St. Johns River Water Management District

Ann B. Shortelle, Ph.D., Executive Director

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September 2, 2021

Honorable E. Gary Early
Division of Administrative Hearings
1230 Apalachee Parkway
Tallahassee, FL 32399-3060

RE: Ned Bowers vs. Orange County and St. Johns River Water Management District DOAH Case No. 21-0432; SJRWMD F.O.R. No. 2021-01

Dear Judge Early:

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

1. Final Order;
2. Respondent Orange County's Exceptions to Recommended Order;
3. Petitioner Ned Bowers' Exceptions to Recommended Order;
4. Respondent St. Johns River Water Management District's Exception to Recommended Order;
5. Respondent St. Johns River Water Management District's Response to Orange County's Exceptions to the Recommended Order;
6. Respondent St. Johns River Water Management District's Responses to Petitioner's Exceptions to the Recommended Order;
7. Respondent Orange County's Response to Petitioner Ned Bowers' Exceptions to Recommended Order; and
8. Respondent Orange County's Response to St. Johns River Water Management Districts Exception to Recommended Order. Please note that this response was untimely filed.

Sincerely,

Karen C Fy

Karen C. Ferguson
Assistant General Counsel
Office of General Counsel

KCF/mbp

Enclosure

cc: Mary Ellen Winkler, General Counsel
Elizabeth Schoonover

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DIVISION OF ADMINISTRATIVE HEARINGS

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SJR 2021-049

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

NED BOWERS,

Petitioner,

v.

DOAH Case No. 21-0432

THE ST. JOHNS RIVER WATER MANAGEMENT DISTRICT and ORANGE COUNTY, a political subdivision of the State of Florida,

SJRWMD F.O.R. No. 2021-01

Respondents.
______________________________________/

FINAL ORDER

The Division of Administrative Hearings, by its designated Administrative Law Judge, the Honorable E. Gary Early ("ALJ"), held a formal administrative hearing in the above-styled case on May 10 – 13, 2021, by Zoom conference. The hearing transcript, in four volumes, was filed on June 8, 2021. The parties requested 30 days from the filing of the hearing transcript to file their post-hearing submittals. On July 19, 2021, the ALJ submitted a Recommended Order ("RO") to the St. Johns River Water Management District ("District"), a copy of which is attached as Exhibit "A." The RO contains findings of fact and conclusions of law regarding Environmental Resource Permit ("ERP") application 154996-2 to construct and operate an outfall drainage improvement project for a 0.167-acre project known as Lake Ola Circle Outfall Drainage Improvements, and the related construction of an upgradient rock check dam in a swale along the north side of Lake Ola Drive. Petitioner Ned Bowers ("Petitioner"), along with Respondents Orange County ("Orange County" or "the County") and District staff filed exceptions to the Recommended Order. District staff filed responses to Petitioner's and Orange

County's exceptions[1]. This matter then came before the Executive Director of the District, pursuant to Section 373.079(4)(a), *Florida Statutes* ("F.S."), [2] for final agency action and entry of a Final Order.[3]

I. STATEMENT OF THE ISSUE

The general issue before the District is whether to adopt the Recommended Order as the District's Final Order for the ERP, or to reject or modify the Recommended Order in whole or in part, in accordance with Section 120.57(1)(*l*), F.S. The specific issue is whether ERP application number 154996-2 ("Permit") meets the conditions for issuance of a permit as set forth in Part IV, Chapter 373, F.S., and Chapter 62-330, Florida Administrative Code ("F.A.C."), and Environmental Resource Permit Applicant's Handbook Volume I (General and Environmental) (December 22, 2020) and Volume II (for use within the geographic limits of the St. Johns River Water Management District) (June 1, 2018). The ERP application from Orange County ("County"), is for the construction and operation of an outfall drainage improvement project for a 0.167-acre project known as Lake Ola Circle Outfall Drainage Improvements, and the related construction of an upgradient rock check dam in a swale along the north side of Lake Ola Drive. The ALJ recommended issuance of Environmental Resource Permit No. 154996-2 to Orange County as proposed. (RO at 39).

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[1] On August 16, 2021, Orange County filed an untimely response indicating it had no objection to District staff's Exceptions to the Recommended Order. As the response was untimely, it was not considered in the preparation of this Final Order.

[2] References to statutes are to Florida Statutes (2020), unless otherwise noted.

[3] The District's governing board has, pursuant to the legislative mandate contained in section 373.079(4)(a), F.S., delegated to the Executive Director the authority to take final agency action on permit applications under Part IV of Chapter 373, F.S. *See* Dist. Policy 120, ¶(8) (4/13/21).

II. STANDARD OF REVIEW

A. Nature of an Agency's Review of a Recommended Order

The rules regarding an agency's consideration of exceptions to a recommended order are well established. Section 120.57(1)(*l*), F.S., governs an agency's actions in reviewing and ruling upon exceptions to a recommended order. The ALJ, not the agency, is the fact finder. *Goss v. Dist. Sch. Bd. of St. Johns County*, 601 So. 2d 1232, 1235 (Fla. 5th DCA 1992); *Heifetz v. Dep't of Bus. Regulation*, 475 So. 2d 1277, 1281-82 (Fla. 1st DCA 1997). A finding of fact may not be rejected or modified unless the agency first determines from a review of the entire record that (1) the finding of fact is not based upon competent substantial evidence or (2) that the proceedings on which the finding of fact was based did not comply with the essential requirements of law. *See* §120.57(1)(*l*), F.S. In its review, the District must be guided by the true nature of the finding, not its title. "The mere fact that what is essentially a factual determination is labeled a conclusion of law, whether labeled by the hearing officer or the agency, does not make it so, and the obligation of the agency to honor the hearing officer's findings of fact cannot be avoided by categorizing a contrary finding as a conclusion of law." *See Kinney v. Dept. of State*, 501 So. 2d 1277 (Fla. 5th DCA 1987); *Pillsbury v. State, Dep't of Health & Rehabilitative Servs.*, 744 So. 2d 1040, 1041-42 (Fla. 2d DCA 1999); *Goin v. Comm. on Ethics*, 658 So. 2d 1131 (Fla. 1st DCA 1995); *Charlotte Cnty v. IMC Phosphates Co.*, 18 So. 3d 1089 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So. 2d 61 (Fla. 1st DCA 2007); *Herrin v. Volusia Cnty., et al.* Case No. 11-2527 p. 3 (Fla. DOAH Jan. 24 2012; Fla. DEO March 29, 2012)(Conclusions of law labeled as findings of fact, and findings labeled as conclusions, will be considered as a conclusion or finding based upon the statement itself and not the label assigned).

B. Competent Substantial Evidence

"Competent substantial evidence" is such evidence as is sufficiently relevant and material that a reasonable mind would accept such evidence as adequate to support the conclusion reached. *Perdue v. TJ Palm Assoc., Ltd.*, 755 So. 2d 660 (Fla. 4th DCA 1999). The term "competent substantial evidence" relates not to the quality, character, convincing power, probative value or weight of the evidence, but refers to the existence of some quantity of evidence as to each essential element and as to the legality and admissibility of that evidence. *Scholastic Book Fairs v. Unemployment Appeals Comm'n*, 671 So. 2d 287, 289 (Fla. 5th DCA 1996); *Nunez v. Nunez*, 29 So. 3d 1191, 1192 (Fla. 5th DCA 2010).

If a finding is supported by any competent substantial evidence from which the finding could be reasonably inferred, the finding cannot be disturbed. *Freeze v. Dep't. of Bus. Regulation, Div. of Alcoholic Beverages & Tobacco*, 556 So. 2d 1204 (Fla. 5th DCA 1990); *Berry v. Dep't of Envtl. Regulation*, 530 So. 2d 1019 (Fla. 4th DCA 1998). *See also Save Our Creeks, Inc. and Envtl. Confederation of SW Fla., Inc. v. Fla. Fish and Wildlife Conservation Comm'n and Dep't of Envtl. Prot.*, Case No. 12-3427 (Fla. DOAH July 3, 2013; Fla. DEP Jan. 15, 2014). The agency may not reweigh evidence admitted in the proceeding, may not resolve conflicts in the evidence, may not judge the credibility of witnesses or otherwise interpret evidence anew. *Goss,* 601 So. 2d at 1235; *Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1088 (Fla. 2d DCA 2009); *Rogers v. Dep't of Health*, 920 So. 2d 27, 30 (Fla. 1st DCA 2005); *Brown v. Criminal Justice Standards & Training Comm'n*, 667 So. 2d 977 (Fla. 4th DCA 1996).

The issue is not whether the record contains evidence contrary to the findings of fact in the recommended order, but whether the finding is supported by competent substantial evidence.

Fla. Sugar Cane League v. State Siting Bd., 580 So. 2d 846, (Fla. 1st DCA 1991). Finally, the District is precluded from making additional or supplemental findings of fact. *Fla. Power & Light v. State Siting Bd.*, 693 So. 2d 1025, 1026-27 (Fla. 1st DCA 1997); *See also N. Port Fla. v. Consol. Minerals*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994); *Boulton v. Morgan*, 643 So. 2d 1103 (Fla. 4th DCA 1994)(agency may not make supplemental findings of fact on an issue where the hearing officer has made no findings); *Cohn v. Dep't Proof's Regulation*, 477 So. 2d 1039 (Fla. 3d DCA 1985)(agency has no authority to make supplemental findings on matters susceptible of ordinary proof; if missing findings are critical to resolve the issue, the agency should remand).

C. Essential Requirements of Law

A reviewing agency may also reject or modify a finding of fact if it determines from a review of the entire record, and states with particularity in the order, that the finding is based on a proceeding that did not comply with the "essential requirements of law." *See* §120.57(1)(*l*), F.S. As stated by Judge Benton, in his concurring opinion in *Fla. Power & Light Co.* at 1028, citing to the 1996 amendment to the Administrative Procedure Act:

> Except in the most extreme cases - those where "the proceedings did not comply with essential requirements of law"-the Administrative Procedure Act (APA) precludes an agency's changing an ALJ's finding of fact on any basis other than the lack of substantial competent evidence to support it. Among the revisions to the APA which will apply on remand, *see Life Care Ctrs. of Am. v. Sawgrass Care Ctr.,* 683 So.2d 609 (Fla. 1st DCA 1996), is language intended to foreclose altogether evidentiary rulings in a final order entered after entry of a recommended order.

Id. See also Putnam Cnty. Envtl. Council, Inc. et al v. Dep't. Envtl. Prot. & Georgia-Pacific Corp., Case No. 01-2442, pp. 8-9 (Fla. DOAH July 3, 2002; Fla. DEP Aug. 6, 2002) (holding that, based on a review of the record, the DOAH proceeding did not constitute an *extreme case* where procedural and evidentiary rulings of the ALJ adverse to the Petitioners were so "*egregious"* as to violate the "essential requirements of law" within the purview of

§120.57(1)(1), F.S.) (emphasis added); *Cf. State Dep't. of Fin. Serv. v. Mistretta*, 946 So. 2d 79, 80 (Fla. 1st DCA 2006) (holding that ALJ who sua sponte raised and decided the issue of default after the final hearing without giving parties an opportunity to present evidence and/or argument departed from the essential requirements of law by denying due process). Therefore, an agency may not reject or modify a finding of fact that is supported by competent substantial evidence except in the most extreme cases.

D. Subject Matter Jurisdiction

With respect to conclusions of law in the recommended order, the agency may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretations of administrative rules over which it has substantive jurisdiction, provided the reasons for such rejection or modification are stated with particularity and the agency finds that such rejection or modification is as, or more reasonable than, the ALJ's conclusion or interpretation. *See* §120.57(1)(*l*), F.S. In interpreting the term "substantive jurisdiction," the courts have continued to interpret the standard of review as requiring deference to the expertise of an agency in interpreting its own rules and enabling statutes. *See, e.g., State Contracting & Eng'g Corp. v. Dep't of Transp.,* 709 So. 2d 607, 610 (Fla. 1st DCA 1998). The "deference rule" recognizes that:

> Policy considerations left to the discretion of an agency may take precedence over findings of fact by an administrative law judge. The rule provides:
>
> > Matters that are susceptible of ordinary methods of proof, such as determining the credibility of witnesses or the weight to accord evidence, are factual matters to be determined by the hearing officer. On the other hand, matters infused with overriding policy considerations are left to agency discretion. *Baptist Hosp., Inc. v. Department of Health & Rehabilitative Servs.,* 500 So.2d 620, 623 (Fla. 1st DCA 1986) (citations omitted); *McDonald v. Department of Banking & Fin.,* 346 So.2d 569 (Fla. 1st DCA 1977).

Gross v. Dept. of Health, 819 So. 2d 997, 1002 (Fla. 5th DCA 2002). Matters infused with overriding policy considerations include instances where an agency must interpret one of its own rules, or where a statute confers broad discretionary authority upon the agency which depends on whether certain criteria are found by the agency to exist. *Id. at 1002.*

The agency lacks subject matter jurisdiction to overturn an ALJ's rulings on procedural and evidentiary issues. *Barfield v. Dep't of Health*, 805 So. 2d 1008, 1012 (Fla. 1st DCA 2001) (the agency lacked jurisdiction to overturn an ALJ's evidentiary ruling); *Lane v. Dep't of Envtl. Prot.*, Case No. 05-1609 (Fla. DOAH May 11, 2007; Fla. DEP Aug. 8, 2007)(the agency has no substantive jurisdiction over procedural issues, such as whether an issue was properly raised, and over an ALJ's evidentiary rulings); *Lardas v. Dep't of Envtl. Prot.*, Case No. 05-458 (Fla. DOAH Aug. 24, 2004; Fla. DEP Oct. 21, 2005) (evidentiary rulings of the ALJ concerning the admissibility and competency of evidence are not matters within the agency's substantive jurisdiction).

The agency's authority to modify a recommended order is not dependent on the filing of exceptions. *Westchester Gen. Hosp. v. Dep't of Health and Rehabilitative Serv.,* 419 So. 2d 705 (Fla. 1st DCA 1982). However, when exceptions are filed, they become part of the record before the agency. *See* §120.57(1)(f), F.S. In the final order, the agency must expressly rule on each exception, except for any exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record. *See* §120.57(1)(k), F.S. Thus, the agency is not required to rule on an omnibus exception in which a party states that its exception to a particular finding of fact is also an exception to any portion of the recommended order where the finding of fact is restated or repeated.

III. <u>EXCEPTIONS AND RESPONSES</u>

The Administrative Procedure Act provides the parties to an administrative hearing with an opportunity to file exceptions to a recommended order. *See* §§120.57(1)(b) and (k), F.S. The purpose of exceptions is to identify errors in a recommended order for the agency to consider in issuing its final order. As discussed above in Section II (Standard of Review), the agency may accept, reject, or modify the recommended order within certain limitations. When the agency considers a recommended order and exceptions, its role is like that of an appellate court in that it reviews the sufficiency of the evidence to support the ALJ's findings of fact and, in areas where the District has substantive jurisdiction, the correctness of the ALJ's conclusions of law. In an appellate court, a party appealing a decision must show the court why the decision was incorrect so that the appellate court can rule in the appellant's favor. Likewise, a party filing an exception must specifically alert the agency to any perceived defects in the ALJ's findings, and in so doing the party must cite to specific portions of the record as support for the exception. *John D. Rood & Jamie A. Rood v. Larry Hecht & Dep't of Envtl. Prot.*, Case. No. 98-3879 (Fla. DOAH March 10, 1999; Fla. DEP April 23, 1999); *Kenneth Walker & R.E. Oswalt d/b/a Walker/Oswalt v. Dep't of Envtl. Prot.*, Case No. 96-4318BID (Fla. DOAH Dec. 16, 1996; Fla. DEP March 12, 1997); *Worldwide Investment Group, Inc. v. Dep't of Envtl. Prot.*, Case No. 97-1498 (Fla. DOAH Mary 7, 1998; Fla. DEP June 19, 1998). To the extent that a party fails to file written exceptions to a recommended order regarding specific issues, the party has waived such specific objections. *Envtl. Coalition of Fla., Inc. v. Broward Cnty.*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991).

