Order), *adopted* (*Southwest Fla. Water Management Dist.* April 1, 2009). Accordingly, at the least, facts used to determine whether an activity is exempt under the first requirement in section 373.406(2), F.S., could also be used to determine whether an activity is exempt under section 373.406(3), F.S.

All parts of a statute must be read together to achieve a consistent whole, and all related provisions should be read together when possible, to achieve harmony. *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992). *See also Meeks ex rel. Estate of Meeks v. Fla. Power & Light Co.*, 816 So. 2d 1125, 1131 (Fla. 5th DCA 2002), *WFTV, Inc. v. Wilken*, 675 So. 2d 674, 679 (Fla. 4th DCA 1996). Reading sections 373.406(2) and (3), F.S., together to achieve a consistent whole, "agriculture" does not have two separate meanings or require two different sets of facts upon which to apply the respective analyses. Rather, section 373.406(2), F.S., has three requirements. The first includes consideration of the occupation of agriculture, without reference to "normal and customary" practices, and the second includes consideration of "normal and customary" practices of agriculture. Section 373.406(3), F.S., includes consideration of an "agricultural closed system" without reference to "normal and

customary" practices. To avoid an absurd result, whether something is "agriculture" in the first requirement under section 373.406(2), F.S., and whether something is "agricultural" under section 373.406(3), F.S., can be determined using at least the same set of facts.

Even if the principle Respondents' assert—the mention of one thing implies the exclusion of another—applies, the result is the same. "Normal and customary" is not mentioned in the first requirement of section 373.406(2), F.S. Applying this principle, because the legislature did not include "normal and customary," consideration of "normal and customary" is excluded from the first requirement of section 373.406(2), F.S. Thus, analyses of both the first requirement in section 373.406(2), F.S., and the requirements in section 373.406(3), F.S., respectively, are made without consideration of what is "normal and customary." This is confirmed in FDACS rules, and by the analysis of the first requirement in the FDACS Binding Determination, as discussed above. *See* Fla. Admin. Code R. 5M-15.005(1), Ex. 45, p. 6.

Thus, the interpretation Respondents assert is not as or more reasonable than the ALJ's conclusion in Conclusion of Law 52 that it would be incongruous to ignore the state agriculture agency's finding about what is the practice of agriculture.

Additionally, to the extent Respondents assert the fact findings underlying the ALJ's conclusion that the activities on the Property are not agriculture are not supported by competent substantial evidence, record evidence other than the Binding Determination shows that competent substantial evidence supports such a finding, as discussed in detail in the rulings on Respondents' Exceptions 3, 4, 6, 7, and 8.

Accordingly, Respondents' Exception 10 is rejected.

Exception 11

Respondents' Exception 11 takes issue with the last sentence of the ALJ's Conclusion of Law 53, which states "Respondents' attempt to use the District's definitions in section 14.7 of the A.H., Vol. II to overcome DACS' Binding Determination is not persuasive." (R.O. ¶53). Respondents assert that it is an incorrect application of law and is not supported by competent substantial evidence because the findings of the Binding Determination have no application to the section 373.406(3), F.S., exemption; the only testimony or evidence regarding the applicable definitions of "agriculture" and "agricultural activity" shows that the definitions in Section 14.7 of the District's Applicant's Handbook Volume II apply to determine eligibility for the section 373.406(3), F.S., exemption; and the only agricultural expert testified that the "farm activities" meet the definitions of "agriculture" and "agricultural activity" of the District's Applicant's Handbook Volume II, Section 14.7. (Resp. Except. 11).

The District maintains that Ms. Dewey testified that the definitions in Section 14.7 of the District's Applicant's Handbook Volume II apply only to agricultural activities that do not meet an exemption and require an ERP, and competent substantial evidence supports the ALJ's finding that the Respondents' activities are mining, not agriculture. (Dist. Resp. 11).

The Chairman may only reject or modify an ALJ's conclusion of law or interpretation of administrative rule by stating with particularity the reasons for rejecting or modifying it, and must make a finding that the substituted conclusion of law or interpretation of administrative rule is as or more reasonable than the ALJ's. *See* § 120.57(1)(l), F. S.

To the extent Respondents assert that the facts in the Binding Determination cannot be considered in the ALJ's analysis of the section 373.406(3), F.S. exemption, they have not

asserted an interpretation or application of a rule or law that is as or more reasonable than the ALJ's conclusion, as discussed in the ruling on Respondents' Exception 10.

