SJR 2021-033

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

EGAN RANCH, LLC,

Petitioner,

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT and BABCOCK, LLC,

Respondents.
_____/

DOAH Case No. 21-0437

SJRWMD F.O.R. No. 2020-31

FINAL ORDER AND ORDER OF REMAND

Background and Procedural History

1. Babcock, LLC (Applicant) applied for an environmental resource permit (ERP) to modify an existing permit to construct a stormwater management system for a coquina pit/mine in Brevard County. The St. Johns River Water Management District (District) issued the permit on December 1, 2020.

2. On December 22, 2020, Egan Ranch, LLC (Petitioner) requested an administrative hearing to challenge the issuance of the permit. The District filed a Motion to Dismiss on January 4, 2021 and, on January 19, 2021, the petition was dismissed with leave to amend for failing to comply with the requirements of rule 28-106.201(2), Florida Administrative Code (F.A.C.).

3. Petitioner timely filed an Amended Petition for Administrative Hearing with the District on February 3, 2021 (Amended Petition), which was referred to the Division

of Administrative Hearings (DOAH) where it was assigned to the Honorable Francine M. Ffolkes (ALJ).

4. On February 17, 2021, the District filed a Motion to Dismiss the Amended Petition, or in the Alternative, Motion to Strike Immaterial Allegations from the Amended Petition (Motion to Dismiss). In its Motion to Dismiss, the District argued, among other things, that certain allegations in the Amended Petition, such as Petitioner's property rights, were immaterial to the proceeding and/or outside of the jurisdictional purview of both the District and DOAH. As an alternative to its Motion to Dismiss, the District argued that certain allegations in the Amended Petition should be stricken as immaterial and irrelevant.

5. On February 24, 2021, Petitioner filed a Response to the District's Motion to Dismiss.

6. On March 8, 2021, Applicant filed a Joinder in Motion to Dismiss filed by the District wherein it provided notice of its intent to institute a Circuit Court action in Brevard County seeking, among other things, declaratory relief and adjudication of its property rights. On March 18, 2021, Applicant filed a Notice of Filing Circuit Court Litigation and requested the ALJ take judicial notice of the filing of that lawsuit.

7. Petitioner filed a Response to Applicant's Joinder in the Motion to Dismiss on March 12, 2021.

8. On March 23, 2021, the ALJ submitted to the District and all the parties to this proceeding a Recommended Order of Dismissal (Recommended Order), a copy of which is attached as Exhibit "A."

9. The Recommended Order advised the parties that they had 15 days to file exceptions to the Recommended Order with the District. On March 24, 2021, counsel for the Governing Board of the District sent all the parties a letter advising them of their right to file exceptions to the Recommended Order by no later than 5:00 p.m. on April 7, 2021. A copy of the March 24, 2021 letter is attached hereto as Exhibit "B."

10. Petitioner and District filed timely exceptions to the Recommended Order on April 7, 2021. That same day, Petitioner also filed a Request for Official Notice with the District's Clerk, requesting notice of ERP permits 105413-3 and 105413-4 and Permittee's Notice of Filing Circuit Court Litigation.

11. On April 8, 2021, the Applicant filed Exceptions to the Recommended Order (Applicant's Exceptions). Applicant's Exceptions were filed after the 15-day timeframe provided in the statute and rule, which was specifically called out in the Governing Board Counsel's letter to the parties. *See*, §120.57(1)(k), F.S.[1]; R. 28-106.117(1), F.A.C.; and Exhibit B. Thus, Applicant's Exceptions must be treated as untimely. *Town of Hillsboro Beach v. City of Boca Raton and Dep't of Envtl. Prot.,* No. 18-0019 (Fla. Dep't Envtl. Prot. Jan. 30, 2018). (Final Order). Since Applicant's Exceptions were untimely, Applicant has waived its objections to the ALJ's findings of fact and conclusions of law. *Henderson v. Dep't of Health, Bd. of Nursing*, 954 So.2d 77, 81 (Fla. 5th DCA 2007); *Worster v. Dep't of Health*, 767 So.2d 1239, 1240 (Fla. 1st DCA 2000); *Env't Coal. of Fla., Inc. v. Broward Cnty.*, 586 So.2d 1212, 1213 (Fla. 1st DCA 1991). However, an agency head reviewing a recommended order is free to modify or reject any erroneous conclusions of law over

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

which the agency has substantive jurisdiction, even when exceptions are not filed. *See* §120.57(1)(l), F.S.; Barfield v. Dep't of Health, 805 So.2d 1008 (Fla. 1st DCA 2001).

12. Responses to exceptions are due within 10 days from the date exceptions were filed with the District. R. 28-106.217(3), F.A.C. On April 19, 2021, the District filed timely Responses to Petitioner's Exceptions to the Recommended Order.