In addition to filing exceptions, the parties have the opportunity to file responses to exceptions filed by other parties. *See* Fla. Admin. Code R. 28-106.217(2). The responses are meant to assist the agency in evaluating and ultimately ruling on exceptions by providing legal

argument and citations to the record.

Petitioner Ned Bowers filed 24[4] exceptions to the ALJ's Recommended Order on August 2, 2021. The District filed one exception on August 3, 2021, and the Respondent Orange County filed three exceptions on July 27, 2021. This order makes rulings on each exception.

IV. RULINGS ON EXCEPTIONS[5]

A. Rulings on Petitioner's Exceptions

Petitioner's Exception No. 1

In his Exception No. 1, Petitioner takes exception to a portion of Finding of Fact ("FOF") 14 on the grounds that the RO "wrongly concludes that Orange County introduced competent substantial evidence in the form of '… recorded easements and surveys to establish its prima facie case that it has a sufficient real property interest over the land upon which the activities subject to the Permit application will be conducted.'",[6] (Pet. Exceptions at 2).

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[4] Petitioner inadvertently included two exceptions numbered 21. To avoid confusion, Petitioner's first exception 21, starting on page 16 of Petitioner's Exceptions will be addressed herein as Petitioner's Exception 21(a) and Petitioner's second exception 21, starting on page 19 of Petitioner's Exceptions will be addressed as Petitioner's Exception 21(b).

[5] Citations to page numbers in the transcript of the formal administrative hearing will be designated by the transcript page(s) and lines; (e.g., T. 234:7-24). Citations to exhibits admitted by the ALJ will be made by identifying the party that entered the exhibit followed by the exhibit number (e.g., Jt. Ex. 2). Citations to the Recommended Order will be designated by "RO" page (p.) or paragraph (¶) number (e.g., RO at 13; RO at ¶ 12). Citations to the District's Applicant's Handbook: Environmental Resource Permit Applicant's Handbook Volume I (General and Environmental) (December 22, 2020) and Volume II (June 1, 2018) will be designated by the abbreviation "AH" followed by the volume number ("Vol. I" or "Vol. II") and the section number (e.g., AH Vol. I §3.4.1(b)). Citations to the parties' exceptions will be referred to "Pet./App./Dist. Exception(s) at", "Pet/App./Dist. Response to Pet./App./Dist. Exception(s) at", followed by the page number.

[6] Notably, Petitioner does not take exception to the portions of finding of fact 14 that state "[t]he evidence submitted by Petitioner was not sufficient to establish that Orange County was proposing to construct the drainage improvements outside of the boundary of the easement" and ". . . as will be discussed in the Conclusions of Law, the proposed Permit conveys no title, and

FOF 14 states as follows:

> The 18-inch outfall pipe and baffled endwall are to be installed entirely within a drainage easement 20 feet in width along the eastern edge of Mr. Bowers's property. Mr. Bowers owns the underlying servient fee interest. Orange County introduced competent substantial evidence *in the form of recorded easements and surveys to establish its prima facie case that it has a sufficient real property interest over the land upon which the activities subject to the Permit application will be conducted.* The evidence submitted by Petitioner was not sufficient to establish that Orange County was proposing to construct the drainage improvements outside of the boundary of the easement. However, as will be discussed in the Conclusions of Law, the proposed Permit conveys no title, and affects no real property interests. Disputes over the scope, extent, and rights conferred under the easement are left to a court of competent jurisdiction over conflicting real property claims.

(RO at 11, emphasis supplied.)

As mentioned in section II above, a finding of fact may not be rejected or modified unless the agency first determines from a review of the entire record that (1) the finding of fact is not based on competent substantial evidence or (2) that the proceedings on which the finding of fact was based did not comply with the essential requirements of law. § 120.57(1)(*l*), F.S. Petitioner does not allege that the proceedings on which the finding of fact was based did not comply with the essential requirements of law. Nor does Petitioner allege that there is no evidence to support the FOF, just that the evidence presented by the County essentially does not rise to the level of competent substantial evidence. Rather, Petitioner argues that his witnesses provided competent substantial evidence that the County's surveys are inherently unreliable (Pet. Exceptions at 2).

The term "competent substantial evidence" relates not to the quality, character, convincing power, probative value or weight of the evidence, **but refers to the existence of some quantity of evidence as to each essential element and as to the legality and**

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affects no real property interests. Disputes over the scope, extent, and rights conferred under the easement are left to a court of competent jurisdiction over conflicting real property claims."

admissibility of that evidence. *Scholastic Book Fairs v. Unemployment Appeals Comm'n*, 671 So. 2d 287, 289 (Fla. 5th DCA 1996); *Nunez v. Nunez*, 29 So. 3d 1191, 1192 (Fla. 5th DCA 2010).

The ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. *See, e.g., Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co.,* 18 So. 3d 1079, 1088 (Fla. 2d DCA 2009).

As the ALJ correctly points out in Conclusion of Law ("COL") 91,[7] section 4.2.3(d), A.H., Vol. 1, provides that:

> The submitted application must contain one original mailed or an electronic submittal of the materials requested in the applicable sections of the form, and such other information as is necessary to provide reasonable assurance that the activities proposed in the application meet the conditions for issuance under Rule 62-330.301, F.A.C., the additional conditions for issuance under Rule 62-330.302, F.A.C., and the applicable provisions of the Applicant's Handbook. Those materials include:
>
> ***
>
> (d) Documentation of the applicant's real property interest over the land upon which the activities subject to the application will be conducted. **Interests in real property typically are evidenced by**:
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> ***
>
> **2. The applicant being the holder of a recorded easement conveying the right to utilize the property for a purpose consistent with the authorization requested in the permit application.**

Emphasis supplied.

[7] No exceptions were taken to COL 91.

Orange County provided drainage easements as a part of its permit application. (Jt. Ex.'s. 10, 27; T: 170:12-24, 171:16-25, 172:12-20, 173:19-174:01, 179:06-13, 901:01-17). The record also reflects that the County submitted a signed and sealed survey and other certifications to support its application. (Jt. Ex.'s 4, 5, 11, 12, 13, 15, 16, 17, 23, 24, 25, 26, OC Ex. 46; T. 50:17-19, 51:2-7, 52:5-10, 537:14-544:05). Moreover, the District's expert in water resources engineering, Cameron Dewey, P.E. ("Ms. Dewey") testified that Orange County satisfied the requirements of section 4.2.3(d), A.H., Vol. I, by providing the District with a copy of its recorded drainage easements and that boundary surveys did not play a role in her review. (T. 901:1-17). Thus, the record contains evidence that is sufficiently relevant and material, and adequately provides the factual basis to support the portion of FOF 14 which finds that Orange County introduced competent substantial evidence in the form of recorded easements and surveys to establish its prima facie case that it has a sufficient real property interest over the land upon which the activities subject to the Permit application will be conducted. (RO at 11).

Accordingly, competent substantial evidence supports the ALJ's findings. *City of Hialeah Gardens v. Miami-Dade Charter Found., Inc.*, 857 So. 2d 202, 204 (Fla. 3d DCA 2003). It is the ALJ's function to consider the evidence presented, resolve conflicts, and judge witness credibility. *See Heifetz*, 475 So. 2d at 1281. Therefore, Petitioner's exception No. 1 is rejected.

Petitioner's Exception No. 2

In his Exception No. 2, Petitioner takes exception to FOFs 66 and 67,[8] contending that the ALJ "wrongly" concluded: (1) in FOF 66, that Orange County provided sufficient

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[8] The introductory language to Petitioner's Exceptions No. 1-3 states that Petitioner takes exception to FOF 68. Nevertheless, in Petitioner's Exception number 2 (Pet. Exceptions at 3, ¶2), Petitioner has only taken exception to FOFs 66 and 67. FOF 68 states that "Rule 62-330.350(1)(i), which has been incorporated verbatim as Condition 9 of the Permit, provides that, as a general condition: . . ." There is competent substantial evidence in the record to support FOF

documentation to establish a good faith certification of its right to use the property in the project area, and (2) in FOF 67, that the County failed to provide the District with a signed and sealed survey and, therefore, failed to provide the District with reasonable assurances that it satisfied the requirements of sections 2.3 or 2.5, A.H., Vol. II, and section 4.2.3(d), A.H., Vol. I. (Pet. Exceptions at 3).

The District's ability to reject or modify findings of fact is limited to a determination from a review of the entire record that (1) the finding of fact is not based on competent substantial evidence or (2) that the proceedings on which the finding of fact was based did not comply with the essential requirements of the law. § 120.57(1)(*l*), F.S. If a finding is supported by any competent substantial evidence from which the finding could be reasonably inferred, the finding cannot be disturbed. *Freeze v. Dep't. of Bus. Regulation, Div. of Alcoholic Beverages & Tobacco*, 556 So. 2d 1204 (Fla. 5th DCA 1990); *Berry v. Dep't of Envtl. Regulation*, 530 So. 2d 1019 (Fla. 4th DCA 1998). *See also Save Our Creeks, Inc. and Envtl. Confederation of SW Fla., Inc. v. Fla. Fish and Wildlife Conservation Comm'n and Dep't of Envtl. Prot.*, Case No. 12-3427 (Fla. DOAH July 3, 2013; Fla. DEP Jan. 15, 2014). Moreover, the agency may not reweigh evidence admitted in the proceeding, may not resolve conflicts in the evidence, may not judge the credibility of witnesses or otherwise interpret evidence anew. *Goss,* 601 So. 2d at 1235; *Peace River/Manasota Regional Water Supply Auth. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1088 (Fla. 2d DCA 2009); *Rogers v. Dep't of Health*, 920 So. 2d 27, 30 (Fla. 1st DCA 2005); *Brown v. Criminal Justice Standards & Training Comm'n*, 667 So. 2d 977 (Fla. 4th DCA 1996). The issue is not whether the record contains evidence contrary to the findings of fact in the

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68. *See* Fla. Admin. R. 62-330.350(1)(i), Officially Recognized by order of ALJ dated April 28, 2021; Jt. Ex.'s 1, 2.

recommended order, but whether the finding is supported by competent substantial evidence. *Fla. Sugar Cane League v. State Siting Bd.*, 580 So. 2d 846, (Fla. 1st DCA 1991).

FOFs 66 and 67 state as follows:

> 66. Neither the rule nor the A.H. require proof as would be necessary to adjudicate disputes in property rights and boundaries in circuit court. Rather, they require a good faith certification. That certification was provided by Orange County in the Permit application.
>
> 67. Orange County also submitted, along with its certification, documentation, including copies of the drainage easement and survey, sufficient to meet the criteria in the rule and the A.H., that it has sufficient real property interest over the land upon which the Project is to be conducted. That document, on its face, established Orange County's prima facie right to use the recorded drainage easement and, thus, entitlement to the Permit. The evidence submitted by Petitioner was not sufficient, even if accepted as true, to demonstrate that Orange County was proposing to construct the drainage improvements outside of the boundary of the easement.

There is competent substantial evidence that Orange County provided the requisite good faith certification and sufficient documentation in its permit application. (Jt. Ex.'s 10, 15, 16, 27; T. 901:1-17); *see also* FOF 93 fn. 3 (RO at 32). The District's expert witness Ms. Dewey testified that the County satisfied the requirements of section 4.2.3(d), A.H., Vol. I, by providing the District with a copy of its recorded drainage easements and that boundary surveys did not play a role in her review. (T. 901:1-17). Additionally, Jt. Ex's 15 and 16, which establish the County's good faith certification, were admitted into evidence *without objection* as a part of the County and the District's prime facie case. (T 46:21-47:05, 51:10-11).

Moreover, it is the ALJ's function, not that of the agency, to consider the evidence presented, resolve conflicts, and judge witness credibility. *See Heifetz*, 475 So. 2d at 1281. The District may not reweigh record evidence. *Id. See also Walker v. Bd. of Prof'l Eng'r*, 946 So. 2d 604, 605 (Fla. 1st DCA 2006). Here, the ALJ specifically found that "[t]he evidence submitted by Petitioner was not sufficient, even if accepted as true, to demonstrate that Orange County was

proposing to construct the drainage improvements on Mr. Bowers's property outside of the boundary of the easement." RO at 24.

As described above, the record contains evidence that is sufficiently relevant and material, and adequately provides the factual basis to support FOFs 66 and 67. Accordingly, competent substantial evidence supports the ALJ's finding. *City of Hialeah Gardens*, 857 So. 2d at 204. Therefore, Petitioner's Exception No. 2 is rejected.

Petitioner's Exception No. 3

In his Exception No. 3, Petitioner takes exception to the portions of COLs, 84, 92, and 93 which relate to the ALJ's determination that Orange County made a prima facie case of entitlement to the Permit in accordance with §120.569(2)(p), F.S. Petitioner generally objects to these conclusions of law by arguing that the underlying facts are not supported by competent substantial evidence. (Pet. Exceptions at 3 – 4).

In his Exception No. 3, Petitioner describes his exceptions to conclusions of law, but his exceptions challenge evidentiary determinations relating to findings of fact which support COLs 84, 92 and 93. As stated above, the District lacks authority to overrule the ALJ's evidentiary determinations. §120.57(1)(*l*), F.S.; *Barfield v. Dep't of Health*, 805 So.2d 1008, 1012 (Fla. 1st DCA 2002). As such, the findings of fact supporting COLs 84, 92 and 93 will not be rejected or modified.

The District may only reject a conclusion of law over which it has substantive jurisdiction, that is as or more reasonable than the ALJ's conclusion. §120.57(1)(*l*), F.S. To the extent Exception No. 3 describes Petitioner's desire to have the District substitute or modify conclusions of law, the District lacks jurisdiction to do so. The District does not have substantive jurisdiction over §120.569(2)(p), F.S., and therefore, cannot reject the ALJ's

interpretation of the statute. *Matlacha Civic Assn., Inc. et al. v. City of Cape Coral and Dep't of Envtl. Prot.*, DOAH Case No. 18-6752 (Fla. DOAH Dec. 12, 2019; Fla. DEP March 11, 2020); *City of Jacksonville v. Dames Point Workboats, LLC, and Dep't of Envtl. Prot.*, DOAH Case No. 18-5246 (Fla. DOAH March 1, 2019; Fla. DEP April 12, 2019).

Furthermore, in his Exception No. 3 to COLs 84, 92 and 93, Petitioner argues for contrary evidentiary rulings regarding the existing condition and scope of the proceeding below but does not propose a conclusion of law that is as or more reasonable than COLs 84, 92 and 93. Accordingly, Petitioner's Exception No. 3 is rejected.

Petitioners' Exception No. 4

In his Exception No. 4, Petitioner takes exception to the portion of FOF 7 that describes the soils within the catchment area[9] as being Type-A soils as described by the U.S. Department of Agriculture. (Pet. Exceptions at 4).

The District 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 Orange County's expert in water resources engineering, including stormwater modeling and hydrology, Brian Mack, P.E., testified that he relied on NRCS soils information that characterized the soils for the entire area as Type-A soils. (Jt. Ex. 19; T. 660:18-661:2). He also testified that it is not standard practice for engineers to "ground-truth" the soils data and that the NRCS soils data was the best available data for the area. (Jt. Ex. 19; T 662:9-14; 179:13-17).