To the extent Respondents assert that the last sentence of Conclusion of Law 53 is not supported by competent substantial evidence because it is based on Finding of Fact 34, that finding is supported by competent substantial evidence, as discussed in the ruling on Respondents' Exception 7.

To the extent Respondents suggest that the last sentence of Conclusion of Law 53 is erroneous because Respondents' expert Mr. Ray testified that the definitions in section 14.7 of the District's Applicant's Handbook Volume II apply to statutory determinations under section 373.406(3), F.S., the record contains District expert Ms. Dewey's testimony that explains the definitions apply to activities that require an ERP. (T. 194). As discussed previously, the record shows that the ALJ accepted Ms. Dewey as an expert in the field of stormwater engineering and water resource engineering. (T. 24). Ms. Dewey has been a District employee for 33 years, and she has reviewed over 1,000 Environmental Resource Permits, including 50 to 100 for borrow pits, and oversees review engineers that review projects for agricultural activities. (T. 23, 25-26). The ALJ overruled Respondents' objection to Ms. Dewey's testimony regarding the excavation activities at the Property and their relation to agricultural activities. (T. 199). The Chairman is without authority to reweigh evidence or decide which expert testimony to accept. *See Walker*, 946 So. 2d at 605 (weight of the evidence), *Collier Med. Ctr.*, 462 So. 2d at 85 (expert testimony). To the extent Respondents take exception to the ALJ's evidentiary ruling, the Chairman does not have authority to disturb that ruling. *See Barfield*, 805 So. 2d at 1011.

Ms. Dewey specifically explained that while the Applicant's Handbook Volume I applies statewide, each water management district has its own Volume II Applicant's Handbook. (T.

194). Section 14 of the District's Volume II Applicant's Handbook includes the District's prior ERP rules applicable to "projects that were an agricultural activity and they still exceeded a permit threshold." *Id*. Additionally the Binding Determination does not contain any reference to the definitions in section 14.7 of the District's Applicant's Handbook Volume II. (Ex. 45).

Thus, the record includes evidence that is sufficiently relevant and material and provides support for the factual findings underlying the last sentence of the ALJ's Conclusion of Law 53. *See generally City of Hialeah Gardens*, 857 So. 2d at 204.

Chapter 62-330 of the Florida Administrative Code, which includes rule 62-330.020, applies statewide. *See* Fla. Admin. Code R. 62-330.010 ("This chapter, together with the rules and all documents it incorporates by reference, implements the comprehensive, statewide [ERP] program under Section 373.4131, F.S."). Rule 62-330.010(4)(a), F.A.C., incorporates the Applicant's Handbook Volume I, "General and Environmental," and states that it applies "statewide to all activities regulated under Chapter 62-330, F.A.C. It includes explanations, procedures, guidance, standards, and criteria on what is regulated by this chapter, the types of permits available, how to submit an application or notice for a regulated activity to the Agencies, how applications and notices are reviewed, the standards and criteria for issuance, and permit duration and modification." Rule 62-330.010(4)(b), F.A.C., provides that an Applicant's Handbook Volume II has been adopted for use within each District. This means that there is a different Applicant's Handbook Volume II for each water management district.

Rule 62-330.020, F.A.C. contains the permit thresholds—a list of which activities require an ERP. Rule 62-330.051, F.A.C., lists the activities that exceed a threshold—and would otherwise require an ERP under rule 62-330.020—that are exempt. Among these exemptions are

"[a]ctivities conducted in conformance with the exemptions in section 373.406, [F.S.]." Fla. Admin. Code R. 62-330.051(2).

Thus, as set forth in the ERP rules, the determination of whether an activity exceeds a threshold and would require an ERP is based on the statewide rules, which include chapter 62-330, F.A.C., and Volume I of the Applicant's Handbook. Similarly, if the activity would otherwise exceed a threshold and require an ERP, but it falls under a listed exemption, that determination is based on the statewide rules, which include chapter 62-330, F.A.C., and Volume I of the Applicant's Handbook. In other words, the definitions in section 14 of the District's Volume II Applicant's Handbook do not apply until it is determined that the activity exceeds a threshold and would require an ERP pursuant to rule 62-330.020, F.A.C., does not meet one of the exemptions listed in rule 62-330.051, F.A.C., and is located specifically within the St. Johns River Water Management District. Respondents' suggested use of definitions from the District's Applicant's Handbook Volume II, which applies only within the District and not statewide, would require application of a "local" definition to an analysis that relies on statewide uniformity. If other water management districts in Florida have different definitions of "agriculture" or "agricultural activity" or do not define those terms in their respective volume II handbooks, statewide rules would no longer have consistent statewide application.