13. On April 20, 2021, Applicant filed an untimely Joinder in the District's Responses to Petitioner's Exceptions to the Recommended Order (Joinder in District's Responses) in which it joined in all but one of the District's Responses to Petitioner's Exceptions (excluding the consideration of remanding the case). Thus, Permittee's Joinder in District's Responses must be considered untimely, and the undersigned need not consider it.

14. Pursuant to Section 373.079(4) of the Florida Statutes, the Governing Board of the District has delegated all of its authority to take final action approving permit applications under Part IV of Chapter 373 of the Florida Statutes, to specific staff, including the District's Executive Director. Because counsel for the Governing Board of the District recommends a limited remand of this matter back to DOAH to consider one issue, this matter now comes before me as the District's Executive Director for final agency action.

Standard of Review - Generally

The District's authority to modify a Recommended Order is not dependent on the filing of exceptions. *Westchester General Hospital v. Dep't Human Res. Servs.*, 419 So.2d 705 (Fla. 1st DCA 1982). Under section 120.57(1)(k), F.S., and rule 28-106.217(1), F.A.C., any party may file written exceptions to a recommended order with the agency

responsible for rendering final action. Section 120.57(1)(k), F.S., provides that an agency need not rule on an exception to a recommended order if the exception does not:

a) "clearly identify the disputed portion of the recommended order by page number or paragraph,"

b) "identify the legal basis for the exception, or"

c) "include appropriate and specific citations to the record."

§120.57(1)(k), F.S.

A party filing an exception must specifically alert the agency to any perceived defects in the Administrative Law Judge's (ALJ) findings, and in so doing the party must cite to specific portions of the record as support for the exception. *Dep't of Envtl. Prot. v. South Palafox Prop., Inc.*, No. 14-3674, FO at p.20 (FDEP May 29, 2015) (holding petitioner's exception contained more argument and no record citations; therefore, the exception was denied for failing to meet the requirements of section 120.57(1)(k), F.S.). Thus, an exception that simply refers to or attempts to incorporate by reference another exception fails to comply with the statutory requirements of section 120.57(1)(k), F.S., and need not be ruled on.

Standard of Review – for Rejecting Conclusions of Law

When ruling on an exception to a conclusion of law, the District must follow section 120.57(1)(l), F.S., which provides:

> The agency in its final order may reject or modify the conclusions of law **over which it has substantive jurisdiction** and **interpretation** of administrative rules **over which it has substantive jurisdiction**. 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.

(Emphasis added.) Thus, 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.*

The District 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 District finds that such rejection or modification is as or more reasonable than the ALJ's conclusion or interpretation. Section 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 District 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. Protection,* DOAH 05-1609 (DEP 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. Protection*, 28

F.A.L.R. 3844, 3846 (DEP 2005) (evidentiary rulings of the ALJ concerning the admissibility and competency evidence are not matters within the agency's substantive jurisdiction).

The District's authority to modify a Recommended Order is not dependent on the filing of exceptions. *Westchester General Hospital v. Dep't Human Res. Servs.*, 419 So.2d 705 (Fla. 1st DCA 1982). An agency head reviewing a recommended order is free to modify or reject any erroneous conclusions of law over which the agency has substantive jurisdiction, even when exceptions are not filed. *See* §120.57(1)(l), F.S.; *Barfield v. Dep't of Health*, 805 So.2d 1008 (Fla. 1st DCA 2001).

Ruling on Petitioner's Request for Official Notice

On April 7, 2021, Petitioner filed a Request for Official Notice with the District, requesting the District take official notice of certain ERP permits and the Permittee's Notice of Filing Circuit Court Litigation in the formulation of this Final Order. However, upon receiving a recommended order from the ALJ, the District is limited to the alternatives set forth in paragraphs 120.57(1)(k) and (l), for rejecting or modifying the ALJ's conclusions of law and findings of fact. Nothing in these paragraphs authorize an agency to reopen the record, receive additional evidence, and make additional findings. *Lawnwood Med. Ctr., Inc. v. Agency for Health Care Admin.*, 678 So.2d 421 (Fla. 1st DCA 1996), citing *Henderson Signs v. Fla. Dep't of Transp.*, 397 So.2d 769, 772 (Fla. 1st DCA 1981). Moreover, official notice (or official recognition) cannot be used as a device for agencies to circumvent an ALJ's findings of fact by building a new record on which to make new findings. *Fla. Dep't of Transp. v. J.W.C. Co., Inc.*, 396 So.2d 778 (Fla. 1st DCA 1981). Based on the foregoing, Petitioner's Request for Official Notice is denied.