[9] The "catchment area" is the 46.3-acre area, comprised of eight drainage sub-basins, which is served by the stormwater management system that currently drains to the outfall on Petitioner's property. (RO at 9).

Petitioner argues that his expert provided testimony that constitutes competent substantial evidence contrary to Mr. Mack's testimony. (Pet. Exceptions at 4-5). 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 District may not reweigh record evidence. *Id. See also Walker v. Bd. of Prof'l Eng'r*, 946 So. 2d 604, 605 (Fla. 1st DCA 2006).

The record contains evidence that is sufficiently relevant and material, and adequately provides the factual basis to support FOF 7. Accordingly, competent substantial evidence supports the ALJ's finding. *City of Hialeah Gardens*, 857 So. 2d at 204. Therefore, Petitioner's Exception No. 4 is rejected.

Petitioners' Exception No. 5

In his Exception No. 5, Petitioner takes exception to the portion of FOF 8 that states "the evidence was not sufficient to determine whether water flows from the south side of the [Cooper Cross] drain to the north, or from the north side to the south." (RO at 9) (Pet. Exceptions at 5).

The District 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 Orange County's expert, Mr. Mack, testified that he reviewed multiple documents, including a topographic map, LiDar data, and a survey to determine that the elevation on the north side of the Cooper Cross-drain was slightly higher than the south side (Jt. Ex.'s 5, 7; OC Ex.'s 16-1, 29-2; T. 648:2-655:22).

Petitioner argues that his expert gave competent substantial evidence contrary to Mr. Mack's testimony. (Pet. Exceptions at 5). 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

District may not reweigh record evidence. *Id*. *See also Walker v. Bd. of Prof'l Eng'r*, 946 So. 2d 604, 605 (Fla. 1st DCA 2006).

The record contains evidence that is sufficiently relevant and material, and adequately provides the factual basis to support FOF 8. Accordingly, competent substantial evidence supports the ALJ's finding. *City of Hialeah Gardens*, 857 So. 2d at 204. Therefore, Petitioner's Exception No. 5 is rejected.

Petitioners' Exception No. 6

In his Exception No. 6, Petitioner takes exception to footnote 1, which annotates a portion of FOF 9 (RO at 9, n. 1). Specifically, Petitioner takes exception to the statements "the permitting status of the pipe is unknown" and that there is "no evidence of a citizen suit for injunctive relief regarding the pipe." (Pet. Exceptions at 5)(RO, at 9, n. 1).

The District 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'r*, 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 District, 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.

Regarding the status of the pipe mentioned in FOF 9, n. 1, the record shows the pipe is not part of the permit application at issue (Jt. Ex.'s 1, 13; T. 30:12-33-13). Orange County's application contemplates the construction and operation of outfall drainage improvements, specifically including a concrete pipe to enclose an existing open ditch along the east side of

Petitioner's property, a swale, ditch bottom inlet, and end wall baffles, plus an upstream rock check dam. (Jt. Ex. 1;T. 55: 7-19; 201:24; 893: 1-10). Existing conditions, for purposes of this permit, are the conditions that existed when the application for the permit was submitted in March 2020. (T. 397:1-4, 419:7-11, 754:10-16, 922:23-923:7, 929:12-930:18). Because the 2010 pipe is not within the project area, the ALJ determined it to be irrelevant to the formulation of agency action in this proceeding. (T. 397:1-4 and 16-17, 419:7-11, 754:10-16, 922:23-923:7, 929:12-930:18).

The District lacks subject matter jurisdiction to overrule an ALJ's evidentiary ruling on the admissibility of evidence. *See Barfield v. Dep't of Health*, 805 So.2d 1008, 1012 (Fla. 1st DCA 2002) (noting the Board of Dentistry lacked the substantive jurisdiction to overrule an ALJ's evidentiary ruling); *Lane v. Dep't of Envtl. Prot.*, Case No. 05-1609 (Fla. DOAH May 11, 2007; Fla. DEP Aug. 8, 2007)(the agency has no substantive jurisdiction over procedural issues, such as whether an issue was properly raised, and over an ALJ's evidentiary rulings); *Lardas v. Dep't of Envtl. Prot.*, Case No. 05-458 (Fla. DOAH Aug. 24, 2004; Fla. DEP Oct. 21, 2005) (evidentiary rulings of the ALJ concerning the admissibility and competency of evidence are not matters within the agency's substantive jurisdiction).

Regarding the ALJ's finding that there is no evidence of a citizen suit for injunctive relief regarding the pipe, the record contains a final judgment on counts of inverse condemnation, injunctive relief, and declaratory relief in a lawsuit Petitioner filed against Orange County relating to a 1969 drainage easement. (Jt. Ex.'s 10, 17). That lawsuit does not relate to the pipe. (Jt. Ex. 17; T. 30:12-33:13). The record contains evidence that is sufficiently relevant and material, and adequately provides the factual basis to support FOF 9, n 1. Accordingly,

competent substantial evidence supports the ALJ's finding. *City of Hialeah Gardens*, 857 So. 2d at 204. For the reasons stated above, Petitioner's Exception No. 6 is rejected.

Petitioners' Exception No. 7

In his Exception No. 7, Petitioner takes exception to the portions of FOFs 21, 22, 24 and 25 which describe existing conditions for the project as the conditions that existed in March 2020, when the Applicant applied for the permit. (Pet. Exceptions at 6). As stated above in the ruling on Petitioner's Exception No. 6, the ALJ determined existing conditions, for purposes of this permit, are the conditions that existed when the application for the permit was submitted in March 2020. (T. 397:1-4, 419:7-11, 754:10-16, 922:23-923:7, 929:12-930:18).

The District lacks subject matter jurisdiction to overrule an ALJ's evidentiary ruling on the admissibility of evidence. *See Barfield v. Dep't of Health*, 805 So.2d 1008, 1012 (Fla. 1st DCA 2002) (noting the Board of Dentistry lacked the substantive jurisdiction to overrule an ALJ's evidentiary ruling); *Lane v. Dep't of Envtl. Prot.*, Case No. 05-1609 (Fla. DOAH May 11, 2007; Fla. DEP Aug. 8, 2007)(the agency has no substantive jurisdiction over procedural issues, such as whether an issue was properly raised, and over an ALJ's evidentiary rulings); *Lardas v. Dep't of Envtl. Prot.*, Case No. 05-458 (Fla. DOAH Aug. 24, 2004; Fla. DEP Oct. 21, 2005) (evidentiary rulings of the ALJ concerning the admissibility and competency of evidence are not matters within the agency's substantive jurisdiction).

In his Exception No. 7, Petitioner argues competent substantial evidence exists that would serve to expand the project area. However, the proceeding below was intended to formulate final agency action, not to review action taken earlier or preliminarily. (RO at 62).

The record shows the ALJ considered inclusion of additional project area, but held it was irrelevant to the instant permit application. (T. 397:1-4 and 16-17, 419:7-11, 754:10-16, 922:23-

923:7, 929:12-930:18). The District lacks jurisdiction to disturb the ALJ's evidentiary rulings. *Barfield,* 805 So. 2d at 1012. As such, Petitioner's Exception No. 7 is rejected.

Petitioners' Exception No. 8

In his Exception No. 8, Petitioner takes exception to FOFs 29 and 31 regarding the methodology used by Applicant's expert, Brian Mack, P.E. in his engineering modeling of the water quantity impacts of the project. (Pet. Exceptions at 6-7).

The District 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 Orange County's expert, Mr. Mack, testified about model inputs, including elevations and soil typing, for three different model scenarios. Scenario 1 modeled the conditions of the project site prior to 2010 (Jt. Ex.'s 6, 7, 8; T. 692:5-6; 733:20-734:2). Scenario 2 modeled the existing conditions (Jt. Ex.'s 6, 7, 8; T. 701:8-17, 903:9-11, 906:2-7, 919:1-8, 919:23-920:1, 940:15-23); and the Proposed Condition modeled the conditions after the Project is constructed (Jt. Ex.'s 6, 7, 8; T. 903:9-11, 906:2-7, 919:1-8, 919:23-920, 940:15-23).

Petitioner argues that his expert in engineering, Daniel L. Morris, P.E. provided testimony regarding model inputs. (Pet. Exceptions at 7). The record shows Mr. Morris did testify regarding model inputs and provide opinions contrary to Mr. Mack's. (T. 215:13-23, 217:15-24). 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 District may not reweigh record evidence. *Id*. *See also Walker v. Bd. of Prof'l Eng'r*, 946 So. 2d 604, 605 (Fla. 1st DCA 2006).

The record contains evidence that is sufficiently relevant and material, and adequately provides the factual basis to support FOFs 29 and 31. Accordingly, competent substantial

evidence supports the ALJ's findings. *City of Hialeah Gardens*, 857 So. 2d at 204. Therefore, Petitioner's Exception No. 8 is rejected.

Petitioners' Exception No. 9

In his Exception No. 9, Petitioner takes exceptions to the portions of FOFs 32, 33, 34, 35, 36 and 37 which find Scenario 2 is the accepted modeling scenario for the permitted project. (Pet. Exceptions at 7).

The District 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 the District's expert Ms. Dewey testified that in order to determine whether the application would meet applicable permitting criteria, she reviewed model Scenario 2, which compared existing conditions, or pre-development conditions, with the post-development condition. (T. 903:9-11, 906:2-7, 919:1-8, 919:23-920:1, 940:15-23). Ms. Dewey testified that model Scenario 1 was merely used for general informational purposes and was not required to determine whether the project met the applicable permitting criteria. (T. 903:8-14, 940:18-21).

As described in the rulings on Petitioner's Exceptions Nos. 6 and 7 above, existing conditions, for purposes of this permit, are the conditions that existed when the application for the permit was submitted in March 2020. (T. 397:1-4, 419:7-11, 754:10-16, 922:23-923:7, 929:12-930:18).

The record contains evidence that is sufficiently relevant and material, and adequately provides the factual basis to support FOFs 32, 33, 34, 35, 36 and 37. Accordingly, competent substantial evidence supports the ALJs findings. *City of Hialeah Gardens*, 857 So. 2d at 204. Therefore, Petitioner's Exception No. 9 is rejected.

Petitioners' Exception No. 10

In his Exception No. 10, Petitioner takes exception to FOF 72, one of the ALJ's Ultimate Findings of Fact, which states, in its entirety:

> The greater weight of the competent substantial evidence establishes that the rock check dam and the 0.167-acre outfall drainage improvement at Lake Ola Circle meet all applicable permitting criteria for issuance of the Permit. Petitioner did not meet his burden of demonstrating that the Permit should not be issued. Evidence to the contrary was not persuasive.

(RO at 25).

The District 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 the application file was accepted into evidence, and that pursuant to § 120.569(2)(p), F. S., the application established Orange County's prima facie entitlement to the permit (Jt. Ex's. 1 through 10 and 14 through 32; T. 51:2-7). At that point, the burden of ultimate persuasion shifted to Petitioner to prove his case in opposition to the permit by a preponderance of the competent and substantial evidence, and thereby, prove that the applicant failed to provide reasonable assurance that the standards for issuance of the permit were met. (RO at 5; *Last Stand, Inc. and George Halloran v. Fury Mgmt., Inc. and Dep't of Envtl. Prot.*, DOAH Case No. 12-2574 (Fla. DOAH Dec. 31, 2012; Fla. DEP Feb. 7, 2013).

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 District may not reweigh record evidence. *Id*. *See also Walker v. Bd. of Prof'l Eng'r*, 946 So. 2d 604, 605 (Fla. 1st DCA 2006). The record contains evidence that is sufficiently relevant and material, and adequately provides the factual basis to support the determination that the project met applicable permitting criteria. (Jt. Ex.1; T. 811:15-24, 902:7-15, 909:15-910-24). Accordingly, competent substantial evidence

supports the ALJs findings. *City of Hialeah Gardens*, 857 So. 2d at 204. Therefore, Petitioner's Exception No. 10 is rejected.

<u>Petitioners' Exception No. 11</u>

In his Exception No. 11, Petitioner takes exception to the portions of Conclusions of Law 96, 100, 101, 102 and 109 which relate to the ALJ's determination that conditions existing in 2010 be accepted as existing (or predevelopment) conditions, and the ALJ's determination that the compliance status of the 2010 pipe was outside the scope of review at the final hearing. (Pet. Exceptions at 8-9). Petitioner describes his Exceptions to conclusions of law, but he is challenging evidentiary determinations relating to findings of fact which support COLs 96, 100, 101, 102 and 109.

As stated above, the District lacks authority to overrule the ALJ's evidentiary determinations. §120.57(1)(*l*), F.S.; *Barfield v. Dep't of Health*, 805 So.2d 1008, 1012 (Fla. 1st DCA 2002). As such, the findings of fact supporting COLs 96, 100, 101, 102 and 109 will not be rejected or modified.

Also, within his Exception No. 11, Petitioner states "[b]y repeatedly limited the scope of this case, and by applying permitting standards to some structures, but not others, the ALJ disregarded the basic requirements of Florida Statutes." (Pet. Exceptions at 8). Findings of fact must emanate from proceedings that comply with the essential requirements of law. *See* §120.57(1)(*l*), F.S., *Putnam Cnty. Envtl. Council, Inc. et al v. Dep't. Envtl. Prot. & Georgia-Pacific Corp*., Case No. 01-2442, pp. 8-9 (Fla. DOAH July 3, 2002; Fla. DEP Aug. 6, 2002) (holding that, based on a review of the record, the DOAH proceeding did not constitute an *extreme case* where procedural and evidentiary rulings of the ALJ adverse to the Petitioners were so "*egregious"* as to violate the "essential requirements of law" within the purview of

§120.57(1)(1), F.S.) (emphasis added). However, the District lacks jurisdiction and authority to overrule the ALJ's evidentiary rulings.

The record shows Orange County's permit contemplates the construction and operation of outfall drainage improvements, which include a concrete pipe to enclose an existing open ditch along the east side of Mr. Bowers' property, a swale, ditch bottom inlet, and end wall baffles, plus an upstream rock check dam. (Jt. Ex. 1; T. 55:7-19, 201:24, 893:1-10). The construction that occurred in 2010 is not contemplated as part of this permit. (Jt. Ex.'s 1, 13).

Furthermore, the ALJ ruled that the existing conditions, for purposes of this permit, are the conditions that existed when the application for the permit was submitted in March 2020. (T. 397:1-4, 419:7-11, 754:10-16, 922:23-923:7, 929:12-930:18). Upon review of the record, these rulings are not egregious and do not violate the essential requirements of law. *See* §120.57(1)(*l*), F.S., *Fla. Power & Light v. State Siting Bd.*, 693 So. 2d 1025, 1028 (Fla. 1st DCA 1997) (Benton, J. concurring).

In his Exception No. 11 to COLs 96, 100, 101, 102, and 109, Petitioner argues for contrary evidentiary rulings regarding the existing condition and scope of the proceeding below but does not propose a conclusion of law that is as or more reasonable than COLs 96, 100, 101, 102, and 109. Therefore, Petitioner's Exception No. 11 is rejected.

Petitioners' Exception No. 12

In his Exception No. 12, Petitioner takes exception to portions of FOF 38 and 39, describing existing conditions for the project as the conditions that existed in March 2020, when the Applicant applied for the permit. As stated above in the ruling on Petitioner's Exceptions Nos. 6, 7, and 9, the ALJ determined existing conditions, for purposes of this permit, are the

conditions that existed when the application for the permit was submitted in March 2020. (T. 397:1-4, 419:7-11, 754:10-16, 922:23-923:7, 929:12-930:18).

