STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

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

FINAL ORDER

An Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH) on December 12, 2019, submitted a Recommended Order (RO) to the Department of Environmental Protection (DEP or Department) in the above captioned administrative proceeding. A copy of the RO is attached hereto as Exhibit A.

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

BACKGROUND

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

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

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

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

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

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

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

SUMMARY OF THE RECOMMENDED ORDER

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

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

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

STANDARDS OF REVIEW OF DOAH RECOMMENDED ORDERS

Section 120.57(1)(l), Florida Statutes, prescribes that an agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2019); *Charlotte Cty. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1082 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So. 2d 61, 62 (Fla. 1st DCA 2007). The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value or weight of the evidence. Rather, "competent substantial evidence" refers to the existence of some evidence as to each essential element and as to its admissibility under legal rules of evidence. *See e.g., Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm'n*, 671 So. 2d 287, 289 n.3 (Fla. 5th DCA 1996); *Nunez v. Nunez*, 29 So. 3d 1191, 1192 (Fla. 5th DCA 2010).

A reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See, e.g., Rogers v. Dep't of Health*, 920 So. 2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep't of Envtl. Prot.*, 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands Cty. School Bd.*, 652 So. 2d 894, 896 (Fla. 2d DCA 1995). If there is competent substantial evidence to support an ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Constr. Co. v. Dyer*, 592 So. 2d 276, 280 (Fla. 1st DCA 1991); *Conshor, Inc. v. Roberts*, 498 So. 2d 622, 623 (Fla. 1st DCA 1986).

The ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. *See, e.g., Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1088 (Fla. 2d DCA 2009); *Collier Med. Ctr. v. State, Dep't of HRS*, 462 So. 2d 83, 85 (Fla. 1st DCA 1985); *Fla. Chapter of Sierra Club v. Orlando Utils. Comm'n*, 436 So. 2d 383, 389 (Fla. 5th DCA 1983). In addition, an agency has no authority to make independent or supplemental findings of fact. *See, e.g., North Port, Fla. v. Consol. Minerals*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994); *Fla. Power & Light Co. v. Fla. Siting Bd.*, 693 So. 2d 1025, 1026-1027 (Fla. 1st DCA 1997).

Section 120.57(1)(l), Florida Statutes, authorizes an agency to reject or modify an ALJ's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." *See Barfield v. Dep't of Health*, 805 So. 2d 1008, 1012 (Fla. 1st DCA 2001); *L.B. Bryan & Co. v. Sch. Bd. of Broward Cty.*, 746 So. 2d 1194, 1197 (Fla. 1st DCA 1999); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140 1141-142 (Fla. 2d DCA 2001). However, the agency should not label what is essentially an ultimate factual determination as a "conclusion of law" to modify or overturn what it may view as an unfavorable finding of fact. *See, e.g., Stokes v. State, Bd. of Prof'l Eng'rs*, 952 So. 2d 1224, 1225 (Fla. 1st DCA 2007). Furthermore, agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be the only reasonable interpretations. It is enough if such agency interpretations are "permissible" ones. *See, e.g., Suddath Van Lines, Inc. v. Dep't of Envtl. Prot.*, 668 So. 2d 209, 212 (Fla. 1st DCA 1996).

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

susceptible to ordinary methods of proof that are not infused with [agency] policy considerations," are not matters over which the agency has "substantive jurisdiction." *See Martuccio v. Dep't of Prof'l Regulation*, 622 So. 2d 607, 609 (Fla. 1st DCA 1993); *Heifetz v. Dep't of Bus. Regulation*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). Evidentiary rulings are matters within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. *See Martuccio*, 622 So. 2d at 609.

RULINGS ON EXCEPTIONS

In reviewing a recommended order and any written exceptions, the agency's final order "shall include an explicit ruling on each exception." *See* 120.57(1)(k), Fla. Stat. (2019). The agency, however, need not rule on an exception that "does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." *Id.*

A party that files no exceptions to certain findings of fact "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Envtl. Coal. of Fla., Inc. v. Broward Cty.*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Med. Ctr., Inc. v. State of Fla., Agency for Health Care Admin.*, 847 So. 2d 540, 542 (Fla. 4th DCA 2003). However, an agency head reviewing a recommended order is free to modify or reject any erroneous conclusions of law over which the agency has substantive jurisdiction, even when exceptions are not filed. *See* § 120.57(1)(l), Fla. Stat. (2019); *Barfield,* 805 So. 2d at 1012; *Fla. Pub. Emp. Council, v. Daniels,* 646 So. 2d 813, 816 (Fla. 1st DCA 1994).