Ruling on Respondent District's Exceptions

The District's two exceptions to the Recommended Order are both to scrivener's errors in the introductory paragraph. In District Exception No. 1, the District takes exception to the reference to the South Florida Water Management District as the Respondent who filed the Motion to Dismiss in this case. The record is clear that the South Florida Water Management District is not a party to this case and that the Motion to Dismiss was filed by the St. Johns River Water Management District.

In District Exception No. 2, the District notes a scrivener's error in the next to last sentence in the introductory paragraph, which states:

> The proposed modification (ERP Permit Modification) increases the depth of excavation activities to 75 feet below the land *service*.

(Emphasis added). The record does not support the depth of excavation activities to 75 feet below the land *service*. Rather, the record is clear that the permit modification is for increasing the depth of excavation activities to 75 below the land *surface*. See, District's December 1, 2020 Technical Staff Report, attached to the Notice of Referral as Attachment 2.

District Exception Nos. 1 and 2 are accepted and the record is corrected to reflect the changes to the introductory paragraph described above.

Ruling on Petitioner Egan Ranch, LLC's Exceptions

All five of Petitioner's Exceptions ask the District to reject or modify conclusions of law. However, it is unclear what interpretation(s) of rules or statutes it seeks to have rejected or modified. Instead, Petitioner simply alleges in its Exceptions that "the ALJ erred at law" (Exception No. 1, page 1; Exception No. 2, page 8; Exception No. 4, page

14, Exception No. 5, page 17) or "erred under the law" (Exception No. 3, page 11). Petitioner does not provide a statement or analysis of the District's substantive jurisdiction to grant exceptions and does not offer contrary interpretations of administrative rules or environmental statutes which are as or more reasonable than the ALJ's conclusions of law or interpretation of a District rule. Without an adequate exception that provides an "as or more reasonable" conclusion of law or interpretation than the Judge's, the District could not grant an exception. §120.57(1)(l), F.S. However, as previously stated, an agency head reviewing a recommended order is free to modify or reject any erroneous conclusions of law over which the agency has substantive jurisdiction, even when exceptions are not filed. *See* §120.57(1)(l), F.S.; *Barfield v. Dep't of Health*, 805 So.2d 1008.

Petitioner Egan Ranch, LLC's Exception Nos. 1, 2, 5

Petitioner's Exceptions Nos. 1, 2, and 5 all pertain to an easement agreement between Petitioner and Respondent Babcock, LLC's (Applicant) predecessor in interest in the land upon which Applicant proposes to expand its mining operations. In Exceptions Nos. 1, 2, and 5, Petitioner argues that the ALJ "erred at law." As explained above, the District's standard of review in ruling on exceptions is not whether the ALJ "erred at law" but rather whether the Petitioner has provided a substitute conclusion of law that is "as or more reasonable" over a matter of which the District has substantive jurisdiction. §120.57(1)(l), F.S.

Petitioner's Exception No. 1 argues that the ALJ was incorrect in concluding that easement agreements cannot be adjudicated in administrative pleadings. Petitioner's Exception No. 2 argues that the ALJ was incorrect in concluding that the circuit court

retains jurisdiction of all action involving the right of possession of real property (here in the context of reviewing the subject easement). Petitioner's Exception No. 5 argues that the ALJ was incorrect in concluding that interpretation of the restrictions in the drainage easement agreement was a contract interpretation issue vested solely in the judiciary. Each of these three exceptions also argues that Applicant does not have sufficient real property interests over the land upon which the activities subject to the application will be conducted, citing Rule 62-330.060(3), F.A.C., and subsection 4.2.3(d), Environmental Resource Permit Applicant's Handbook Volume I (ERP A.H., Vol. I)

To provide reasonable assurance that permitted projects "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" pursuant to Rule 62-330.301(1)(j), F.A.C., an application must contain "documentation of the applicant's real property interest over the land **upon which the activities subject to the application will be conducted**." (Emphasis added) Section 4.2.3(d), ERP A.H., Vol. I. Specifically, "[i]nterests in real property typically are evidenced by: (1) The applicant being the record title holder." Section 4.2.3(d)1. ERP A.H., Vol. I. Additionally, rule 62-330.060(3), F.A.C., provides, in pertinent part, that "(t)he applicant must certify that it has sufficient real property interest over the land **upon which the activities subject to the application will be conducted**, as required in Section A of Form 62-330.060(1) and Section 4.2.3(d) of [ERP A.H., Vol. I]." (Emphasis added) In the application at issue here, Applicant provided a deed[2] demonstrating it is the record title holder over the land upon which the permitted activities will occur.

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[2] The Deed is attached as Exhibit C to the Amended Petition.