The District 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 the ALJ addressed the project's existing conditions multiple times during the final hearing by ruling it was irrelevant to the proceeding. (T. 397:1-4 and 16-17, 419:7-11, 754:10-16, 922:23-923:7, 929:12-930:18).

The District lacks subject matter jurisdiction to overrule an ALJ's evidentiary ruling on the admissibility of evidence. *See Barfield v. Dep't of Health*, 805 So.2d 1008, 1012 (Fla. 1st DCA 2002) (noting the Board of Dentistry lacked the substantive jurisdiction to overrule an ALJ's evidentiary ruling); *Lane v. Dep't of Envtl. Prot.*, Case No. 05-1609 (Fla. DOAH May 11, 2007; Fla. DEP Aug. 8, 2007)(the agency has no substantive jurisdiction over procedural issues, such as whether an issue was properly raised, and over an ALJ's evidentiary rulings); *Lardas v. Dep't of Envtl. Prot.*, Case No. 05-458 (Fla. DOAH Aug. 24, 2004; Fla. DEP Oct. 21, 2005) (evidentiary rulings of the ALJ concerning the admissibility and competency of evidence are not matters within the agency's substantive jurisdiction).

Also in his Exception No. 12, Petitioner takes exception to the portions of FOFs 38 and 39 regarding whether the permit application met the applicable water quality conditions for issuance, and whether the proposed project would cause adverse water quality impacts to Lake Ola. (Pet. Exceptions at 10-11).

The record shows Applicant's project will not cause adverse water quality impacts to Lake Ola because the project does not propose a change in drainage patterns, runoff volumes, or land use change that would change the pollutant loading to Lake Ola. (Jt. Ex.'s 1, 13; T. 546:5-

16, 570:2-25, 94:12-19, 910:10-14, 947:14-16, 950:7-17). There is no change in the existing runoff from the pre-development condition to the post-development condition. (Jt. Ex. 13; T. 572:20-25, 918:13-15). In other words, the water flowing to Lake Ola in the existing condition is exactly the same as the water that will be flowing to Lake Ola after the proposed project is constructed. (T. 573:3-6, 946:1-5, 947:16-18). Additionally, the project includes construction of a rock check dam upstream, which will help slow down water flow and thereby promote infiltration for smaller storm events. (Jt. Ex.'s 1, 13; T. 519:20-23, 519:24-520:1, 569:2-8, 569:7-10, 910:15-19). Increased infiltration will result in more stormwater being absorbed and treated in the ground. (T. 910:15-19, 911:04-12).

The record contains evidence that is sufficiently relevant and material, and adequately provides the factual basis to support FOFs 38 and 39. Accordingly, competent substantial evidence supports the ALJs findings. *City of Hialeah Gardens*, 857 So. 2d at 204. Therefore, Petitioner's Exception No. 12 is rejected.

Petitioners' Exception No. 13

In his Exception No. 13, Petitioner takes exception to FOF 47 which finds the proposed project will not adversely affect the public health, safety, or welfare of the property of others. (Pet. Exceptions at 11-12). Petitioner challenges findings related to the first prong of the public interest test which is part of the additional conditions for issuance of environmental resource permits. *See* subparagraph 62-330.302(1)(a)1. F.A.C.

The District 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. Petitioner argues the project "does not provide for any water quality treatment and will adversely affect the public health safety and welfare." (Pet. Exceptions at 11).

The record shows the project will not cause adverse water quality impacts to Lake Ola because the project does not propose a change in drainage patterns, runoff volumes, or land use change that would change the pollutant loading to Lake Ola. (Jt. Ex.'s 1, 13; T. 546:5-16, 570:2-25, 94:12-19, 910:10-14, 947:14-16, 950:7-17). There is no change in the existing runoff from the pre-development condition to the post-development condition. (Jt. Ex. 13; T. 572:20-25, 918:13-15). The water flowing to Lake Ola in the existing condition is exactly the same as the water that will be flowing to Lake Ola after the proposed project is constructed. (T. 573:3-6, 946:1-5, 947:16-18). Therefore, because the proposed project is not adding any additional pollutants to the water, water quality treatment is not required. (T. 569:23-570:12, 909:15-910:24, 950:12-17).

Even though water quality treatment is not required for the proposed project, Orange County will construct a rock check dam upstream, which will help slow down water flow and thereby promote infiltration for smaller storm events. (Jt. Ex.'s 1, 13; T. 519:20-23, 519:24-520:1, 569:2-8, 569:7-10, 910:15-19). Increased infiltration will result in more stormwater being absorbed and treated in the ground. (T. 910:15-19, 911:04-12).

The record contains evidence that is sufficiently relevant and material, and adequately provides the factual basis to support FOF 47. Accordingly, competent substantial evidence supports the ALJs findings. *City of Hialeah Gardens*, 857 So. 2d at 204. Therefore, Petitioner's Exception No. 13 is rejected.

Petitioners' Exception No. 14

In his Exception No. 14, Petitioner takes exception to FOF 48 which finds the proposed project will not adversely affect the conservation of fish and wildlife, including endangered or threatened species or their habitats. (RO at 19, Pet. Exceptions at 12). Petitioner challenges

findings related to the second prong of the public interest test. *See* subparagraph 62-330.302(1)(a)2. F.A.C.

The District 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 the District's expert in wetland and wildlife ecology Nicole Martin testified there would not be any adverse impacts to the value and functions to fish and wildlife, based on the proposed project. (Jt. Ex. 1; T. 801:3-7, 868:19-869:4, 876:4-877:11). She testified the project area has been historically mowed and maintained as a residential lawn. (T. 801:10-11). Ms. Martin visited the project site twice: on June 5, 2020 and September 21, 2020 (T. 790: 23-791-5). She found no significant value to the functions of fish and wildlife within the project area, and no observation of fish and wildlife using the project area. (Jt. Ex. 1; T. 801: 11-15). Ms. Martin did not observe any areas within the proposed project area that would have been used for nesting or feeding. (T. 808: 18-25). Thus, the record contains evidence that is sufficiently relevant and material, and adequately provides the factual basis to support FOF 48. Accordingly, competent substantial evidence supports the ALJ's findings. *City of Hialeah Gardens*, 857 So. 2d at 204.

Petitioner also argues paragraph 48 is incorrect because the proposed project "will adversely affect the conservation of fish and wildlife, including endangered or threatened species in Lake Ola, and when Lake Ola eventually outfalls into Lake Beauclair, Lake Carlton, and Lake Apopka." There is no evidence in the record of the existence of endangered or threatened species in or around Lake Ola, nor is there evidence in the record regarding the eventual outfall of Lake Ola.

The District 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'r*, 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). For the foregoing reasons, Petitioner's Exception No. 14 is rejected.

Petitioners' Exception No. 15

In his Exception No. 15, Petitioner takes exception to FOF 54, which finds "a preponderance of the competent substantial evidence...establish[ed]…that the Project will not be contrary to the public interest as defined in A.H. Volume I, section 10.2.3." (RO at 20).

The District 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 District expert Ms. Martin testified she evaluated environmental factors of the public interest test (Jt. Ex. 1; T. 805:3-19). Ms. Martin testified the project is within a historically mowed and maintained law, and it is not expected to have any environmental hazard for safety or hazards with respect to environmental conditions. (Jt. Ex. 1; T. 805: 3-19, 868:19-869:4, 876:4-877:11) District expert Ms. Dewey testified she evaluated the public interest test factors relating to flooding and erosion (Jt. Ex. 1; T. 915:4-916:7). Ms. Dewey testified the project is not expected to cause adverse flooding (Jt. Ex. 1; T. 915: 19-24) or harmful erosion (Jt. Ex. 1; T. 916:5-7).

Thus, the record contains evidence that is sufficiently relevant and material, and adequately provides the factual basis to support FOF 54. Accordingly, competent substantial evidence supports the ALJ's findings. It is the ALJ's function to consider the evidence

presented, resolve conflicts, and judge witness credibility. *See Heifetz*, 475 So. 2d at 1281. Therefore, Petitioner's Exception No. 15 is rejected.

Petitioners' Exception No. 16

In his Exception No. 16, Petitioner takes exception to the portion of FOF 55 which finds "the Project will have no effect on water quality." (RO at 21). Petitioner argues FOF 55 is "incorrect…because the substantial competent evidence shows the Permit will have a negative effect on water quality." (Pet. Exceptions at 12).

The District 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 District expert Ms. Dewey testified that the Technical Staff Report refers to the project not causing a water quality violation. (Jt. Ex. 1; T. 914:20-21). Ms. Dewey further explained that because the Project does not propose any impervious surfaces, and because the proposed outfall pipe will not produce erosive velocities, the project will not result in any water quality violation. (T. 914:22-915:3).

Thus, the record contains evidence that is sufficiently relevant and material, and adequately provides the factual basis to support the portion of FOF 55 which finds the project will have no effect on water quality. Accordingly, competent substantial evidence supports the ALJ's findings. *City of Hialeah Gardens*, 857 So. 2d at 204. It is the ALJ's function to consider the evidence presented, resolve conflicts, and judge witness credibility. *See Heifetz*, 475 So. 2d at 1281. Therefore, Petitioner's exception No. 16 is rejected.

Petitioners' Exception No. 17

In his Exception No. 17, Petitioner takes exception to the portion of FOF 71 which finds the project is not "reasonably expected to cause or contribute to a violation of state water quality

standards." (RO at 25). Petitioner argues FOF 71 is "incorrect…because the evidence presented by Petitioner demonstrates there is a large pollution load being discharged to Lake Ola by the Permit without any water quality treatment." (Pet. Exceptions at 12).

The District 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 Petitioner's witness, David Russell, reviewed the results of soil samples and a water sample taken by ENCO Lab upstream of the proposed project area in 2015. (Pet. Ex.'s 64, 66; T. 422:21-424:11, 425:7-426-4, 434:5-10). Mr. Russell testified to his opinion that the soil samples show higher levels of phosphate and nitrate, and to the extent that those are contaminants, they are carried over and sent down to a Lake Ola outfall. (T. 436:15-18).

Orange County's expert in water quality sampling and testing, Julie Bortles, testified that the 2015 report did not show sampling procedure used in the field. (Pet. Ex.'s 64, 66; T. 618:12-13) Typically, a report would describe the sampling technique, equipment used, and the validity of the data collection. (T. 618:17-24). Ms. Bortles also testified that the ENCO report did not contain information as to the time period between placement of any fill relative to the date the samples were taken. (Pet. Ex.'s 64, 66; T. 623:9-12). Due to the lack of information regarding when the samples were taken, Ms. Bortles testified she could not determine whether the upstream property was a source of nutrients. (T. 623: 4-15).

Orange County's expert in water resource engineering and stormwater management, Benjamin Pernezny, P.E. testified that for purposes of water quality, the applicant provided the District with information demonstrating the project will not cause a change to the existing runoff characteristics from predevelopment to postdevelopment. (Jt. Ex. 6, 7, 8; T. 572:20-24). Mr. Pernezny further testified the project will not increase runoff volume, will not change land use,

and will not increase impervious area. (T. 572:24-573:2). District expert Ms. Dewey testified that because the project does not include impervious surface or change in land use, the expected pollutant loading would not change. (Jt. Ex. 1; T. 944:25-945:4, 946:4-5, 947:14-18).

The ALJ's decision to accept the testimony of one expert witness over that of another witness is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. *See, e.g., Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co.,* 18 So. 3d 1079, 1088 (Fla. 2d DCA 2009). Thus, the record contains evidence that is sufficiently relevant and material, and adequately provides the factual basis to support the portion of FOF 55 which finds the project will have no effect on water quality. Accordingly, competent substantial evidence supports the ALJ's findings. *City of Hialeah Gardens*, 857 So. 2d at 204. It is the ALJ's function to consider the evidence presented, resolve conflicts, and judge witness credibility. *See Heifetz*, 475 So. 2d at 1281. Therefore, Petitioner's exception No. 17 is rejected.

Petitioners' Exception No. 18

In his Exception No. 18, Petitioner takes exception to the portions of COLs, 84, 85 and 86 which relate to the ALJ's determination that §120.569(2)(p), F.S. governed the order of presentation of evidence, as well as the burden of proof in the proceedings below. Petitioner generally objects to these conclusions of law by arguing he provided evidence "that the project is a potential and likely source of pollution to Lake Ola." (Pet. Exceptions at 12-13).

As he does in his Exception No. 11, in Exception No. 18, Petitioner describes his Exceptions to conclusions of law, but he is challenging evidentiary determinations relating to findings of fact which support COLs 84, 85 and 86. As stated above, the District lacks authority to overrule the ALJ's evidentiary determinations. §120.57(1)(*l*), F.S.; *Barfield v. Dep't of*

Health, 805 So.2d 1008, 1012 (Fla. 1st DCA 2002). As such, the findings of fact supporting COLs 84, 85 and 86 will not be rejected or modified.

The District may only reject a conclusion of law over which it has substantive jurisdiction, that is as or more reasonable than the ALJ's conclusion. §120.57(1)(*l*), F.S. To the extent Exception No. 18 describes Petitioner's desire to have the District substitute or modify conclusions of law, the District lacks jurisdiction to do so. The District does not have substantive jurisdiction over §120.569(2)(p), F.S., and therefore, cannot reject the ALJ's interpretation of the statute. *Matlacha Civic Assn., Inc. et al. v. City of Cape Coral and Dep't of Envtl. Prot.*, DOAH Case No. 18-6752 (Fla. DOAH Dec. 12, 2019; Fla. DEP March 11, 2020); *City of Jacksonville v. Dames Point Workboats, LLC, and Dep't of Envtl. Prot.*, DOAH Case No. 18-5246 (Fla. DOAH March 1, 2019; Fla. DEP April 12, 2019).

Furthermore, in his Exception No. 18 to COLs 84, 85 and 86, Petitioner argues for contrary evidentiary rulings regarding the existing condition and scope of the proceeding below but does not propose a conclusion of law that is as or more reasonable than COLs 84, 85 and 86. Therefore, Petitioner's Exception No. 18 is rejected.

Petitioners' Exception No. 19

In his Exception No. 19, Petitioner takes exception to COL 89 which sets forth the ALJ's conclusion that a permit applicant must provide reasonable assurance that the proposed activities will meet applicable permitting standards (RO at 30). Also in his Exception No. 19, Petitioner takes exception to COL 90, which sets forth the legal definition of "reasonable assurance". (RO at 30-31)(citing *Metro. Dade Cnty. v. Coscan Fla., Inc.*, 609 So. 2d 644, 648 (Fla. 3d DCA 1992). Petitioner generally objects to these conclusions of law by arguing that the Applicant "has not provided the District with sufficient information to analyze, in advance the anticipated

effects of the Proposed Project." Specifically, Petitioner argues Applicant's application does "not provide an accurate account of the quantity of water discharged to Lake Ola" and that "[n]o water quality data was submitted by Orange County so the District could analyze whether this Permit will cause degradation of existing water quality…"(Pet. Exceptions at 13-14).

As he does in his Exception Nos. 11 and 18, in Exception No. 19, Petitioner describes his Exception to conclusions of law, but he again is challenging evidentiary determinations relating to finds of fact which support COLs 89 and 90. He challenges the conclusion that Applicant provided reasonable assurance that the proposed project met applicable permitting standards. (Pet. Exceptions at 13-14). As stated above, the District lacks authority to overrule the ALJ's evidentiary determinations. §120.57(1)(*l*), F.S.; *Barfield v. Dep't of Health*, 805 So.2d 1008, 1012 (Fla. 1st DCA 2002). As such, the findings of fact supporting COLs 89 and 90 will not be rejected or modified.