Accordingly, Respondents have cited to expert testimony that contains their preferred rule interpretation, but they have not proposed a conclusion or rule interpretation that is as or more reasonable than the last sentence of the ALJ's Conclusion of Law 53. Respondents' Exception 11 is rejected.

Exception 12

Respondents take exception to the portion of the ALJ's Conclusion of Law 55 that states "Respondents' system is not a 'closed system.'" (R.O. ¶55). Respondents assert that the uncontroverted expert testimony is that the Revised Mass Grading Plan is an interim construction document that contains plans to manage stormwater during construction of the complete system, which would be an exempt activity upon completion. (Resp. Except. 12). The ALJ erred by not accepting uncontroverted expert testimony, so this portion of the ALJ's conclusion is not supported by competent substantial evidence. (Resp. Except. 12).

The District maintains that Ms. Dewey's testimony that the District reviews the current ongoing activities, which are a borrow pit and are not a closed system, to determine whether a permit is required, rebuts the expert testimony Respondents cite. (Dist. Resp. 12). The Chairman does not have authority to reweigh the evidence, and the ALJ is even free to reject unrebutted expert testimony. *Id*. Therefore, the ALJ's conclusion is supported by competent substantial evidence. *Id*.

The Chairman may only reject or modify an ALJ's conclusion of law or interpretation of administrative rule by stating with particularity the reasons for rejecting or modifying it, and must make a finding that the substituted conclusion of law or interpretation of administrative rule is as or more reasonable than the ALJ's. *See* § 120.57(1)(l), F. S.

In the record, Mr. Wicks read the statutory definition of "closed system" from section 373.403(6), F.S.: "The title closed system means any reservoir or works located entirely within agricultural land owned or controlled by the user and which requires water only for the filling, replenishing, and maintaining the water level thereof." (T. 175). Mr. Wicks explained that the grading plan and the farm plan define the activities on the Property. (T. 177). The "initial mass

grading project" provides a dry retention. *Id*. For the hay and blueberry production, the dry retention will be converted to a tailwater recovery pond "as part of developing the beds for the planting areas." (T. 177-178). Mr. Wicks opined that the farm plan establishes a closed system once construction is completed. (T. 175).

Ms. Dewey explained the difference between mass grading and a borrow pit. (T. 191). Mass grading generally involves moving dirt around within a site, and a borrow pit involves the excavated material being removed from the site. *Id*. She also explained that a dry retention pond is not a closed system. (T. 205-206). Applying the statutory definition, she explained that there are two prongs – the first is that it is located entirely within agricultural land, and the second is that water is required only for filling, replenishing, and maintaining the water level. (T. 206). As to the first prong, she stated that the current activity is a borrow pit, so the system is not on agricultural land. *Id*. As to the second prong, she stated that the pond does not continue water; it is designed to be a dry pond and recover the water. *Id*. The District looks at the current ongoing activities to determine whether a permit is required, and a permit is required for the activities at the Property. (T. 200-201, 220).

The record shows that the ALJ accepted both Mr. Wicks and Ms. Dewey as experts, and overruled Respondents' objection to Ms. Dewey's testimony regarding the excavation activities at the Property and their relation to agricultural activities. (T. 24, 171, 199). The Chairman is without authority to reweigh evidence or decide which expert testimony to accept. *See Walker*, 946 So. 2d at 605 (weight of the evidence), *Collier Med. Ctr.*, 462 So. 2d at 85 (expert testimony).

The record also contains additional evidence regarding the nature of the current activities at the Property. District experts Ms. Dewey and Mr. Prather observed excavation and removal of

sand, which are consistent with borrow pit activities. (T. 30, 32-33, 44, 54, 198, 217, 218). FDACS found, in the portion of its analysis regarding whether the landowner was engaged in the occupation of agriculture, that the Property had two "separate and distinct" active operations—a hay field and an approximately 30-acre large scale, mass grading and excavation area with six separate fields of approximately five acres each. (Ex. 45, p. 6.) The excavation work included large dump trucks entering and exiting the Property. *Id*. No blueberry plants were observed on the site, no consumptive use permit had been issued, and the existing agricultural classification was timber. As to the "purported blueberry production areas" FDACS concluded that "the extent of excavation and alteration of the site's hydrology indicate that the activities undertaken are consistent with the occupation of sand mining, and not that of a *bona fide* agricultural activity." *Id*. (emphasis in original).