The essence of Petitioner's Exceptions 1, 2, and 5 appears to be the following: (1) the ALJ erred in "the legal conclusion that neither SJRWMD nor the ALJ can hold an administrative hearing to determine whether the Applicant can establish a real property interest authorizing the **activity of discharging mine water** that flows *south* into Canal E over Egan Ranch property;" and (2) an applicant must "certify that it has 'sufficient real property interest over the land upon which the **activities** subject to the application **will be conducted' - specifically**, in this case, **whether Babcock had the requisite flowage easement to allow *mine water* to flow over the portion of Canal** E located on Egan Ranch property... ." (**Emphasis supplied;** italics in original) (Petitioner's Exceptions at page 5).

Petitioner argues that Applicant must demonstrate a sufficient real property interest over the land where stormwater will flow. Basically, Petitioner appears to believe that "activity" includes where water will flow or discharge. However, Petitioner has misconstrued or misinterpreted what "activities" means in the phrase "sufficient real property interest over the land upon which the activities subject to the application will be conducted." The term "activities" is defined as follows:

> "Activity" or "Activities" means **construction, alteration, operation**, maintenance, abandonment, or removal of **any stormwater management system**, dam, impoundment, reservoir, works [including dredging or filling, as those terms are defined in Sections 373.403(13) and (14), F.S.], and appurtenant works.

(Emphasis added) Subsection 2.0(a)2., ERP A.H., Vol. I.

Thus, the "activity" is where the stormwater management system will be constructed or altered, and generally does not include where stormwater discharges occur (unless an offsite area will be used to meet criteria in rule 62-330.301, F.A.C., in

which case section 1.5.6, ERP A.H., Vol. I, would apply). The scope of "activity" is further illuminated as generally only applying to the construction, alteration, or operation of the physical system by the following definitions in Subsection 2.0(a), ERP A.H., Vol. I.:

> 72. "Permit area" means *the area where works* occur as part of an activity requiring a permit under Part IV of Chapter 373, F.S., and any mitigation, buffer, and preservation areas, and all portions of the stormwater management system serving the project area.
> ***
> 76. "Project" — see "system."
>
> 77. "Project area" means *the area where works occur* as part of an activity requiring a permit under part IV of Chapter 373, F.S., or Section 403.814, F.S.
> ***
>
> 99. "Stormwater management system" means a surface water management system that is designed and constructed or implemented to control discharges which are necessitated by rainfall events, incorporating methods to collect, convey, store, absorb, inhibit, treat, use, or reuse water to prevent or reduce flooding, over drainage, environmental degradation, and water pollution or otherwise affect the quantity and quality of discharges from the system. [Sections 373.403(10) and 403.031(16), F.S.]
> ***
>
> 108. "System" or "surface water management system" means a stormwater management system, dam, impoundment, reservoir, appurtenant work, or works, or any combination thereof, including areas of dredging or filling, as those terms are defined in Sections 373.403(13) and (14), F.S. For purposes of Chapter 62-330, F.A.C., and this Handbook, the term "project" generally will be used in lieu of the term "system."

None of these definitions suggest that the term "activities" includes offsite flows[3]. The Amended Petition does not allege that the drainage easement limiting water flows is located on the land where the permitted construction and alteration work would occur. Thus, Petitioner's arguments about the ALJ's alleged ability to adjudicate real property

[3] Unless an offsite area will be used to meet criteria in rule 62-330.301, F.A.C., in which case section 1.5.6, ERP A.H., Vol. I, would apply.

rights or contract rights in that offsite drainage easement is irrelevant when considering the sufficiency of the applicant's real property interest in the land where the construction and alteration of the system will occur. Subsection 2.0(a)2., ERP A.H., Vol. I.

Petitioner also alleges that the proposed permit "purports to bestow upon Babcock a flowage easement that effectively obliterates Egan Ranch's rights under the Parrish to Egan flowage easement." (Petitioner's Exceptions at page 5). The District's permits do not create, affect, or destroy any property rights. Notably, rule 62-330.350(1)(i), F.A.C., which generally applies to all individual permits unless specifically noted otherwise, states following regarding property rights:

> (i) This permit does not:
>
> 1. *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.;
> 2. *Convey to the permittee or create in the permittee any interest in real property*;
> 3. Relieve the permittee from the need to obtain and comply with any other required federal, state, and local authorization, law, rule, or ordinance; or
> 4. *Authorize any entrance upon or work on property that is not owned, held in easement, or controlled by the permittee.*

This standard permit condition by rule makes it clear that the issuance of a District permit does not create, affect, or destroy any property rights. Moreover, the Amended Petition does not allege that the proposed permit contains substantially different language than appears in rule 62-330.350(1)(i) above.

For all these reasons, the ALJ's well-reasoned conclusions of law challenged in Petitioner's Exceptions 1, 2, and 5 will not be disturbed, and these Exceptions are rejected.