Administrative agencies must follow interpretations of statutes by the courts of this state. *Costarell v. Fla. Unemployment Appeals Comm'n*, 916 So. 2d 778, 782 (Fla. 2005); *Mikolsky v. Unemployment Appeals Comm'n*, 721 So. 2d 738, 740 (Fla. 5th DCA 1998) ("An agency of this state…must follow the interpretations of statutes as interpreted by the courts of this state."). Thus, the District is not at liberty to ignore the interpretation of the "reasonable assurance" standard set forth by the Third DCA and cited by the ALJ in COL 90.

The record shows the District applied the reasonable assurance standard in the manner described in COL 90, that is: "reasonable assurance does not require absolute guarantees that the applicable conditions for issuance of a permit have been satisfied." (RO at 30). Reasonable assurance means a substantial likelihood that the conditions for issuance have been met. (T. 900: 16-24). Petitioner states his agreement with the interpretation that "reasonable assurance

does not require absolute guarantees that the applicable conditions for issuance of a permit have been satisfied." (Pet. Exceptions at 13).

Instead, in his Exception 19, Petitioner argues the permit application did not provide "sufficient information to analyze, in advance the anticipated effects of the Proposed Project." (Pet. Exceptions at 13). Petitioner states concerns regarding the sufficiency of evidence regarding water quality data and "whether the permit will cause degradation of existing water quality." (Pet. Exceptions at 13-14). The sufficiency of information provided in the permit application is an evidentiary determination that the District lacks authority to overrule. "Matters that are susceptible of ordinary methods of proof, such as determining the credibility of witnesses or the weight to accord evidence, are factual matters to be determined by the hearing officer." *Gross v. Dept. of Health*, 819 So. 2d 997, 1002 (Fla. 5th DCA 2002). The District may not reweigh record evidence. *Heifetz*, 475 So. 2d at 1281 *See also Walker v. Bd. of Prof'l Eng'r*, 946 So. 2d 604, 605 (Fla. 1st DCA 2006).

The record shows the applicable condition for issuance regarding water quality impacts is found in paragraph 62-330.301(1)(e), F.A.C. (T. 909:15-25). The District reviewed the application and found the Applicant's proposed project met this criterion. (Jt. Ex. 1; T. 910:5-24). Petitioner argues that he offered "contrary evidence and data of existing and increasing pollution being discharged into Lake Ola from a point source along the shoreline …." (Pet. Exceptions at 14). However, in ruling on exceptions to a Recommended Order, the issue for the District to decide is not whether the record contains evidence contrary to the findings of fact in the recommended order, but whether the finding is supported by competent substantial evidence. *Fla. Sugar Cane League v. State Siting Bd.*, 580 So. 2d 846, (Fla. 1st DCA 1991).

The record shows the proposed project does not include the placement of any impervious surfaces that would change a land use or produce an increased pollutant source. (Jt. Ex's. 1 through 4, 13; T. 594:7-19, 910:11-14, 918:13-15, 947:14-16, 950:7-17). Further, the record shows the proposed project does not propose a change in drainage patterns or runoff volumes (T. 546:9-11, 570:17-25, 572: 20-573:6).

Thus, the record contains evidence that is sufficiently relevant and material, and adequately provides the factual basis to support the finding that the project will have no effect on water quality. Accordingly, competent substantial evidence supports the ALJ's findings. *City of Hialeah Gardens*, 857 So. 2d at 204.

In his Exception No. 19 to COLs 89 and 90, Petitioner argues for contrary evidentiary rulings regarding the sufficiency of evidence supporting the permit application but does not propose a conclusion of law that is as or more reasonable than COLs 89 and 89. Accordingly, for the foregoing reasons, Petitioner's Exception No. 19 is rejected.

Petitioners' Exception No. 20

In his Exception No. 20, Petitioner takes exception to COL 103, in which the ALJ determined that the project will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters. (RO at 37). Also, in his Exception No. 20 Petitioner takes exception to COL 104, in which the ALJ determined the project will not adversely affect the quality of receiving waters such that the state water quality standards will be violated. (RO at 37). Specifically, Petitioner argues the "permit will not meet the standards established in rule 62-330.301(1)(d) or Rule 62-330.301(1)(e), F.A.C., nor will it meet the standards of Section 10.1.1(a) or Section 10.1.1(c) of A.H. Vol. I." (Pet. Exceptions at 15).

As he does in his Exception Nos. 11, 18 and 19, in Exception No. 20, Petitioner describes his Exception to conclusions of law, but he is challenging evidentiary determinations relating to finds of fact which support COLs 103 and 104. Namely, Petitioner challenges the conclusion that Applicant provided reasonable assurance that the proposed project met applicable permitting standards of rule 62-330.301(1)(d), 62-330.301(1)(e), and Section 10.1.1(c), A.H., Vol. 1. (Pet. Exceptions at 15). As stated above, the District lacks authority to overrule the ALJ's evidentiary determinations. §120.57(1)(*l*), F.S.; *Barfield v. Dep't of Health*, 805 So.2d 1008, 1012 (Fla. 1st DCA 2002). As such, the findings of fact supporting COLs 103 and 104 will not be rejected or modified.

As to the condition for issuance found in 62-330.301(1)(d), F.A.C., the record shows District expert Ms. Martin testified there would not be any adverse impacts to the value and functions to fish and wildlife, based on the proposed project. (Jt. Ex 1; T. 801:3-7, 868:19-869:4, 876:4-877:11).

The record shows the applicable condition for issuance regarding water quality impacts is found in paragraph 62-330.301(1)(e), F.A.C. (T. 909:15-25). District expert Ms. Dewey testified Lake Ola is not designated as an impaired water body. (T. 910:1-4). The Project does not propose to place any impervious surfaces or change in land use that would increase pollution. (T. 910:10-14). The Project does not include a new road. (T. 950:3-11). The pollutant loading is not expected to change. (T. 944:20-946:5, T. 947:14-18). The existing ditch on Petitioner's property is lined with asphalt and is fairly steep with decent flow velocities. (T. 573:13-574:4). The District found the Applicant's proposed project will not cause adverse impacts to Lake Ola. (Jt. Ex. 1; T. 910:5-24).

Petitioner argues "the lack of water quality data collected by Orange County or the District…and the concerns demonstrated by the Petitioner and his experts" overcame the presumption that the application demonstrated reasonable assurance to meet the conditions for issuance set forth in paragraphs 62-330.301(1)(d) and (e), F.A.C. (Pet. Exceptions at 16). In ruling on exceptions to a Recommended Order, the issue for the District to decide is not whether the record contains evidence contrary to the findings of fact in the recommended order, but whether the finding is supported by competent substantial evidence. *Fla. Sugar Cane League v. State Siting Bd.*, 580 So. 2d 846, (Fla. 1st DCA 1991).

In his Exception No. 20 to COLs 103 and 104, Petitioner argues for contrary evidentiary rulings regarding the sufficiency of evidence supporting the permit application but does not propose a conclusion of law that is as or more reasonable than COLs 103 and 104. Accordingly, for the foregoing reasons, Petitioner's Exception No. 20 is rejected.

Petitioners' Exception No. 21(a)[10]

In his Exception No. 21(a), Petitioner takes exception to COLs 109, 110, and 111 in which the ALJ determined that the project will not be contrary to the public interest, will not cause unacceptable cumulative impacts upon wetlands and other surface waters, and meets the standards established in rule 62-330.302(1)(a), F.A.C., and section 10.2.3, A.H., Vol. I. (RO at 38).

Specifically, to support his Exception No. 21(a), Petitioner argues he provided evidence of "excessive loads of nitrogen and phosphorous were being discharged into Lake Ola by the

[10] Petitioner has numbered two different exceptions as 21. The District will address them, in turn, herein as Petitioner's Exception 21(a) (Pet. Exceptions at 16-19) and Petitioner's Exception 21(b) (Pet. Exceptions at 19-21).

permit." (Pet. Exceptions at 17) and states his concern that "downstream water quality standards" will not be met, particularly in Lake Apopka. (Pet. Exceptions at 17).

Initially, as noted in response to Petitioner's Exception No. 14 above, there is no evidence in the record regarding the eventual outfall of Lake Ola, nor is there evidence in the record regarding the water quality of Lake Apopka. The District 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'r*, 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).

As he does in his Exception Nos. 11, 18, 19 and 20, in Exception No. 21(a), Petitioner describes his Exception to conclusions of law, but he is challenging evidentiary determinations relating to finds of fact which support COLs 109, 110 and 111. He challenges the ALJ's ultimate conclusion that Applicant provided reasonable assurance that the proposed project met the conditions for issuance of an ERP. (Pet. Exceptions at16-17). As stated above, the District lacks authority to overrule the ALJ's evidentiary determinations. §120.57(1)(*l*), F.S.; *Barfield v. Dep't of Health*, 805 So.2d 1008, 1012 (Fla. 1st DCA 2002). As such, the findings of fact supporting COLs 109, 110, and 111 will not be rejected or modified.

The record shows the Applicant's expert Mr. Pernezny explained the proposed project will not cause a change in water quality characteristics. (T. 537:13-21). The District's expert, Ms. Dewey testified that the permit would not violate state water quality standards, including anti-degradation provisions, (T. 909:15-910:24) Ms. Dewey further testified the project is within the Ocklawaha River hydrologic basin and the Wekiva recharge protection area; it is not within the District's Lake Apopka hydrologic basin. (Jt. Ex. 1; T. 912:13-24, 914:1-2). Pursuant

to special basin criteria for the Ocklawaha River hydrologic basin, the Applicant demonstrated through ICPR model analysis that the postdevelopment peak rate of discharge to Lake Ola did not exceed the predevelopment peak rate of discharge for both the 10-year, 24-hour storm event and the 25-year, 24-hour storm event. (T. 912:21-913:10).

This is competent substantial record evidence directly contrary to Petitioner's argument that "neither the applicant nor agency have any supporting data that water quality will not be worse in the post development state when compared to the predevelopment discharges." (Pet. Exceptions 21(a) at 19). The District's review of the project's location, design, construction plans, and stormwater calculations resulted in the conclusion that the project complies with all applicable conditions for issuance established by rules 62-330.301 and 62-330.302, F.A.C. (RO at 38).

Petitioner's relies on *City of West Palm Bach v. Palm Beach Cnty.*, 253 So. 3d 623, 627-28 (Fla. 4th DCA 2018) to support his argument that the applicant was required to provide "water quality data" to demonstrate "that all state water quality standards applicable…would not be violated by the project." (Pet. Exceptions at 18). The type and scope of the project at issue in *City of West Palm Bach v. Palm Beach Cnty.*, 253 So. 3d 623, 627-28 (Fla. 4th DCA 2018) make that case factually distinguishable from the instant case. *Palm Beach* involved an ERP authorizing the construction of a road extension (an impervious surface) that would discharge stormwater runoff to Grassy Waters Preserve, a nature preserve which is "home to numerous species of plants and animals, including threatened and endangered wildlife, which depend on a low phosphorus environment" and which was the City of West Palm Beach's drinking water supply. 253 So. 3d at 624. The City of West Palm Beach petitioned issuance of the ERP, and the recommended order resulting from the administrative hearing included a misinterpretation of

the narrative nutrient standard. *Id*. at 628. The narrative nutrient standard is a state-water quality standard which requires that nutrient concentrations shall not "be altered so as to cause an imbalance in natural populations of aquatic flora or fauna." *Id*. at 628, quoting rule 62-302.530(48)(b), F.A.C.

In the instant case, the project does not propose impervious surfaces that would change a land use or produce an increased pollutant source. (Jt. Ex.' 1 through 4, 13; T. 594:7-19, 910:11-14, 918:13-15, 947:14-16, 950:7-17). As such, the District determined the project will not result in any water quality violation. (T. 914:22-915:3).

Additionally, Petitioner cites to section 403.061(44)(b), F.S.[11]in support of his argument that the Applicant was required to provide "water quality data" in its ERP application. As described above, because the project does not propose impervious surfaces that would change a land use or produce an increased pollutant source (Jt. Ex.'s. 1 through 4, 13; T. 594:7-19, 910:11-14, 918:13-15, 947:14-16, 950:7-17, the District determined the project will not result in any water quality violation. (T. 914:22-915:3) There was not a need to analyze state water quality standards such as that provided in section 403.061(44)(b), F.S.

As conclusions of law, the District may only reject or modify COLs 109, 110, and 111 if they contain interpretations of statutes or administrative rules over which it has substantive jurisdiction, and only if the reasons for rejection or modification are as or more reasonable than the ALJ's interpretation. §120.57(1)(*l*), F.S. In his Exception No. 21(a) to COLs 109, 110, and 111, Petitioner argues for contrary evidentiary rulings regarding the sufficiency of evidence supporting the permit application but does not propose a conclusion of law that is as or more

[11] Petitioner quotes language from section 403.061(44)(b), F.S. but mis-cites the section he intended to reference.

reasonable than COLs 109, 110, and 11. For the foregoing reasons, Petitioner's Exception No. 21(a) is rejected.

Petitioner's Exception No. 21(b)

In his exception No. 21(b), Petitioner takes exception to FOFs 61 and 62, contending that they are incorrect findings. A finding of fact may not be rejected or modified unless a review of the entire record shows that the finding was not based upon competent substantial evidence. § 120.57(1)(*l*), F. S. As the ALJ observed in the RO, this is a *de novo* administrative proceeding that is intended to formulate final agency action and is not intended to review action taken earlier and preliminarily. Sec. 120.57(1)(k), F.S.; *Young v. Dep't of Cmty. Affairs*, 625 So.2d 831 (Fla. 1993); *Fla. Dep't of Transp. v. J.W.C., Co.* 396 So.2d 778 (Fla. 1st DCA 1981). There is competent substantial evidence to support the ALJ's finding that by the time the final hearing occurred, the construction plans and modeling data had all been signed, sealed, and dated as required by section 2.3, A.H. Vol. II (Jt. Ex.'s 11, 12, 13; T 544:07-08). The ALJ reserved ruling on the admissibility of Joint Exhibits 11, 12 and 13 until he heard argument regarding whether they were submitted in compliance with the Order of Prehearing Instructions (OPI). (T. 50:17-51:09). The ALJ ultimately ruled that Mr. Pernezny had developed and disclosed his opinions in compliance with the OPI and Joint Exhibits 11, 12 and 13 were received into evidence. (T. 543:23-544:08). The record also reflects that other than modifying the title block to reflect Mr. Pernezny's role as successor engineer of record, the construction plans and modeling data were unchanged. (T. 531:17-24, 532:3-5 and 11-17, 534:1-10, 538:13-18, 898:25 – 899:06, 935:936).

The ALJ's decision to accept the testimony of one expert witness over that of another witness is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. *See, e.g., Peace*

River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co., 18 So. 3d 1079, 1088 (Fla. 2d DCA 2009). Thus, the record contains evidence that is sufficiently relevant and material, and adequately provides the factual basis to support FOFs 61 and 62.