Respondents' expert Mr. Ray also testified that the activities on the Property include grading with exported materials, and that any exporting of materials from a site would meet the definition of a borrow pit. (T. 161). Kirk Leiffer indicated there was no written business plan for blueberry production, and blueberries had not been purchased. (T. 126, 127). Christopher Leiffer stated there was a $2,170,000.00 contract to sell approximately 700,000 cubic yards of fill material from the Property for the State Road 46, Wekiva Parkway Project; he had been in the trucking business his entire life; and he had hired a blueberry planting consultant after giving a deposition in this case. (Jt. Ex. 2, T. 75-76, 81, 98, 101-102). Christopher Leiffer admitted stating that the "priority is the dirt" and said excavation would be ongoing following blueberry planting. (T. 82, 84).

Thus, to the extent Respondents assert the last sentence of the ALJ's Conclusion of Law 55 is based on facts that are not supported by competent substantial evidence, the record includes

evidence that is sufficiently relevant and material and provides a factual basis to support the ALJ's finding that Respondents' system is not a closed system. Accordingly, competent substantial evidence supports the facts underlying this portion of Conclusion of Law 55. *See City of Hialeah Gardens*, 857 So. 2d at 204.

Respondents did not suggest alternative conclusion or rule interpretation that is as or more reasonable than that of the ALJ.

For these reasons, Respondents' Exception 12 is rejected.

Exception 13

Respondents' Exception 13 takes issue with the ALJ's application in Conclusion of Law 56 of the requirement in the agricultural closed system exemption in section 373.406(3), F.S., that it shall not be construed to eliminate the requirement that generally accepted engineering practices apply to construction, operation, and maintenance of a dam, dike, or levee. (Resp. Except. 13). Respondents argue that because no dam, dike, or levee has been constructed on the Property, this requirement is not applicable. *Id*.

The District maintains that as a statute enacted to protect the public health, safety, and welfare from further harm to water resources, the statute must be liberally construed to carry out its purposes, and conversely, exceptions to the regulatory authority in chapter 373 must be narrowly construed against the person claiming a statutory exception. (Dist. Resp. 13). The District further asserts that record testimony from its expert, Ms. Dewey, shows that the Respondents' design plan does not follow generally accepted engineering practices and the failure of the side slopes of the area being excavated would cause damage similar to that of a dam, dike, or levee, and Respondents did not demonstrate that such harm is unlikely. *Id*.

The Chairman may only reject or modify an ALJ's conclusion of law or interpretation of administrative rule by stating with particularity the reasons for rejecting or modifying it, and must make a finding that the substituted conclusion of law or interpretation of administrative rule is as or more reasonable than the ALJ's. *See* § 120.57(1)(l), F.S.

To prevail on their affirmative defense under section 373.406(3), F.S., Respondents had the burden to prove by a preponderance of the evidence that the activities on the Property are exempt from ERP regulation under Chapter 373, Part IV, F.S. *See Hough v. Menses*, 95 So.2d 410, 412 (Fla. 1957). To do so, Respondents must prove that the activities on the Property are construction, operation, or maintenance of an agricultural closed system, and such construction, operation or maintenance meets generally accepted engineering practices for construction, operation, and maintenance of dams, dikes, or levees. § 373.406(3), F.S.

The ALJ's Findings of Fact and Conclusions of Law that the activities on the Property are not an "agricultural closed system" are supported by competent substantial evidence, and Respondents have not proposed an interpretation of a statute or rule that is as or more reasonable than the ALJ's, as discussed in the rulings on Exceptions 7, 9, and 12, above.