Petitioner Egan Ranch, LLC's Exception No. 4

In Exception No. 4, the Petitioner appears to take exception to the ALJ's conclusion of law regarding administrative finality on pages 3 and 4 of the RO. The District's ability to reject or modify conclusions of law is limited to those "conclusions of law over which it has substantive jurisdiction." §120.57(1)(l), F.S. The applicability of administrative finality is not a matter within the District's substantive jurisdiction. Thus, the District cannot reject or modify these conclusions. *Id.*; *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So.2d 1140, 1143 (Fla. 2d DCA 2001)(DEP lacked substantive jurisdiction to reject ALJ's conclusion of law on the applicability of *res judicata* (i.e., administrative finality)).

The ALJ correctly applied the doctrine of administrative finality to preclude Petitioner from using the instant permit challenge of ERP No. 105413-4 as a way to challenge a prior District permit (ERP No. 105413-3) and to raise complaints of noncompliance with the City of Palm Bay's permitting program. In the RO, the ALJ set forth well-reasoned conclusions recommending dismissal of Petitioner's arguments related to the prior ERP and the other agency's permit. (RO at page 3-4). *Friends of the Everglades, Inc. v. State Dep't of Envtl. Reg.*, 496 So.2d 181 (Fla. 1st DCA 1986); *Conservancy of Southwest Fla. V. G.L. Homes of Naples Assoc. II, Ltd.*, No. 06-4922, RO ¶ 109 (Fla. DOAH May 15, 2007; Fla. SFWMD July 11, 2007).

The ALJ's well-reasoned conclusion of law applying the doctrine of administrative finality should not be disturbed, and thus Petitioner's Exception No. 4 is rejected.

Petitioner Egan Ranch, LLC's Exception No. 3

Although Petitioner does not provide a citation to the Recommended Order[4], Petitioner's Exception No. 3 appears to take exception to the ALJ's conclusion of law regarding standing on page 2 of the RO. In Exception No. 3, Petitioner asserts that the allegations in paragraphs 46 - 52 of the Amended Petition are sufficient to establish its standing to challenge the issuance of District ERP 104413-4 to Applicant.

Whether a party's substantial environmental interests have been affected by a proposed permit action so as to confer standing to participate in an administrative proceeding challenging proposed agency action is a matter within the agency's substantive jurisdiction under section 120.57(1)(k), F.S. *Peace River/Manasota Regional Water Supply Authority v. IMC Phosphates Co.*, No. 03-0791, FO at page 10-11 (FDEP July 31, 2006). The "zone of interest" standing test, described in detail below, requires looking beyond the Administrative Procedure Act to the "regulatory statutes or other pertinent substantive law." *Id.*; quoting *Sickon v. Alachua County School Board*, 719 So.2d 360, 363 (Fla. 1st DCA 1998).

To establish standing to proceed in a permit challenge pursuant to section 120.57(1), F.S., a petitioner must make allegations sufficient to satisfy a two-part test as set forth in the seminal case of *Agrico Chemical Co. v. Department of Environmental Regulation*. *Agrico* 406 So.2d 478 (Fla. 2d DCA 1981). Under *Agrico*, a petitioner must make allegations sufficient to satisfy a two-part test: (1) that petitioner will suffer an injury in fact which is of sufficient immediacy to entitle petitioner to a hearing, and (2) that the

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[4] Which is required by §120.57(1)(k), F.S.

alleged injury is within the zone of interest which the proceeding is designed to protect. *Id.* at 482.

The first prong focuses on whether the injury arising from the agency action is of a specific, real immediacy warranting relief and is not a remote or speculative injury. *Town of Palm Beach v. Dep't of Nat. Res.*, 577 So.2d 1383 (Fla. 4th DCA 1981) (department's determination that no permit was required for removal of dune vegetation immediately impacted petitioner's concerns as to impacts to their properties as well as to the dune system itself); *Terwilliger v. South Fla. Water Mgmt. Dist.*, Case No. 04-1504, RO ¶137 (Fla. DOAH Feb 27, 2002; Fla. SFWMD April 11, 2002) (the "immediacy" requirement is intended to preclude standing based upon remote or speculative concerns).

The second prong focuses on whether the type of injury alleged falls within the ambit of the agency's statutory authority to protect. More to the point, does the statute or agency rules from which the agency action arises contemplate consideration of, or protection against, the injury petitioner asserts will result from the agency action? *Boca Raton Mausoleum, Inc. v. State, Dep't of Banking & Fin.*, 511 So.2d 1060 (Fla. 1st DCA 1987) (alleged traffic congestion caused by the licensure of a cemetery was not the type of injury the cemetery licensing statute was designed to protect); *Friends of the Everglades, Inc. v. Bd. of Trustees of the Intern. Imp. Tr. Fund*, 595 So.2d 186 (Fla. 1st DCA 1992) (the nature of the injury which is required to demonstrate standing will be determined by the statute which defines the scope and nature of the proceeding).