To the extent that Petitioner alleges that he was prejudiced by the ALJ's decision to allow Mr. Pernezny's testimony about these matters into evidence, Petitioner is essentially requesting that the District modify or overrule a procedural or evidentiary ruling, which the District is unable to do. *See Barfield*, 805 So.2d 1008; *Compass Envtl., Inc.*, 27 F.A.L.R. 3249, 3258. Moreover, this evidentiary ruling does not rise to the level of not complying with the essential requirements of law such that the District could reject or modify it. *See Miccosukee Tribe of Indians of Fla. & Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, Case No. 96-3151 (Fla. DOAH Nov. 19, 1996; Fla. DEP April 21, 1998)(ruling by ALJ limited the scope of an expert's testimony is an evidentiary ruling that did not fall within the "extreme" category and does not deprive petitioners of the essential requirements of law).

Although labeled a finding of fact, a portion of FOF 62 contains a conclusion of law in that the ALJ concluded that documents received into evidence are sufficient to provide reasonable assurance that the project meets District permitting standards. In his exception, Petitioner fails to offer a contrary interpretation of the District's rules or enabling statute or to allege an interpretation on this COL that is as or more reasonable than the ALJ's COL. To reject or modify a conclusion of law or interpretation of a District rule, the reasons for such rejection or modification must be stated with particularity, the law or rule must be within its substantive jurisdiction, and the District must find that its substituted conclusion or interpretation is as or more reasonable than the rejected one. § 120.57(1)(*l*), F.S. Without an adequate exception that provides an "as or more reasonable" conclusion of law or interpretation than the Judge's, the

District cannot grant an exception. *Id.* Petitioner offers nothing more than an argument that FOF 61 and 62 are incorrect findings of fact.

Accordingly, competent substantial evidence supports the ALJ's findings. *City of Hialeah Gardens*, 857 So. 2d at 204. It is the ALJ's function to consider the evidence presented, resolve conflicts, and judge witness credibility. *See Heifetz*, 475 So. 2d at 1281. Therefore, Petitioner's exception No. 21(b) is rejected.

Petitioner's Exception No. 22

In his Exception No. 22, Petitioner takes exception to two of the ALJ's Ultimate Findings of Fact, 70 and 72, arguing, once again, that there is no competent substantial evidence that the engineering report, the modeling data, or the surveys in the permit application had been signed and sealed in compliance with Chapters 471 and 472, F.S., or the rules promulgated thereunder.

The District 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 the application file was accepted into evidence, and that pursuant to § 120.569(2)(p), F. S., the application established Orange County's prima facie entitlement to the permit (Jt. Ex's. 1 through 10, 14 through 32; T. 51:2-7). At that point, the burden of ultimate persuasion shifted to Petitioner to prove his case in opposition to the permit by a preponderance of the competent and substantial evidence, and thereby, prove that the applicant failed to provide reasonable assurance that the standards for issuance of the permit were met.

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 District may not reweigh record evidence. *Id. See also Walker v. Bd. of Prof'l Eng'r*, 946 So. 2d 604, 605 (Fla. 1st DCA 2006). The record contains evidence that is sufficiently relevant and material, and adequately provides

the factual basis to support FOFs 70 and 72. (Jt. Ex.'s 11, 12, 13; T 544:7-8, 901:01-17). Accordingly, competent substantial evidence supports the ALJs findings. *City of Hialeah Gardens*, 857 So. 2d at 204. Therefore, Petitioner's Exception No. 22 is rejected.

Petitioner's Exception No. 23

In Petitioner's Exception No. 23, Petitioner takes exception to COLs 84, 85, and 86, asserting that these conclusions of law are incorrect because the County could not make a prima facie case of entitlement to the Permit because some of the evidence submitted in support of its prima facie case did not meet the requirements of Chapters 471 and 472, F.S., and the rules promulgated thereunder, and section 2.3, A.H., Vol. II. Thus, Petitioner contends that the "District cannot have reasonable assurances that the activities authorized in the Permit will meet applicable standards . . ." (Pet. Exceptions at 21-23).

Conclusions of law 84, 85, and 86 state in their entirety:

> 84. Orange County and the District made the prima facie case of entitlement to the Permit by entering into evidence the application file and supporting documentation, and the District's TSR and proposed Permit.
>
> 85. As to the issue of the hearsay nature of the engineering plans and reports, the nature of evidence that is sufficient to establish prima facie entitlement to an ERP was discussed in *Last Stand, Inc., and George Halloran v. Fury Management, Inc. and Department of Environmental Protection*, DOAH Case No. 12-2574 (Fla. DOAH Dec. 31, 2012; Fla. DEP Feb. 7, 2013), in which Judge Bram D.E. Canter states:
>
>> 90. When an agency's intent to issue a permit has been challenged, the procedure and burden of proof established in section 120.596(2)(p) provides for a logical and efficient proceeding. The permit application and supporting material that the agency determined was satisfactory to demonstrate the applicant's entitlement to the permit retains its status as satisfactory when it is admitted into evidence at the final hearing, and it does not lose that status unless the challenger proves that specific aspects of the application are unsatisfactory.
>>
>> 91. It follows that the permit application and supporting material submitted to the agency may be received into evidence for the truth of the

> matters asserted in them, without being subject to hearsay objections. If these documents could not be admitted except through witnesses with personal knowledge and requisite expertise as to all statements contained within the documents, one of the primary purposes of the statute would be destroyed.
>
> 86. With Orange County having made its prima facie case for the Permit, the burden of ultimate persuasion was on Mr. Bowers to prove his case in opposition to the Permit by a preponderance of the competent and substantial evidence, and thereby prove that Orange County failed to provide reasonable assurance that the standards for issuance of the Permit were met.

Although Petitioner describes his exceptions to conclusions of law, he again challenges evidentiary determinations relating to findings of fact which support COLs 84, 85, and 86. The District lacks authority to overrule the ALJ's evidentiary determinations. §120.57(1)(*l*), F.S.; *Barfield v. Dep't of Health*, 805 So.2d 1008, 1012 (Fla. 1st DCA 2002). As such, the findings of fact supporting COLs 84, 85 and 86 will not be rejected or modified.

To the extent Exception No. 23 describes Petitioner's desire to have the District substitute or modify the conclusions of law that the County and District made the prima facie case of entitlement to the Permit, the District lacks jurisdiction to do so. Section 120.57(1)(1), Florida Statutes, authorizes an agency to reject or modify an ALJ's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." *See Barfield*, 805 So. 2d at 1012; *L.B. Bryan & Co.*, 746 So. 2d at 1196-97; *Deep Lagoon Boat Club, Ltd.*, 784 So. 2d at 1141-42. However, the District does not have authority to reject the ALJ's interpretation of Section 120.569(2)(p), Florida Statutes, since this statutory provision is not one over which it has substantive jurisdiction. Even if the District disagreed with the ALJ's interpretation of Section 120.569(2)(p), Florida Statutes, which is not the case here, it does not have the authority to reject the ALJ's interpretation of this statutory provision. *See Matlacha Civic Assn., Inc. et al. v. City of Cape Coral and Dep't of Envtl. Prot.*, DOAH Case No. 18-6752 (Fla. DOAH Dec. 12, 2019; Fla.

DEP March 11, 2020)); *City of Jacksonville v. Dames Point Workboats, LLC, and Dep't of Envtl. Prot.*, DOAH Case No. 18-5246 (Fla. DOAH March 1, 2019; Fla. DEP April 12, 2019). *See also, Fla. Wildlife Fed'n v. CRP/HLV Highlands Ranch, LLC and Dep't of Envtl. Prot.*, Case No. 12-3219 (Fla. DOAH April 11, 2013; Fla. DEP June 13, 2013)(Interpreting the APA is within the ALJ's jurisdiction, and conclusions of law in this regard are not subject to change by the agency.)

As a conclusion of law, the District may only reject or modify COLs 84, 85, and 86 if they contain interpretations of statutes or administrative rules over which it has substantive jurisdiction, and only if the reasons for rejection or modification are as or more reasonable than the ALJ's interpretation. §120.57(1)(*l*), F.S. In his Exception No. 23 to COLs 84, 85, and 86, Petitioner argues for contrary evidentiary rulings regarding the sufficiency of evidence supporting the permit application but does not propose a conclusion of law that is as or more reasonable than COLs 84, 85, and 86. For the foregoing reasons, Petitioner's Exception No. 23 is rejected.

B. Ruling on District's Exception

District's Exception No. 1

In its Exception No. 1, the District takes exception to FOF 20 contending that FOF 20 is really a conclusion of law that incorrectly summarizes the District's water quantity permitting criteria. FOF 20 states:

> 20. In permitting stormwater management systems, or elements thereof, the District is guided by the principle that post-development stormwater volume cannot exceed predevelopment stormwater volume.

Although labeled as a finding of fact, paragraph 20 is more in the nature of a conclusion of law. *Pillsbury v. State Dep 't of Health & Rehab. Serv.,* 744 So. 2d 1040, 1041-42 (Fla. 2d

DCA 1999) ("The mere fact that what is essentially a factual determination is labeled a conclusion of law, whether labeled by the hearing officer or the agency, does not make it so, and the obligation of the agency to honor the hearing officer's findings of fact cannot be avoided by categorizing a contrary finding as a conclusion of law. *See Kinney, supra.*

When ruling on an exception to a conclusion of law, the agency must adhere to Section 120.57(1)(*l*), F.S., which provides:

> When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified.

The District's water quantity related conditions for issuance are found in Florida Administrative Code Rule 62-330.301(1)(a), (b), and (c). (T. 901:20 – 902:01). Section 3.2.1 of the Applicant's Handbook Volume II (A.H. Vol. II) contains presumptive criteria for the water quantity related conditions for issuance. (Jt. Ex. 1: 3; T. 904:08 – 905:16). Section 3.2.1, A.H. Vol. II, states in pertinent part:

3.2.1 Water Quantity Revised 6/1/18

> (a) The post-development ***peak discharge rate*** must not exceed the pre-development ***peak rate of discharge*** for the mean annual 24-hour storm for systems serving both of the following:
>
> (1) New construction area greater than 50% impervious (excluding waterbodies)
>
> (2) Projects for the construction of new developments that exceed the thresholds in paragraphs 62-330.020(2)(b) or (c), F.A.C.
>
> Note: Both of these conditions must be met before a project is required to comply with the ***peak discharge criterion***. Also, projects which modify existing systems are exempt from this criterion pursuant to condition 2., above. Pervious concrete and turf blocks are not considered impervious surface for

this purpose, however, compacted soils and limerock are considered impervious for purposes of this subsection.

(b) The post-development ***peak rate of discharge*** must not exceed the pre-development ***peak rate of discharge*** for the 25-year frequency, 24-hour duration storm for all areas of the District except: ….

(Emphasis added)

To determine whether the disputed permit would meet the applicable permitting criteria, the District's expert witness, Ms. Dewey, testified that she compared the post-development peak rate of discharge with the pre-development peak rate of discharge. (T. 905:10 - 907:21). The permitting criteria requires the District to compare the post-development peak rate of discharge with the pre-development peak rate of discharge. (Section 3.2.1, A.H. Vol. II; T. .905:10 - 907:21). Indeed, in FOFs 34, 35, and 36, the ALJ recognized that the permit would meet the applicable water quantity related permitting criteria by finding that "the post-development *peak rate of discharge* will not exceed the predevelopment *peak rate of discharge,*" "the Project will not cause flooding to on-site or off-site property because the *peak stages of the discharge* will not extend beyond the limits of Orange County's easement," and "the Project will not cause flooding to on-site or off-site property because the *peak stages of the discharge* will not extend beyond the limits of Orange County's easement" Thus, the granting of this exception will not lead to a different result.

There being no such permitting criterion and no competent substantial evidence to support the comparison of pre- and post- development *stormwater volume*, FOF 20 should be corrected to reflect the testimony and exhibits that establish a comparison of the pre- and post-development peak rate of discharge under section 3.2.1 of A.H. Vol. II. Therefore, the FOF is modified to read:

> 20. In permitting stormwater management systems, or elements thereof, the District is guided by the principle that the post-development peak rate of discharge ~~stormwater volume~~ cannot exceed the pre-development peak rate of discharge ~~stormwater volume.~~"

Based on the above, this substituted conclusion of law is as or more reasonable than that which was modified.

C. Rulings on Orange County's Exceptions[12]

Orange County's Exception No. 1

In its first exception, the County takes exception to the last sentence of FOF 3 on page 8 of the RO, which states:

> Orange County is the applicant for the Permit, the activities authorized by which are, except for the rock check dam on Lake Ola Boulevard, to be constructed on a drainage easement in its favor over the eastern 20 feet of Petitioner's property.

(RO at 8)

The County takes exception to this finding of fact "because it does not specifically mention Orange County's 10-foot drainage easement on the adjoining neighbor's property," (App. Exceptions at 2, citing RO at 8). The County asks that this finding of fact be amended to include "easements" in the plural and to include the language: "and the western 10 feet of the adjacent property." (App. Exceptions at 2.) The District maintains that elsewhere in the RO, the ALJ has acknowledged the existence of the 10-foot easement on Petitioner's neighbor's property. (Dist. Response to App. Exceptions at 2, citing RO FOF 10, 12).

The District 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.

[12] Orange County took three exceptions to the RO, which were labeled Exception A, B, and C. For purposes of this FO, Orange County's exceptions will be referred to as Orange County's exceptions 1, 2, and 3, respectively.

The record reveals the activities authorized by the permit are to be constructed on a drainage easement in Orange County's favor over the eastern 20 feet of Petitioner's property (Jt. Ex. 13 (construction plans); Jt. Ex. 26 (survey)). Thus, the last sentence of paragraph 3 on page 8 of the RO (RO at 8, FOF 3) is based on competent, substantial evidence.

The District cannot grant the County's request for an additional, supplemental finding of fact. *Charlotte Cnty. v. IMC Phosphates Co.*, 18 So. 3d 1089, 1092 (Fla. 2d DCA 2009) ("If the findings are supported by record evidence and comply with the essential requirements of law, [the agency] is bound by the ALJ's findings of fact." (citing *Fla. Dep't of Corr. v. Bradley*, 510 So. 2d 1122, 1123 (Fla. 1st DCA 1987)); *Berry v. Fla. Dep't of Envtl. Regulation*, 530 So. 2d 1019, 1022 (Fla. 4th DCA 1988) ("the agency may reject the findings of the hearing officer only when there is *no* competent substantial evidence from which the finding could reasonably be inferred" (emphasis in original)).

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 3. Accordingly, competent substantial evidence supports the ALJ's finding. *City of Hialeah Gardens v. Miami-Dade Charter Found., Inc.*, 857 So. 2d 202, 204 (Fla. 3d DCA 2003). Orange County's Exception No. 1 is rejected.

Orange County's Exception No. 2

The County's second exception is to a portion of FOF 19, which twice refers to a 48.3-acre catchment area. App's Exceptions at 4. The County alleges that FOF 19 incorrectly identifies the catchment area as being 48.3 acres rather than the 46.3 acres indicated by the ALJ elsewhere in the R.O. in FOF 6 and that this inconsistency is attributable to a typographical error. Respondent Exceptions at 4.

The District is bound by the ALJ's factual findings if they are supported by competent substantial evidence and comply with the essential requirements of the law. The District may only reject the ALJ's findings of fact where there is *no* competent substantial evidence in the record from which the finding could reasonably have been inferred or where the proceedings on which the finding of fact was based did not comply with the essential requirements of law. *See* §120.57(1)(*l*), Fla. Stat. *See also, Charlotte Cnty.*, 18 So. 3d 1089, 1092; *Berry*, 530 So. 2d 1019, 1022. A review of the entire record indicates that there is no competent and substantial evidence to support the catchment area being 48.3 acres. Rather, the competent substantial evidence shows that the catchment area is 46.3 acres. *See* Jt. Ex. 13 at 4; Jt. Ex. 24 at 3-4; Ex. NB 91 at 130:04-21; NB 91 Ex. 7 at 17, 22-23, and 43-44; *see also* FOF 6 (stating that the catchment area is comprised of a series of eight sub-basins that cumulatively total approximately 46.3-acres).