The ALJ also reached a conclusion based on Ms. Dewey's testimony that Respondents' proposed design does not follow generally accepted engineering practices and that any failure of the borrow pit's side slopes would cause harm similar to the failure of a dam, dike, or levee. (R.O. ¶56). District expert Ms. Dewey testified that she had concern that the side slopes of the excavation area were too steep, and she was concerned about whether they could be maintained because it would be "very prone to erosion and failure." (T. 198). Because of the size of the area being excavated, she had concern that if the side slopes were to fail, there would be a potential for harm equivalent to that of a dam, dike, or levee. (T. 213). She also stated that the District

applies generally accepted engineering practices for anything the District reviews within permit applications. *Id*.

To obtain an ERP, an applicant must provide reasonable assurance that, among others, the construction, alteration, operation, maintenance, removal, or abandonment of the project will be capable, based on generally accepted engineering and scientific principles, of performing and functioning as proposed. Fla. Admin. Code r. 62-330.301(1)(i). Among others, rule 62-330.301 implements section 373.413, F.S., which provides that the Florida Department of Environmental Protection and the District may require permits and impose reasonable conditions necessary to assure that construction or alteration of any stormwater management system, dam, impoundment, reservoir, appurtenant work, or works will comply with chapter 373 and applicable rules promulgated thereto, and will not be harmful to the water resources. *Id*., § 373.413, F. S. The provisions of chapter 373, F.S., shall be liberally construed "in order to effectively carry out its purposes." § 373.616, F. S. Chapter 373's purposes include, among others, to promote the health, safety, and general welfare of the people of Florida and to prevent harm to Florida's water resources. *See* § 373.016, F. S.

Further, exceptions to the regulatory authority conferred to agencies in chapter 373, F.S., are to be narrowly construed against the person claiming the exception. *See Still v. DACS*, Case No. 15-5750 at ¶ 28 (Fla. DOAH Feb. 2, 2016), *adopted* (Fla. Dept. of Agriculture and Consumer Svcs. April 27, 2016) (citing *Samara Dev. Corp. v. Marlow*, 556 So.2d 1097, 1100 (Fla. 1990)). Thus, a liberal construction of chapter 373 to promote the health, safety, and welfare of Floridians and prevent harm to Florida's water resources, and a narrow construction of the agricultural closed system exemption, together, do not result in an application in which generally accepted engineering practices apply only to dams, dikes, and levees. Rather, such an

interpretation would include application of generally accepted engineering principles to construction, alteration, operation, maintenance, removal, or abandonment of any stormwater management system, dam, impoundment, reservoir, appurtenant work, or works, as provided in rule 62-330.301(1)(i), F.A.C.

Accordingly, Respondents' proposed interpretation that because the activities on the Property do not include a dam, dike, or levee, generally accepted scientific and engineering principles should not apply, is not as or more reasonable than the ALJ's conclusion. Therefore, Respondents' Exception 13 is rejected.

Exception 14

Respondents take exception to the ALJ's Conclusion of Law 57, which states "Respondents did not prove by a preponderance of the evidence that the ongoing activities on the Property are exempt as an agricultural system." (R.O. ¶57). The gravamen of Respondents' argument is that it is not supported by competent substantial evidence because the only witness qualified to testify about agriculture testified that the activities on the Property are agriculture, and the only expert engineering testimony regarding whether the activities on the Property constituted a closed system was that the operations are a closed system or will be a closed system upon completion of construction. (Resp. Except. 14).

The District maintains that the ALJ accepted Ms. Dewey as an expert and overruled Respondents' objection as to whether Ms. Dewey could testify about the agricultural aspects of the project. (Dist. Resp. 14). The District asserts that the Chairman cannot overrule the ALJ's evidentiary decision to accept Ms. Dewey as an expert witness or reweigh evidence, resolve conflicts therein, or judge witness credibility to support a different conclusion of law. *Id*. Ms.

Dewey testified that the current construction on the Property is a borrow pit, and not a closed system, and it requires a permit. *Id*.

The Chairman may only reject or modify an ALJ's conclusion of law or interpretation of administrative rule by stating with particularity the reasons for rejecting or modifying it, and must make a finding that the substituted conclusion of law or interpretation of administrative rule is as or more reasonable than the ALJ's. *See* § 120.57(1)(l), F. S.