RULINGS ON THE CITY'S EXCEPTIONS

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

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

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

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

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

The City disagrees with the ALJ's findings and seeks to have the Department reweigh the evidence. However, the Department is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Constr. Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623. For the abovementioned reasons, the City's exception to paragraph 13 of the RO is rejected.

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

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

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

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

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

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

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

The City seeks to have the Department judge the credibility of the witness and then reweigh the evidence. However, the Department is not authorized to reweigh evidence presented at a DOAH final hearing or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Constr. Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623. For the abovementioned reasons, the City's exception to paragraphs 25 and 26 of the RO is rejected.

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

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

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

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

An agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2019); *Charlotte Cty.*, 18 So. 3d at 1082; *Wills,* 955 So. 2d at 62. Contrary to the City's exception, the Department finds that the ALJ's findings quoted above are supported by competent substantive evidence; and thus, must be accepted by the Department. In fact, paragraph 27 is a statement taken directly from DEP's second amended notice of intent. Joint Exhibit 1, pp. 329-30. For the abovementioned reasons, the City's exception to paragraph 27 of the RO is rejected.

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

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

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

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

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

An agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2019); *Charlotte Cty.*, 18 So. 3d at 1082; *Wills,* 955 So. 2d at 62. Contrary to the City's exception, the findings in the first sentence of paragraph 30 and all the findings in paragraph 31 of the RO are supported by competent substantial evidence in the form of expert testimony and Departmental rules.

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 120.57(1)(l), Florida Statutes, prescribes that an agency reviewing a recommended order may reject the ALJ's findings of fact if the agency determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2019); *Charlotte Cty.,* 18 So. 3d at 1082; *Wills,* 955 So. 2d at 62. Since the Department cannot find any competent substantial evidence to support the ALJ's finding that Class III waters are restricted for shellfish harvesting, this portion of paragraph 32 of the RO is rejected.

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

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

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

An agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2019); *Charlotte Cty.*, 18 So. 3d at 1082; *Wills,* 955 So. 2d at 62. Contrary to the City's exception, the statement above in paragraph 34 of the RO is supported by competent substantial evidence in the form of a memorandum authored by Dr. Janicki to the City in reference to removal of the Lock. Petitioners' Ex. No. 132. *See also* Janicki, T. Vol. II, pp. 218-19. For the abovementioned reasons, the City's exception to the above sentence in paragraph 34 of the RO is rejected.

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

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

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

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

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

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

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

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

The City disagrees with the ALJ's findings and seeks to have the Department reweigh the evidence. However, the Department is not authorized to reweigh evidence presented at a DOAH final hearing or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of

fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Constr. Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623. For the abovementioned reasons, the City's exception to paragraph 35 of the RO is rejected.

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

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

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

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

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

An agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2019); *Charlotte Cty.*, 18 So. 3d at 1082; *Wills*, 955 So. 2d at 62. There is no competent substantial evidence to support the ALJ's finding that the Department and City were not aligned about how the City would provide reasonable assurances regarding water quality standards.

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

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

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

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

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

An agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2019); *Charlotte Cty.*, 18 So. 3d at 1082; *Wills,* 955 So. 2d at 62. Contrary to the City's exception, the statement above in paragraph 38 of the RO is supported by competent substantial evidence in the form of a memorandum authored by Dr. Janicki to the City in reference to removal of the Lock. Petitioners' Ex. No. 132. *See also* Janicki, T. Vol. II, pp. 218-19. For the abovementioned reasons, the City's exception to the above sentence in paragraph 38 of the RO is rejected.

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

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

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

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

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

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

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

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

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

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

An agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2019); *Charlotte Cty.*, 18 So. 3d at 1082; *Wills,* 955 So. 2d at 62. Contrary to the City's exception, the Department finds that the ALJ's findings quoted above are supported by competent substantive evidence; and thus, must be accepted by the Department.

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

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

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

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

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

An agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2019); *Charlotte Cty.*, 18 So. 3d at 1082; *Wills,* 955 So. 2d at 62. Contrary to the City's exception, the Department finds that the ALJ's finding quoted above is supported by competent substantive evidence; and thus, must be accepted by the Department. Petitioners' Ex. No. 152, p. 2 (map).

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

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

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

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

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

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

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

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

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

The City seeks to have the Department judge the credibility of the witness and then reweigh the evidence. However, the Department is not authorized to reweigh evidence presented at a DOAH final hearing or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Constr. Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623. For the abovementioned reasons, the City's exception to paragraphs 25 and 26 of the RO is rejected.