The correction of this typographical error does not change the ALJ's ultimate findings or recommendation that Permit No. 154996-2 should be issued. Therefore, Orange County's Exception No. 2 is accepted, and the record is corrected to reflect the two references to the "48.3-acre" catchment area in FOF 19 are changed to reflect the catchment area is "46.3-acres."

Orange County's Exception No. 3

In its third exception, Orange County takes exception to a portion of FOFs 3, 5, 8, 9, and 18, wherein the R.O. refers to Lake Ola Drive by two different names: Lake Ola Drive and Lake Ola Boulevard. The County takes exception to these findings of fact because Lake Ola Drive and Lake Ola Boulevard refer to the same roadway and the County requests a parenthetical be added to further clarify this point.

The County is correct that both Lake Ola Drive and Lake Ola Boulevard refer to the same roadway; however, the disputed findings of fact, as they stand, are based on competent substantial evidence. (Jt. Ex.'s 3, 5, 13, 26; O.C. Ex.'s 50, 51, 53). The District cannot make additional, supplemental finding of fact. *See, e.g.*, *Charlotte Cnty. v. IMC Phosphates Co.*, 18 So. 3d 1089, 1092 (Fla. 2d DCA 2009) ("If the findings are supported by record evidence and comply with the essential requirements of law, [the agency] is bound by the ALJ's findings of fact." (citing *Fla. Dep't of Corr. v. Bradley*, 510 So. 2d 1122, 1123 (Fla. 1st DCA 1987)); *Berry v. Fla. Dep't of Envtl. Regulation*, 530 So. 2d 1019, 1022 (Fla. 4th DCA 1988) ("the agency may reject the findings of the hearing officer only when there is *no* competent substantial evidence from which the finding could reasonably be inferred" emphasis in original)).

Furthermore, whether the roadway is referred to as Lake Ola Boulevard or Lake Ola Drive is immaterial to the issue of whether the proposed construction and operation of an outfall drainage improvement project for a 0.167-acre project known as Lake Ola Circle Outfall Drainage Improvements meets the criteria in rules 62-330.301 and 62-330.302, F.A.C., and A.H. Vol. I. Therefore, Orange County's Exception No. 3 is rejected.

ACCORDINGLY, IT IS HEREBY ORDERED:

The Recommended Order dated July 19, 2021, attached hereto as Exhibit "A," is adopted in its entirety as it relates to ERP application number 154996-2 except as modified by the final action of the agency in the rulings on FOF 19 as clarified in the ruling on Orange County's Exception No. 2 and the ruling on FOF 20 as clarified in the ruling on the District's Exception No. 1. Orange County's ERP number 154996-2 is hereby issued under the terms and conditions contained in the Technical Staff Report dated December 18, 2020, attached hereto as Exhibit "B."

DONE AND ORDERED this 1st day of September 2021, in Palatka, Florida.

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT

BY:
Ann B. Shortelle, Ph.D.
Executive Director

RENDERED this 1st day of September 2021.

BY:
Courtney Waldron
District Clerk

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Notice of Rights

1. Pursuant to Section 120.68, Florida Statutes, a party who is adversely affected by final District action may seek review of the action in the district court of appeal by filing a notice of appeal under Rule 9.110, Florida Rules of Appellate Procedure, within 30 days of the rendering of the final District action.

2. A District action or order is considered "rendered" after it is signed on behalf of the District and is filed by the District Clerk.

3. Failure to observe the relevant time frame for filing a petition for judicial review as described in paragraph 1 will result in waiver of that right to review.

EXHIBIT B

INDIVIDUAL ENVIRONMENTAL RESOURCE PERMIT TECHNICAL STAFF REPORT
18-Dec-2020
APPLICATION #: 154996-2

Applicant: Maricela Torres
Orange County Public Works Department Roads & Drainage Division
by Easement
4200 S John Young Pkwy
Orlando, FL 32839-8659
(407) 836-7875

Owner: Maricela Torres
Orange County Public Works Department Roads & Drainage Division
by Easement
4200 S John Young Pkwy
Orlando, FL 32839-8659
(407) 836-7875

Consultant: Brian Williams
CDM Smith
101 Southhall Ln
Maitland, FL 32751-7240
(239) 938-9630

Project Name: Lake Ola Circle Outfall Drainage Improvements
Acres Owned: 0.0
Project Acreage: 0.167
County: Orange
STR:

Section(s):	Township(s):	Range(s):
8	20S	27E

Receiving Water Body:

Name	Class
Lake Ola	III Fresh

Authority: 62-330.020 (2)(a), 62-330.020 (2)(j)
Existing Land Use: Wetlands(6000), Residential - Low Density(1100)
Mitigation Drainage Basin: Southern Ocklawaha River
Special Regulatory Basin: Wekiva Recharge Basin, Ocklawaha River
Final O&M Entity: Orange County Public Works
ERP Conservation Easements/Restrictions: No
Interested Parties: Yes
Objectors: Yes

Authorization Statement:
Construction and operation of a outfall drainage improvement project for a 0.167-acre project known as Lake Ola Circle Outfall Drainage Improvements as per plans received by the District on October 20, 2020.

Recommendation: Approval
Reviewers: Cammie Dewey; Nicole Martin

Staff Comments

Project Applicant and Sufficient Real Property Interest:

The permit applicant is the holder of a recorded easement conveying the right to utilize the property for a purpose consistent with the authorization requested in the permit application.

Project Location and Brief Description:

The project is located near Lake Ola Circle on the north side of Lake Ola in Orange County. The project includes the construction of a drainage improvement outfall pipe, with a surface swale that includes open grate inlets to replace an existing open channel.

Permitting History:

The proposed application is a modification of permit #154996-1, issued October 1, 2018.

This proposed modification will supersede permit #154996-1.

The proposed improvements as outlined on your ERP application and attached drawings does not qualify for federal authorization pursuant to the State Programmatic General Permit V-R1 (SPGP V-R1) Coordination Agreement, therefore a SEPARATE permit or authorization may be required from the Corps. You may need to apply separately to the Corps using the appropriate federal application form. More information about Corps permitting may be found online in the *Jacksonville District Regulatory Sourcebook*. Failure to obtain Corps authorization prior to construction could subject you to federal enforcement action by that agency.

Engineering

Description of Project:

The applicant proposes to construct an 18-inch concrete drainage outfall pipe with a surface shallow swale and inlets. The concrete pipe with shallow swale and inlets will replace an existing open channel and a segment of an existing 15-inch HDPE pipe that is upstream of the open channel. The last 57-foot segment of the concrete pipe will be constructed at a 0.6% slope and the terminus of the 18-inch concrete pipe will

incorporate baffles to dissipate any flows to non-erosive velocities as the runoff continues to flow overland towards Lake Ola. Runoff in the area of these proposed improvements will continue to flow overland towards the shallow swale with inlets, maintaining the current runoff patterns. Additionally, the applicant proposes to construct a rock check dam in the roadside swale along Lake Ola Boulevard to promote infiltration, in an area that is upstream of the drainage outfall improvements.

Conditions for Issuance (Engineering):

Rule 62-330.301(1), F.A.C., states that an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, removal, or abandonment of the projects regulated under this chapter:

(a) Will not cause adverse water quantity impacts to receiving water and adjacent lands;
(b) Will not cause adverse flooding to on-site or off-site property;
(c) Will not cause adverse impacts to existing surface water storage and conveyance capabilities.

Water Quantity:

Pursuant to section 3.1, ERP A.H. Volume II, it is presumed that the conditions for issuance (a) through (c) above are met if the projects are designed to meet the standards in subsections 3.2.1, 3.3.1, 3.3.2, 3.4.1, 3.5.1, and 3.5.2, ERP A.H. Volume II.

The applicant has met the presumptive criteria and designed the project to meet the applicable standards.

The receiving waterbody is Lake Ola. Lake Ola discharges through a culvert located at Dora Drive to Lake Carlton. Lake Ola is not considered to be land-locked. The applicant has demonstrated using an ICPR model that the post project improvements peak rate of discharge to Lake Ola will not exceed that of the pre project condition for the 10-year and 25-year, 24-hour storm events. Additionally, the peak stages within the conveyance systems for these modeled events are contained within the County's right-of-way and/or drainage easement limits.

(e) Will not adversely affect the quality of receiving waters such that the state water quality standards set forth in Chapters 62-4, 62-302, 62-520, and 62-550, F.A.C., including the antidegradation provisions of paragraphs 62-4.242(1)(a) and (b), F.A.C., subsections 62-4.242(2) and (3), F.A.C., and Rule 62-302.300, F.A.C., and any special standards for Outstanding Florida Waters and Outstanding National Resource Waters set forth in subsections 62-4.242(2) and (3), F.A.C., will be violated.

Water Quality:

The project does not directly discharge to an impaired water body, Outstanding Florida Water, or Outstanding National Resource Water.

The proposed project does not include the placement of any impervious surfaces that would produce an increased pollutant source. The County has proposed a rock check dam within the swale section adjacent to Lake Ola Drive upstream of the drainage outfall improvement project to promote infiltration within the existing swale within the road right-of-way. The proposed plans depict erosion, sediment and turbidity control measures to be utilized during construction. Upon completion of construction the proposed design includes dissipation of flows at the pipe outfall so as to prevent erosive velocities leaving the pipe.

Water Quality Certification
This permit also constitutes a water quality certification under Section 401 of the Clean Water Act, 33 U.S.C. 1341

(g) Will not adversely impact the maintenance of surface or ground water levels or surface water flows established pursuant to section 373.042, F.S.;

The activities proposed in this application are not anticipated to impact the maintenance of surface or ground water levels or surface water flows established pursuant to Section 373.042, F.S.

(h) Will not cause adverse impacts to a Work of the District established pursuant to section 373.086, F.S.;

No works of the District are within the project area.

(i) Will be capable, based on generally accepted engineering and scientific principles, of performing and functioning as proposed;

A registered professional engineer has designed the project. All supporting materials provided by the registered professional demonstrate that the project will be capable of performing and functioning as proposed based on generally accepted engineering and scientific principles.

(j) Will be conducted by a person with the financial, legal and administrative capability of ensuring that the activity will be undertaken in accordance with the terms and conditions of the permit, if issued;

The permit applicant is the holder of a recorded easement conveying the right to utilize the property for a purpose consistent with the authorization requested in the permit application. The applicant also has the financial capability of ensuring that the activity will be undertaken in accordance with the terms and conditions of the permit.

(k) Will comply with any applicable special basin or geographic area criteria.

Special Basin Criteria:
The project is located within the Ocklawaha River Hydrologic Basin. The project, as proposed, is consistent with the conditions for permit issuance pursuant to Section 13.2 and 40C-41.063(2), F.A.C., as follows:

Storm Frequency: The post-development peak rate of discharge is not expected to exceed the pre-development peak rate of discharge generated by the 10-year 24-hour storm event. Therefore, this standard is met.

Runoff Volume: The project does not include a pumped discharge. Therefore, this standard does not apply.

The project is located within the Wekiva Recharge Protection Area. The project does not include the placement of impervious surfaces within the Most Effective Recharge Area; therefore, the standard in Section 13.3.1, A.H. Vol II does not apply.

Operation and Maintenance:
The project will be operated and maintained by the applicant and, thus, meets the requirements of Section 12.3.1(a), ERP A.H. Volume I.

Environmental

Site Description:
The site is within a rural residential area and includes an upland cut ditch that transitions to a shallow swale that discharges to Lake Ola. Wetlands are located at the end of the swale within the area that discharges to Lake Ola. There is a wetland scrub community along the shoreline of Lake Ola; this wetland is located within the easement limits, but outside of the project boundary.

Conditions for Issuance (Environmental):

Rule 62-330.301(1), F.A.C., states that an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, removal, or abandonment of the projects regulated under this chapter:

(d) Will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters;

In evaluating this criterion, District staff considered Section 10.2.2, ERP A.H. Volume I, which states that an applicant must provide reasonable assurances that a regulated activity will not impact the values of wetland and other surface water functions so as to cause adverse impacts to: (a) the abundance and diversity of fish, wildlife, listed species and the bald eagle (*Haliaeetus leucocephalus*); and (b) the habitat of fish, wildlife, and listed species.

District staff conducted a site visit to assess the project area and determined the jurisdictional wetlands within the project boundaries have been historically mowed and maintained as a single-family residential lawn and the ditch and swale has no significant value of functions to fish and wildlife and listed species. The project will not cause adverse impacts to the abundance and diversity of fish, wildlife, listed species and the bald eagle (*Haliaeetus leucocephalus*); and the habitat of fish, wildlife, and listed species.

(f) Will not cause adverse secondary impacts to the water resources.

Secondary impacts: *Subsection 10.2.7, ERP A.H. Volume I, contains a four-part criterion that addresses additional impacts that may be caused by a proposed activity: (a)adverse impacts to wetland (and other surface water) functions and water quality violations that may result from the intended or reasonably expected uses of a proposed activity; (b) adverse impacts to the upland nesting habitat of bald eagles and aquatic or wetland dependent listed animal species; (c) impacts to significant historical and archaeological resources that are very closely linked and causally related to any proposed dredging or filling of wetlands or other surface waters; and (d) adverse wetland (and other surface) impacts and water quality violations that may be caused by future phases of the project or by activities that are very closely linked and causally related to the project.*

The proposed improvements were assessed for the potential to result in unacceptable secondary impacts, as defined in section 10.2.7(a), ERP A.H. Volume I. The improvements within the ditch, swale and jurisdictional wetlands will not result in adverse impacts to the functions of wetlands associated with Lake Ola nor will the improvements result in water quality violations as described previously.

A review for known bald eagle nest sites in the general area was accomplished and there are no nests identified within or in close proximity to the project area.

Significant historical and archaeological resources are not expected to be impacted by the proposed improvements as defined by Section 10.2.7(c), ERP A.H. Volume I.

Based on the submitted information, there is no indication that future phases or activities that are closely linked and causally related to the project would result in water quality violations or adverse impacts to the functions of wetlands or other surface waters, pursuant to Section 10.2.7(d), ERP A.H. Volume I.

Additional Conditions for Issuance

Rule 62-330.302(1) states that in addition to the conditions in Rule 62-330.301, F.A.C., to obtain an individual permit, an applicant must provide

reasonable assurance that the construction, alteration, operation, maintenance, repair,
removal, and abandonment of a project:

(a) Located in, on, or over wetlands or other surface waters will not be contrary to the public interest, or if such activities significantly degrade or are within an Outstanding Florida Water (OFW), are clearly in the public interest, as determined by balancing the following criteria as set forth in sections 10.2.3 through 10.2.3.7, ERP A.H. Volume I:

Public Interest
The project is not located within or adjacent to an OFW. In determining whether the proposed improvements are not contrary to the public interest, the District shall consider and balance the following criteria:

1. Whether the activities will adversely affect the public health, safety, or welfare or the property of others;

In reviewing and balancing this criterion, the District will evaluate whether the activity located in, on, or over wetlands or other surface waters will cause:

(a) An environmental hazard to public health, safety, or improvement to public safety with respect to environmental conditions;

(b) Impacts to areas classified by the Department of Agriculture and Consumer Services as approved, conditionally approved, restricted or conditionally restricted for shellfish harvesting;

(c) Flooding or alleviate existing flooding on the property of others; and

(d) Environmental impacts to property of others.