In this environmental permit challenge, the operative statute is Chapter 373 of the Florida Statutes, which protects the water resources of the state. To demonstrate

standing, there must be some nexus between the alleged injury and the statute or rule alleged to require reversal or modification of the agency's action. *See Orange County, Fla. v. South Fla. Water Mgmt. District*, Case No. 08-2059 (Fla. DOAH March 20, 2008)(Order Granting Intervention). Administrative Law Judge Cantor explained standing at the pleading stage in this way:

> ..., standing requires that a petitioner allege a relevant, non-speculative injury to the petitioner and a violation of law by the respondent...For illustration, in a dock case, the petitioner must allege an injury, such as interference with ingress and egress to petitioner's existing dock, and must allege a violation of an applicable permitting criterion, such as the prohibition against unreasonable interference with navigation.

Id. at 2.

The District agrees with the ALJ's conclusion in the Recommended Order that "[a]lthough Egan Ranch alleges adverse flooding to its property under the District's permitting criteria, the underlying facts all relate to supposed restrictions in a drainage easement agreement, taking of private property rights, and unlawful trespass." (RO at page 2-3).

In its Exception No. 3, Petitioner also states it has met the standard of "alleging how its 'environmental' interests are impacted (as opposed to adverse effects on its property) ... with allegations in ¶¶ 46-52 of its Amended Petition asserting that Babcock's lack of a dredging plan precludes compliance with the standard of rule ... 62-330.301(1) requiring the applicant provide the reasonable assurance that the quantity and quality of receiving waters will not be violated." (Petitioner's Exception No. 3 at pages 13-14).

In paragraph 46 of the Amended Petition, Petitioner re-asserts and argues an administrative hearing should be used to resolve real property issues attendant to the 1988 easement. The ALJ correctly determined those issues should not be litigated in the

permit challenge case because they are outside the area where "activities" would occur under the proposed permit.

However, in paragraphs 47 through 52 of the Amended Petition, it appears Petitioner alleges a lack of reasonable assurance supporting the District's determination in the Technical Staff Report that "the permitted activities will not adversely affect the quality of receiving waters." (Amended Petition at ¶47). Given that all of Petitioner's other allegations were inextricably linked with drainage easement rights, taking of property, or trespass, none of which were reviewable at DOAH, it is unclear whether these allegations of Applicant's alleged failure to comply with subsection 62-330.301(1) are similarly intertwined with the "supposed restrictions in a drainage easement agreement, taking of private property rights, and unlawful trespass." (RO at 3). However, a well-pled allegation that there is a violation of permitting criteria may be sufficient to confer standing upon a petitioner whose substantial interests would be affected by the agency determination. *See* R. 28-106.201(2)(b), F.A.C., and *Agrico, supra.*

The allegations in paragraphs 47 through 52 of the Amended Petition are sufficiently ambiguous such that a remand of this proceeding to the ALJ is warranted for further proceedings to clarify whether Petitioner's allegations in paragraphs 47 through 52 are sufficient to confer standing or whether the allegations relate to issues outside of the zone of interest protected by Chapter 373, Florida Statutes. *See, e.g., State, Dep't of Envtl. Prot. v. Dep't of Mgmt. Servs., Div. of Admin. Hearings, 667 So.2d 369, 370 (Fla. 1st DCA 1995); Charlotte County v. IMC Phosphates Co., 18 So.3d 1089, 1093* (Fla. 2nd DCA 2009)(DEP's remand was appropriate from ALJ's recommended order).

Thus, the District rejects Petitioner's Exception No. 3 in part (regarding the sufficiency of the allegations in paragraph 46 of the Amended Petition) and accepts Petitioner's Exception No. 3 to the extent necessary for a remand to DOAH for such further proceedings as are deemed necessary and appropriate to clarify whether Petitioner's allegations in paragraphs 47 through 52 of the Amended Petition are sufficient to confer standing or whether the allegations relate to issues outside of the zone of interest protected by Chapter 373 of the Florida Statutes.

ACCORDINGLY, IT IS HEREBY ORDERED:

This case is remanded to DOAH for such further proceedings as are deemed necessary and appropriate, which may include determining whether Petitioner's allegations in paragraphs 47 through 52 of the Amended Petition are sufficient to confer standing or whether the allegations relate to issues outside of the zone of interest protected by Chapter 373, Florida Statutes.

DONE AND ORDERED this 19th day of May 2021, in Palatka, Florida.

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT

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

RENDERED this 19th day of May, 2021.

BY: _____
DISTRICT CLERK

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing has been filed with the Clerk of the St. Johns River Water Management District, and that a true and correct copy of the foregoing was furnished to the following via email delivery:

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on this 19th day of May, 2021.