Furthermore, the ALJ can "draw permissible inferences from the evidence." *Heifetz v. Dep't of Bus. Regulation*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). As noted by the ALJ in endnote No. 3 to the RO, "[t]he sufficiency of the facts required to form the opinion of an expert must normally reside with the expert, and any purported deficiencies in such facts relate to the weight of the evidence, a matter also exclusively within the province of the ALJ as the trier of the facts. *See Gershanik v. Dep't of Prof'l Regulation*, 458 So. 2d 302, 305 (Fla. 3rd DCA 1984), *rev. den.*, 462 So.2d 1106 (Fla. 1985).

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

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

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

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

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

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

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

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

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

A. I did.

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

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

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

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

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

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

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

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

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

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

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

An agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2019); *Charlotte Cty.*, 18 So. 3d at 1082; *Wills,* 955 So. 2d at 62. Contrary to the City's exception, the Department finds that the ALJ's finding quoted above is supported by competent substantive evidence; and thus, must be accepted by the Department. Kevin Erwin explained how a permanent drop in water level from only a few inches to 1 or 1.5 feet negatively impacts mangroves. (Erwin, T. Vol. II, pp. 552-54). Mr. Erwin compared the negative impacts to the mangroves in the North Spreader System after removal of the Ceitus Boat Lift was removed in 2008 with the proposed removal of the Chiquita Lock. Erwin, T. Vol. II, pp. 552-54.

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

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

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

An agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2019); *Charlotte Cty.*, 18 So. 3d at 1082; *Wills,* 955 So. 2d at 62. Contrary to the City's exception, the Department finds that the ALJ's finding quoted above is supported by competent substantive evidence; and thus, must be accepted by the

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

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

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

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

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

The City disagrees with the ALJ's findings and seeks to have the Department reweigh the evidence. However, the Department is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Constr. Co.,* 592 So. 2d at 280; *Conshor,*

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

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

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

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

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

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

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

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

A. Yes.

Q. What is that opinion?

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

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

The City disagrees with the ALJ's findings and seeks to have the Department reweigh the evidence. However, the Department is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Constr. Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623. For the abovementioned reasons, the City's exception to paragraph 51 of the RO is rejected.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> 59. Petitioners presented the testimony of Mr. Frank Muto, the general manager of Cape Harbour Marina. Mr. Muto has been at the Cape Harbour Marina for 18 years. The marina has 78 docks on three finger piers along with transient spots. The marina is not currently subject to tidal flows and its water depth is between six and a half and seven and a half feet. He testified that they currently have at least 28 boats that maintain a draft of between four and a half and six feet of water. If the water depth got below four feet, those customers would not want to remain at the marina. Mr. Muto further testified that the Lock was in place when the marina was built, and the marina and docks were designed for an area with no tidal flow.
>
> 60. Mr. Muto also testified that he has witnessed several boating safety incidents in and around the Lock. He testified that he would attribute almost all of those incidents to novice boaters who lack knowledge of proper boating operations and locking procedures. Mr. Muto additionally testified that there is law enforcement presence at the Lock twenty-four hours a day, including FWC marine patrol and the City's marine patrol

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

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

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

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

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

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

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

The Department concludes that paragraph 102 and 103 contain mixed questions of law and fact. An agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2019); *Charlotte Cty.*, 18 So. 3d at 1082; *Wills,* 955 So. 2d at 62.

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

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

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

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

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

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

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

Section 120.57(1)(l), Florida Statutes, authorizes an agency to reject or modify an ALJ's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." *See Barfield*, 805 So. 2d at 1012; *L.B. Bryan & Co.*, 746 So. 2d at 1196-97; *Deep Lagoon Boat Club, Ltd.*, 784 So. 2d at 1141-42. However, DEP does not have authority to reject the ALJ's interpretation of Section 120.569(2)(p), Florida Statutes, since this statutory provision is not one over which it has substantive jurisdiction. Even if DEP disagreed with the ALJ's interpretation of Section 120.569(2)(p), Florida Statutes, it does not have the authority to reject the ALJ's interpretation of this statutory provision. For the abovementioned reasons, the City's exception to paragraphs 67 through 71 of the RO ("Burden of Proof") is rejected.

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

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

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

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

The Department concludes that the ALJ's statement above is in reality a finding of fact. An agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2019); *Charlotte Cty.*, 18 So. 3d at 1082; *Wills,* 955 So. 2d at 62. Contrary to the City's exception, the Department finds that the ALJ's findings quoted above are supported by competent substantive evidence; and thus, must be accepted by the Department. For example, the City's expert, Dr. Janicki, concluded that the Chiquita boat lock removal relied upon the BMAP process to conclude that the Lock's removal "will not result in an increased load above that already estimated." Joint Ex. No. 1, p. 86. Similar statements appear in the City's application in Joint Ex. No. 1, pp. 120-124, 165, 182-84, 208-09, 215, 217, and 220. *See Hasselback v. Wentz and Dep't of Envtl. Prot.*, DOAH Case No. 07-5216)(Fla. DOAH January 28, 2010; DEP March 15, 2010).