The project will not cause an environmental hazard to public health or safety, is not located in a designated shellfish harvesting area, and will not cause environmental impacts to the property of others. The proposed improvements are located within a drainage easement. Pursuant to 10.2.3.1(c), ERP A.H. Volume I, this factor is neutral.

2. Whether the activities will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;

The District’s review of this factor is encompassed within the review of the proposed improvements under section 10.0, ERP A.H. Volume I, described above; therefore, this factor is neutral.

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

In reviewing and balancing this criterion, the District will evaluate whether the activity located in, on, or over wetlands or other surface waters will:

(a) Significantly impede navigability. The District will consider the current navigational use of surface waters and will not speculate on uses that may occur in the future.

(b) Cause or alleviate harmful erosion or shoaling.

(c) Significantly impact or enhance water flow.

The proposed improvements are not located within navigable waters and will not significantly impede navigability. The applicant is required to comply with erosion control best management practices and the permit includes a condition that requires the applicant to utilize appropriate erosion control practices during construction activities. Upon completion of construction the proposed design includes dissipation of flows at the pipe outfall so as to prevent erosive velocities leaving the pipe. Therefore, this factor is neutral.

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

In reviewing and balancing this criterion, the District will evaluate whether the activity located in, on, or over wetlands or other surface waters will cause:

(a) Adverse effects to sport or commercial fisheries or marine productivity.

(b) Adverse effects or improvements to existing recreational uses of a wetland or other surface waters, which may provide boating, fishing, swimming, waterskiing, hunting and bird watching.

There are no sport or commercial fisheries on or directly adjacent to the project. No adverse impacts to wetlands or other surface waters are proposed; therefore, this factor is neutral.

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

The project will result in 0.001 acre of permanent impacts and 0.031 acre of temporary impacts associated with the construction of the outfall structure. No adverse impacts to wetlands or other surface waters are proposed; therefore, this factor is neutral.

6. Whether the activities will adversely affect or will enhance significant historical and archaeological resources under the provisions of Section 267.061, F.S.; and

No adverse impacts to cultural resources are anticipated and the permit includes the recommended condition to cease activities and contact the Division of Historical

Resources should unexpected artifacts be encountered during ground breaking activities. Therefore, this factor is neutral.

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

The wetlands within the project area provides very limited ecological functions and no adverse impacts are proposed; therefore, this factor is neutral.

Staff determined in balancing the above criteria, that the proposed project was neutral and the applicant had provided sufficient reasonable assurance that the project is not contrary to the public interest.

(b) Will not cause unacceptable cumulative impacts upon wetlands and other surface waters as set forth in sections 10.2.8 through 10.2.8.2 of ERP A.H. Volume I.

Cumulative Impacts: *Subsection 10.2.8, ERP A.H. Volume I, requires applicants to provide reasonable assurances that their projects will not cause unacceptable cumulative impacts upon wetlands and other surface waters within the same drainage basin as the project for which a permit is sought. This analysis considers past, present, and likely future similar impacts and assumes that reasonably expected future applications with like impacts will be sought, thus necessitating equitable distribution of acceptable impacts among future applications. Under section 10.2.8, ERP A.H. Volume, when an applicant proposes mitigation that offsets a project's adverse impacts within the same basin as the impacts, the project does not cause unacceptable cumulative impacts.*

The ditch, swale, and wetlands have no significant ecological value. The proposed improvements are within the jurisdictional wetlands historically maintained as a single-family residential lawn. Upon completion of construction, the operation and maintenance of the proposed improvements will not result in unacceptable cumulative impacts.

(c) Located in, adjacent to or in close proximity to Class II waters or located in Class II waters or Class III waters classified by the Department of Agriculture and Consumer Services as approved, restricted, conditionally approved, or conditionally restricted for shellfish harvesting will comply with the additional criteria in section 10.2.5 of Volume I, as described in subsection 62-330.010(5), F.A.C.

The proposed activities do not occur in, adjacent to or in close proximity to Class II or Class III waters as described above.

(d) Involving vertical seawalls in estuaries or lagoons will comply with the additional criteria provided in section 10.2.6 of Volume I.

The proposed activities are not located in or adjacent to an estuary or lagoon and do not include vertical seawalls.

Impacts: *Subsection 10.2.2, ERP A.H. Volume I, states that an applicant must provide reasonable assurances that a regulated activity will not impact the values of wetland and other surface water functions so as to cause adverse impacts to: (a) the abundance and diversity of fish, wildlife and listed species; and (b) the habitat of fish, wildlife and listed species.*

The project involves installation of pipe within an existing upland cut ditch. Observations revealed no evidence that the on-site ditch provide significant habitat for threatened or endangered species and mitigation is not required to offset impacts to these systems. The outfall pipe and associated endwall will result in 0.001 acre of permanent impact and 0.031 acre temporary impact. The wetlands within the project area have been mowed and maintained, and have no significant value to the abundance and diversity of fish, wildlife, and listed species, and their habitat. Therefore, the impacts associated with the outfall pipe and associated endwall within the wetlands are not adverse.

Elimination/Reduction of Impacts: *Pursuant to Subsection 10.2.1.1, ERP A.H. Volume I, the applicant must implement practicable design modifications to reduce or eliminate adverse impacts to wetlands and other surface waters. A proposed modification that is not technically capable of being completed, is not economically viable, or that adversely affects public safety through endangerment of lives or property is not considered "practicable". Alternatively, an applicant may meet this criterion by demonstrating compliance with subsection 10.2.1.2.a. or 10.2.1.2.b, ERP A.H. Volume I.*

The proposed improvements are not adverse. Therefore, the applicant was not required to eliminate or reduce the impacts.

Mitigation:

The work within the ditch, swale, and wetlands meet the provisions of subsection 10.2.2 through 10.2.2.3, A.H., Volume I. The improvements are within the jurisdictional wetlands within an area maintained as a single-family residential lawn. The proposed improvements will not cause any adverse impacts and the area has no significant ecological value. Therefore, mitigation is not required.

Financial Assurance Mechanism:

None.

Off-Site Mitigation:

None.

Lake Ola Circle Outfall Drainage Improvements
Governmental/Institutional

		Acres
Total Surface Water, Upland RHPZ and Wetlands in Project		
Wetlands		0.032
OSW		0.000
Upland RHPZ		0.000
	Total	0.032
Impacts that Require Mitigation		
	Total	**0.000**
Impacts that Require No Mitigation		
Dredged or Filled		0.031
Dredged or Filled		0.001
	Total	**0.032**
Mitigation		
On-Site		
	Total	**0.000**
Off-Site		
	Total	**0.000**
Other		**0.000**

Conclusion:
The applicant has provided reasonable assurance that the proposed project meets the conditions for issuance of permits specified in rules 62-330.301 and 62-330.302, F.A.C.

Conditions

1. All activities shall be implemented following the plans, specifications and performance criteria approved by this permit. Any deviations must be authorized in a permit modification in accordance with Rule 62-330.315, F.A.C. Any deviations that are not so authorized may subject the permittee to enforcement action and revocation of the permit under Chapter 373, F.S.

2. A complete copy of this permit shall be kept at the work site of the permitted activity during the construction phase, and shall be available for review at the

work site upon request by the District staff. The permittee shall require the contractor to review the complete permit prior to beginning construction.

3. Activities shall be conducted in a manner that does not cause or contribute to violations of state water quality standards. Performance-based erosion and sediment control best management practices shall be installed immediately prior to, and be maintained during and after construction as needed, to prevent adverse impacts to the water resources and adjacent lands. Such practices shall be in accordance with the State of Florida Erosion and Sediment Control Designer and Reviewer Manual (Florida Department of Environmental Protection and Florida Department of Transportation June 2007), and the Florida Stormwater Erosion and Sedimentation Control Inspector's Manual (Florida Department of Environmental Protection, Nonpoint Source Management Section, Tallahassee, Florida, July 2008), which are both incorporated by reference in subparagraph 62-330.050(9)(b)5, F.A.C., unless a project-specific erosion and sediment control plan is approved or other water quality control measures are required as part of the permit.

4. At least 48 hours prior to beginning the authorized activities, the permittee shall submit to the District a fully executed Form 62-330.350(1), "Construction Commencement Notice," (October 1, 2013) (http://www.flrules.org/Gateway/reference.asp?No=Ref-02505), incorporated by reference herein, indicating the expected start and completion dates. A copy of this form may be obtained from the District, as described in subsection 62-330.010(5), F.A.C., and shall be submitted electronically or by mail to the Agency. However, for activities involving more than one acre of construction that also require a NPDES stormwater construction general permit, submittal of the Notice of Intent to Use Generic Permit for Stormwater Discharge from Large and Small Construction Activities, DEP Form 62-621.300(4)(b), shall also serve as notice of commencement of construction under this chapter and, in such a case, submittal of Form 62-330.350(1) is not required.

5. Unless the permit is transferred under Rule 62-330.340, F.A.C., or transferred to an operating entity under Rule 62-330.310, F.A.C., the permittee is liable to comply with the plans, terms and conditions of the permit for the life of the project or activity.

6. Within 30 days after completing construction of the entire project, or any independent portion of the project, the permittee shall provide the following to the Agency, as applicable:

    a. For an individual, private single-family residential dwelling unit, duplex, triplex, or quadruplex — "Construction Completion and Inspection Certification for Activities Associated with a Private Single-Family Dwelling Unit" [Form 62-330.310(3)]; or

b. For all other activities — “As-Built Certification and Request for Conversion to Operation Phase” [Form 62-330.310(1)].

c. If available, an Agency website that fulfills this certification requirement may be used in lieu of the form.

7. If the final operation and maintenance entity is a third party:

   a. Prior to sales of any lot or unit served by the activity and within one year of permit issuance, or within 30 days of as-built certification, whichever comes first, the permittee shall submit, as applicable, a copy of the operation and maintenance documents (see sections 12.3 thru 12.3.4 of Volume I) as filed with the Florida Department of State, Division of Corporations and a copy of any easement, plat, or deed restriction needed to operate or maintain the project, as recorded with the Clerk of the Court in the County in which the activity is located.

   b. Within 30 days of submittal of the as- built certification, the permittee shall submit “Request for Transfer of Environmental Resource Permit to the Perpetual Operation and Maintenance Entity” [Form 62-330.310(2)] to transfer the permit to the operation and maintenance entity, along with the documentation requested in the form. If available, an Agency website that fulfills this transfer requirement may be used in lieu of the form.

8. The permittee shall notify the District in writing of changes required by any other regulatory District that require changes to the permitted activity, and any required modification of this permit must be obtained prior to implementing the changes.

9. This permit does not:

   a. Convey to the permittee any property rights or privileges, or any other rights or privileges other than those specified herein or in Chapter 62-330, F.A.C.;

   b. Convey to the permittee or create in the permittee any interest in real property;

   c. Relieve the permittee from the need to obtain and comply with any other required federal, state, and local authorization, law, rule, or ordinance; or

   d. Authorize any entrance upon or work on property that is not owned, held in easement, or controlled by the permittee.

10. Prior to conducting any activities on state-owned submerged lands or other lands of the state, title to which is vested in the Board of Trustees of the Internal Improvement Trust Fund, the permittee must receive all necessary approvals and

authorizations under Chapters 253 and 258, F.S. Written authorization that requires formal execution by the Board of Trustees of the Internal Improvement Trust Fund shall not be considered received until it has been fully executed.

11. The permittee shall hold and save the District harmless from any and all damages, claims, or liabilities that may arise by reason of the construction, alteration, operation, maintenance, removal, abandonment or use of any project authorized by the permit.

12. The permittee shall notify the District in writing:

    a. Immediately if any previously submitted information is discovered to be inaccurate; and

    b. Within 30 days of any conveyance or division of ownership or control of the property or the system, other than conveyance via a long-term lease, and the new owner shall request transfer of the permit in accordance with Rule 62-330.340, F.A.C. This does not apply to the sale of lots or units in residential or commercial subdivisions or condominiums where the stormwater management system has been completed and converted to the operation phase.

13. Upon reasonable notice to the permittee, District staff with proper identification shall have permission to enter, inspect, sample and test the project or activities to ensure conformity with the plans and specifications authorized in the permit.

14. If prehistoric or historic artifacts, such as pottery or ceramics, projectile points, stone tools, dugout canoes, metal implements, historic building materials, or any other physical remains that could be associated with Native American, early European, or American settlement are encountered at any time within the project site area, the permitted project shall cease all activities involving subsurface disturbance in the vicinity of the discovery. The permittee or other designee shall contact the Florida Department of State, Division of Historical Resources, Compliance Review Section (DHR), at (850) 245-6333, as well as the appropriate permitting agency office. Project activities shall not resume without verbal or written authorization from the Division of Historical Resources. If unmarked human remains are encountered, all work shall stop immediately and the proper authorities notified in accordance with Section 872.05, F.S. For project activities subject to prior consultation with the DHR and as an alternative to the above requirements, the permittee may follow procedures for unanticipated discoveries as set forth within a cultural resources assessment survey determined complete and sufficient by DHR and included as a specific permit condition herein.

15. Any delineation of the extent of a wetland or other surface water submitted as part of the permit application, including plans or other supporting documentation,

shall not be considered binding unless a specific condition of this permit or a formal determination under Rule 62-330.201, F.A.C., provides otherwise.

16. The permittee shall provide routine maintenance of all components of the stormwater management system to remove trapped sediments and debris. Removed materials shall be disposed of in a landfill or other uplands in a manner that does not require a permit under Chapter 62-330, F.A.C., or cause violations of state water quality standards.

17. This permit is issued based on the applicant's submitted information that reasonably demonstrates that adverse water resource-related impacts will not be caused by the completed permit activity. If any adverse impacts result, the District will require the permittee to eliminate the cause, obtain any necessary permit modification, and take any necessary corrective actions to resolve the adverse impacts.

18. A Recorded Notice of Environmental Resource Permit may be recorded in the county public records in accordance with Rule 62-330.090(7), F.A.C. Such notice is not an encumbrance upon the property.

19. This permit for construction will expire five years from the date of issuance.

20. All wetland areas or water bodies that are outside the specific limits of construction authorized by this permit must be protected from erosion, siltation, scouring or excess turbidity, and dewatering.

21. The operation and maintenance entity shall inspect the stormwater or surface water management system once within two years after the completion of construction and every two years thereafter to determine if the system is functioning as designed and permitted. The operation and maintenance entity must maintain a record of each required inspection, including the date of the inspection, the name and contact information of the inspector, and whether the system was functioning as designed and permitted, and make such record available for inspection upon request by the District during normal business hours. If at any time the system is not functioning as designed and permitted, then within 30 days the entity shall submit a report electronically or in writing to the District using Form 62-330.311(1), "Operation and Maintenance Inspection Certification," describing the remedial actions taken to resolve the failure or deviation.

22. This permit does not authorize the permittee to cause any adverse impact to or "take" of state listed species and other regulated species of fish and wildlife. Compliance with state laws regulating the take of fish and wildlife is the responsibility of the owner or applicant associated with this project. Please refer to Chapter 68A-27 of the Florida Administrative Code for definitions of "take" and a list of fish and wildlife species. If listed species are observed onsite, FWC staff

are available to provide decision support information or assist in obtaining the appropriate FWC permits. Most marine endangered and threatened species are statutorily protected and a “take” permit cannot be issued. Requests for further information or review can be sent to FWCConservationPlanningServices@MyFWC.com.

23. This permit supersedes permit number 154996-1 and the conditions of this permit now govern the project's construction, operation and maintenance.

24. The proposed project must be constructed and operated as per plans and calculations received by the District on October 20, 2020.