As discussed previously, the record shows that the ALJ accepted Ms. Dewey as an expert in the field of stormwater engineering and water resource engineering. (T. 24). Ms. Dewey has been a District employee for 33 years, and she has reviewed over 1,000 ERPs, including 50 to 100 for borrow pits, and oversees review engineers that review projects for agricultural activities. (T. 23, 25-26). Ms. Dewey has participated in the District's water quality monitoring program, which involved visiting reservoirs or stormwater ponds on agricultural land to collect samples and assess how the systems were operating and functioning. (T. 26). Ms. Dewey has also visited blueberry farms personally and professionally at the request of landowners to perform site visits or review permit applications. (T. 26-27). The ALJ overruled Respondents' objection to Ms. Dewey's testimony regarding the excavation activities on the Property and their relation to agricultural activities. (T. 199). The Chairman is without authority to reweigh evidence or decide which expert testimony to accept. *See Walker*, 946 So. 2d at 605 (weight of the evidence), *Collier Med. Ctr.*, 462 So. 2d at 85 (Fla. 1st DCA 1985) (expert testimony). Additionally, to the extent Respondents take exception to the ALJ's evidentiary ruling, the Chairman does not have authority to disturb that ruling. *See Barfield*, 805 So. 2d at 1011.

Regarding whether the nature of the activities at the Property is agriculture, the record shows that Ms. Dewey testified that she has not seen excavation activities for row crops or

contour farming. (T. 199-200). The record also shows that Ms. Dewey testified that the ongoing activities at the Property, excavating and removing sand, are consistent with borrow pit activities (T. 30, 32-33, 44, 54, 198, 217, 218). Additionally, Respondents' expert Mr. Ray testified that he was not aware of any other blueberry farm in Lake County or central Florida for which the site had been altered to the extent of the site alteration in this case. (T. 131, 158-59). Respondents' expert Mr. Ray also testified that the activities on the Property include grading with exported materials, and that any exporting of materials from a site would meet the definition of a borrow pit. (T. 161).

Additionally, FDACS found, in the portion of its analysis about whether the landowner was engaged in the occupation of agriculture, that the Property had two "separate and distinct" active operations—a hay field and an approximately 30-acre large scale, mass grading and excavation area with six separate fields of approximately five acres each. (Ex. 45, p. 6.) The excavation work included large dump trucks entering and exiting the Property. *Id*. No blueberry plants were observed on the site, no consumptive use permit had been issued, and the existing agricultural classification was timber. As to the "purported blueberry production areas" FDACS concluded that "the extent of excavation and alteration of the site's hydrology indicate that the activities undertaken are consistent with the occupation of sand mining, and not that of a *bona fide* agricultural activity." *Id*. (emphasis in original).

Further, Christopher Leiffer stated that there was a contract to sell approximately 700,000 cubic yards of fill material from the site, for $2,170,000.00, for the State Road 46, Wekiva Parkway Project. (Jt. Ex. 2, T. 75-76, 81). He stated he had been in the trucking business his entire life and had hired a consultant to assist with blueberry planting after he gave a deposition in this case. (T. 98, 101-102). Kirk Leiffer stated he did not have a written business plan for

blueberry production and indicated that blueberries had not been purchased. (T. 126, 127). Christopher Leiffer also said that excavation would be ongoing following blueberry planting, and he confirmed that he gave a television interview and stated, "the priority is the dirt." (T. 82, 84).

Regarding the closed system, Mr. Wicks read the statutory definition of "closed system" from section 373.403(6), F.S.: "The title closed system means any reservoir or works located entirely within agricultural land owned or controlled by the user and which requires water only for the filling, replenishing, and maintaining the water level thereof." (T. 175). Mr. Wicks explained that the grading plan and the farm plan define the activities on the Property. (T. 177). The "initial mass grading project" provides a dry retention. *Id*. For the hay and blueberry production, the dry retention will be converted to a tailwater recovery pond "as part of developing the beds for the planting areas." (T. 177-178). Mr. Wicks opined that the farm plan establishes a closed system once construction is completed. (T. 175).

Ms. Dewey explained the difference between mass grading and a borrow pit. (T. 191). Mass grading generally involves moving dirt around within a site, and a borrow pit involves the excavated material being removed from the site. *Id*. She also explained that a dry retention pond is not a closed system. (T. 205-206). Applying the statutory definition, she explained that there are two prongs – the first is that it is located entirely within agricultural land, and the second is that water is required only for filling, replenishing, and maintaining the water level. (T. 206). As to the first prong, she stated that the current activity is a borrow pit, so the system is not on agricultural land. *Id*. As to the second prong, she stated that the pond does not continue water; it is designed to be a dry pond and recover the water. *Id*. The District looks at the current ongoing activities to determine whether a permit is required, and a permit is required for the activities at the Property. (T. 200-201, 220).