/s/ Thomas I. Mayton, Jr.
Thomas I. Mayton, Jr.

Exhibit "A"

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EGAN RANCH, LLC,

Petitioner,

vs. Case No. 21-0437

BABCOCK, LLC AND ST JOHNS RIVER WATER MANAGEMENT DISTRICT,

Respondents.
_____/

RECOMMENDED ORDER OF DISMISSAL

This cause came before the undersigned on Respondent, South Florida Water Management District's (District), Motion to Dismiss and, in the Alternative, Motion to Strike Immaterial Allegations (Motion) filed on February 17, 2021; and Petitioner, Egan Ranch, LLC's (Egan Ranch), response filed on February 24, 2021. Respondent, Babcock, LLC (Babcock) filed a joinder in the District's Motion on March 8, 2021. The District's Motion is directed to the Amended Petition for Administrative Hearing filed on February 9, 2021 (Amended Petition). The Amended Petition challenges the District's proposed approval modifying Babcock's existing environmental resource permit (Prior ERP Permit) for sand and coquina excavation activities. The proposed modification (ERP Permit Modification) increases the depth of excavation activities to 75 feet below the land service. Upon review of the pleadings and applicable case law, the undersigned grants the District's Motion and dismisses the Amended Petition for the reasons explained below.

Legal Standards

In reviewing the motion to dismiss, the undersigned must assume the allegations in the Amended Petition are true and apply every reasonable inference in the Petitioner's favor. *See Curd v. Mosaic Fertilizer, LLC*, 39 So. 3d 1216, 1222

(Fla. 2010); *Dep't of HRS v. S.A.P.*, 835 So. 2d 1091, 1094 (Fla. 2002). In addition, the undersigned's review is confined to the allegations within the "four corners" of the Amended Petition and its attachments. *See Santiago v. Mauna Loa Invs., LLC*, 189 So. 3d 752, 756 (Fla. 2016). The undersigned cannot consider any factual matters outside the Amended Petition and its attachments. *See St. Francis Parkside Lodge of Tampa Bay v. Dep't of HRS* 486 So. 2d 32, 34 (Fla. 1st DCA 1986).

Standing

The Amended Petition contains allegations regarding Egan Ranch's "substantial interests." In this type of environmental permitting proceeding, Egan Ranch must demonstrate that its substantial environmental interests will be affected. In order to maintain standing under section 120.57(1), Florida Statutes, a petitioner must demonstrate that it will suffer an injury-in-fact which is of sufficient immediacy to entitle it to a hearing, and that the injury is within the zone of interest which the proceeding is designed to protect. *See Agrico Chem. Co. v. Dep't of Envtl. Reg.*, 406 So. 2d 478 (Fla. 2d DCA 1981). The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury. As more fully explained below, Egan Ranch's substantial interest allegations citing operations under a prior permit, violations of restrictions in a drainage easement agreement, taking of private property rights, and unlawful trespass, are not legally cognizable in this type of administrative proceeding. As such, Egan Ranch did not allege sufficient facts to demonstrate its substantial environmental interests could reasonably be expected to be affected by the agency's action. *See, e.g.*, *St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist.*, 54 So. 3d 1051, 1054 (Fla. 5th DCA 2011).

Legal Sufficiency

The Amended Petition contains allegations that are not legally cognizable in this type of environmental administrative proceeding. Although Egan Ranch alleges adverse flooding to its property under the District's permitting criteria, the

underlying facts all relate to supposed restrictions in a drainage easement agreement, taking of private property rights, and unlawful trespass. These allegations cannot be adjudicated in this administrative proceeding. *See, e.g.*, *Ortega v. State, Dep't of Envtl. Prot.*, 646 So. 2d 797 (Fla. 1st DCA 1994)(reflecting that administrative agency did not have jurisdiction over takings claim); *Buckley v. Dep't of HRS* 516 So. 2d 1008 (Fla. 1st DCA 1987); *Miller v. State, Dep't of Envtl. Reg.*, 504 So. 2d 1325 (Fla. 1st DCA 1987)("agencies would not, by their nature, ordinarily have jurisdiction to decide issues of law inherent in evaluation of private property impacts."); *see also* Art. V, § 20(c)(3), Fla. Const. ("Circuit courts shall have jurisdiction of . . . all actions involving the . . . right of possession of real property.").

In addition, Egan Ranch's allegations regarding the restrictions in a drainage easement agreement between Egan Ranch and Babcock's predecessor in interest is a contract interpretation issue vested solely in the judiciary. *See Sandlake Residences, LLC v. Ogilvie*, 951 So. 2d 117, 119 (Fla. 5th DCA 2007); *Eden Isles Condo. Ass'n v. Dep't of Bus. & Prof'l Reg.*, 1 So. 3d 291, 293 (Fla. 3rd DCA 2009)(reflecting that jurisdiction to interpret contracts is vested solely in the judiciary).