The record also shows that Ms. Dewey testified that she has visited blueberry farms in Lake and Orange Counties, and the blueberry plants have been planted on rolling or flat terrain, with minimal contouring. (T. 27). Ms. Dewey stated that she has not seen excavation activities for row crops or contour farming. (T. 199-200). She further stated that the ongoing activities at the Property, excavating and removing sand, are consistent with borrow pit activities (T. 30, 32-33, 44, 54, 198, 217, 218). She said that there are differences between the farm plan and the mass grading plans that had been submitted to the District. (T. 48-50). Contouring had been performed in the areas shown on the plans as hay field, and the activity in the excavation area is not contouring, but excavation, "removal of 15 to 30 feet of material." (T. 200). The activities she observed at the Property are borrow activities, which she does not consider to be agricultural. (T. 198-199).

Thus, the record includes evidence that is sufficiently relevant and material and provides a factual basis for the ALJ's finding that Respondents did not prove by a preponderance of the evidence that the ongoing activities at the site are exempt as an agricultural closed system. Accordingly, competent substantial evidence supports the facts underlying Conclusion of Law 57. *See City of Hialeah Gardens*, 857 So. 2d at 204. Respondents did not suggest a conclusion or rule interpretation that is as or more reasonable than that of the ALJ.

For these reasons, Respondents' Exception 14 is rejected.

Exception 15

Respondents take exception to the ALJ's recommendation "for all the reasons stated above." Respondents have not stated any additional reasons for any of their exceptions. Accordingly, for the same reasons as indicated in the ruling on each of Respondents' Exceptions 1-14, Exception 15 is rejected.

For the foregoing reasons, **IT IS ORDERED**:

1. Finding of Fact 26 of the Recommended Order entered November 24, 2020, attached as Exhibit A, is revised to read:

> 26. Thus, the Revised Mass Grading Plan does not match the Blueberry & Hay Production Farm Plan. The Revised Mass Grading Plan shows excavation of overburden down to 60 and 70 feet, construction of a haul road, and erosion measures to control stormwater runoff. Then, upon completion of construction and excavation, the Blueberry & Hay Production Farm Plan is implemented. For example, the Revised Mass Grading Plan shows a dry retention pond would be constructed, while the Blueberry & Hay Production Farm Plan shows a wet retention tailwater recovery pond would be constructed.

2. All other portions of the Recommended Order entered November 24, 2020, attached as Exhibit A, are **ADOPTED** in their entirety, including the ultimate findings in the Recommendation, as follows:

   a. Respondents commenced construction and operation of a borrow pit/sand mine and haul road on the Property without the necessary ERP;

   b. Respondents' construction and operation of a borrow pit/sand mine and haul road on the Property are not exempt under subsection 373.406(3), F.S.; and

   c. Respondents shall perform the corrective actions from the April 28, 2020 Complaint, attached as Exhibit B, within the timeframes provided therein.

DONE AND ORDERED on January 13, 2021, in Palatka, Florida.

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT

BY: _____
Douglas Burnett
Governing Board Chairman

RENDERED on January 13th, 2021.

BY: Susan Hatchell
for Courtney Waldron, District Clerk

Copies furnished to:

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Counsel for Respondents Christopher Douglas Leiffer, as Trustee of the C&K Family Trust dated January 31, 2020; and Kirk Stephen Leiffer, as Trustee of the C&K Family Trust dated January 31, 2020

NOTICE OF RIGHTS

1. Pursuant to section 120.569, Florida Statutes, the purpose of this notice is to inform each party's attorney of record that judicial review of the Final Order in this case is available under Section 120.68, Florida Statutes.

2. Pursuant to Section 120.68, Florida Statutes, a party who is adversely affected by the Final Order may seek review in the appellate district where the District maintains its headquarters or where a party resides or as otherwise provided by law by filing a notice of appeal or petition for review in accordance with the Florida Rules of Appellate Procedure within 30 days of the rendering of the Final Order. The District's headquarters are in Palatka, Florida, and in this case, the Final Order was rendered on January 13, 2021.

3. Failure to observe the relevant time frames for filing a petition for judicial review will result in waiver of that right to review.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 13, 2021, a copy of this NOTICE OF RIGHTS has been sent by email to the following:

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