Administrative Finality

Egan Ranch's allegations that could have been addressed in a challenge to the Prior ERP Permit are not cognizable in this proceeding challenging the ERP Permit Modification. *See Friends of the Everglades, Inc. v. State, Dep't of Envtl. Reg.*, 496 So. 2d 181 (Fla. 1st DCA 1986)(reflecting that the permitting requirement for a modification does not cast upon the applicant the burden of providing "reasonable assurances" anew with respect to the original project already constructed in accordance with a valid permit); *Conservancy of Southwest Fla. v. G.L. Homes of Naples Assoc. II, Ltd.,* Case No. 06-4922, RO ¶ 109 (Fla. DOAH May 15, 2007; Fla. SFWMD July 11, 2007). In addition, compliance or noncompliance with another agency's permitting program should not be litigated in this administrative

permitting proceeding. *See Save the St. Johns River v. St. Johns River Water Mgmt. Dist.*, 623 So. 2d 1193, 1198 (Fla. 1st DCA 1993).

Having reviewed the pleadings and case law and being otherwise duly advised, it is, therefore,

RECOMMENDED that the District enter a final order dismissing the Amended Petition.

DONE AND ORDERED this 23rd day of March, 2021, in Tallahassee, Leon County, Florida.

FRANCINE M. FFOLKES
Administrative Law Judge
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.

Exhibit "B"

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

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March 24, 2021

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Hand Delivered

Re: Egan Ranch, LLC vs. Babcock, LLC and St. Johns River Water Management District;
DOAH Case No. 21-0437
SJRWMD F.O.R. No. 2020-31

Dear Parties:

My name is Sharon Wyskiel and I am the attorney who will be preparing the proposed Final Order and will serve as the designated Governing Board advisor from this point forward. I will not be representing District staff. I am writing you because yesterday, Administrative Law Judge Francine M. Ffolkes filed a Recommended Order with the District in the above referenced case.

You may file exceptions to the Recommended Order pursuant to section 120.57(1)(k) of the Florida Statutes (F.S.). Should you file exceptions, please keep in mind that section 120.57(1)(k) provides, "[a]n agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record."

Exceptions to the Recommended Order must be filed with the District Clerk at District Headquarters in Palatka no later than 5:00 p.m. on Wednesday, April 7, 2021. Section 120.57(1)(k), F.S.; Rule 28-106.217(1), Florida Administrative Code (F.A.C.).

Any party may file responses to another party's exceptions within ten days from the date the exceptions were filed with the District. Responses to exceptions to the Recommended Order must be filed no later than ten days after the exceptions are filed with the District. Rule 28-106.217(3), F.A.C. No additional time is added to the time limits to file exceptions or responses if served by mail. Rule 28-106.217(4), F.A.C.

The filing date for documents filed by hand delivery or mail shall be the date the District Clerk receives the complete document. The filing date for documents filed by e-mail to Clerk@sjrwmd.com shall be the date the District Clerk receives the complete document in the form of a PDF file in a manner capable of being stored and printed. Receipt by the District Clerk after 5:00 p.m. shall be considered filed as of 8:00 a.m. on the next regular business day. A party who elects to file a document by e-mail is responsible for any delay, disruption, or interruption of the electronic signals and readability of the document and accepts the full risk that the document may not be properly filed with the District Clerk as a result. The District does not accept faxed filings. Please refer to section (5) of the SJRWMD Statement of Agency Organization, which may be obtained from the District's website at https://www.sjrwmd.com/static/Statement-of-Agency-Organization-and-Operation.pdf or upon request to the Agency Clerk, for complete information regarding filing requirements.

Pursuant to section 373.079(4)(a), F.S., the Governing Board has delegated its authority to take final action on permit applications and petitions for variances of permitting requirements to the Executive Director while retaining authority to take final action on a denial of such applications or petitions. *See* section (8), District Policy 120. *Governing Board Delegations* (available upon request). This matter will be presented to the Governing Board for final action only if the proposed final order, prepared by the designated Board advisor, recommends denial; however, if the final order recommends approval, the Executive Director is delegated the authority to take

final action. If this matter is scheduled for the Governing Board, you will have an opportunity to provide oral argument regarding exceptions to the Recommended Order and a proposed procedure will be discussed before that time.

You are reminded that Section 120.66, F.S., restricts communication with the agency head or designee who is involved in the decisional process in the period between issuance of the Recommended Order and entry of a Final Order. Thank you for your attention and cooperation. If you have any questions, please contact me at (386) 643-1986.

Sincerely,

Sharon M. Wyskiel
Assistant General Counsel
Office of General Counsel

cc. Mary Ellen Winkler, General Counsel