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

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

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

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

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

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

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

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

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

B. To a degree, yes.

* * * *

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

B. That's correct.

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

B. Again, to some degree, yes.

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

A. I -- I don't recall.

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

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

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

The City disagrees with the ALJ's findings and seeks to have the Department reweigh the evidence. However, the Department is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Constr. Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623. For the abovementioned reasons, the City's exception to paragraphs 80 and 81 of the RO is rejected.

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

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

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

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

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

The Department concludes that paragraph 82 of the RO is a mixed finding of fact and conclusion of law. An agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2019); *Charlotte Cty.*, 18 So. 3d at 1082; *Wills,* 955 So. 2d at 62. Contrary to the City's exception, the Department finds that the ALJ's findings quoted above are supported by competent substantive evidence; and thus, must be accepted by the Department. For example, the City's expert, Dr. Janicki, concluded that the Chiquita boat lock removal relied upon the BMAP process to conclude that the Lock's removal "will not result in an increased load above that already estimated." Joint Ex. No. 1, p. 86. Similar statements appear in the City's application in Joint Ex. No. 1, pp. 120-124, 165, 182-84, 208-09, 215, 217, and 220. *See Hasselback v. Wentz and Dep't of Envtl. Prot.*, DOAH Case No. 07-5216)(Fla. DOAH January 28, 2010; DEP March 15, 2010).

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

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

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

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

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

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

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

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

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

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

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

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

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

RO ¶ 85.

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

An agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2019); *Charlotte Cty.*, 18 So. 3d at 1082; *Wills,* 955 So. 2d at 62. Contrary to the City's exception, the findings in paragraph 27 of the RO are supported by competent substantial evidence in the form of expert testimony and Departmental rules.

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

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

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

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

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

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

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

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

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

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

RO ¶ 87.

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

An agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2019); *Charlotte Cty.*, 18 So. 3d at 1082; *Wills,* 955 So. 2d at 62. Contrary to the City's exception, the Department finds that the ALJ's findings quoted

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

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

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

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

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

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

RO ¶ 90.

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

An agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2019); *Charlotte Cty.*, 18 So. 3d at 1082; *Wills,* 955 So. 2d at 62. The ALJ can "draw permissible inferences from the evidence." *Heifetz*, 475 So. 2d at 1281. *See Walker v. Bd. of Prof'l Eng'rs*, 946 So. 2d at 605 ("It is the hearing officer's function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence."); *Berry v. Dep't of Envtl. Regulation*, 530 So. 2d 1019, 1022 (Fla. 4th DCA 1988) ("[T]he agency may reject the findings of the hearing officer only when there is no competent substantial evidence from which the finding could reasonably be inferred." (citations omitted)).

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

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

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

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

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

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

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

RO ¶ 93.

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

An agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2019); *Charlotte Cty.*, 18 So. 3d at 1082; *Wills,* 955 So. 2d at 62. Contrary to the City's exception, the Department finds that the ALJ's findings quoted above are supported by competent substantive evidence; and thus, must be accepted by the

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

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

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

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

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

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

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

An agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2019); *Charlotte Cty.*, 18 So. 3d at 1082; *Wills,* 955 So. 2d at 62. Contrary to the City's exception, the Department finds that the ALJ's findings quoted above are supported by competent substantive evidence; and thus, must be accepted by the Department.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

RO ¶ 100.

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

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

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

The Department concludes that paragraph 100 of the RO contains mixed findings of fact and conclusions of law. An agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2019); *Charlotte Cty.*, 18 So. 3d at 1082; *Wills,* 955 So. 2d at 62. Contrary to the City's exception, the Department finds that portions of the ALJ's findings quoted above are supported by competent substantive evidence; and thus, must be accepted by the Department. The ALJ's findings in paragraph 100 of the RO are supported by Kevin Erwin's testimony regarding impacts from removal of the Chiquita lock that will cause or contribute to violations of water quality standards or adverse impacts to the functions of wetlands or other surface waters, including the mangrove ecosystem adjacent to the South Spreader Waterway. (Erwin, T. Vol. II, pp. 539-41, 598-99, 605-06, 615 and 631; Erwin, T. Vol. III, pp. 901-03 and 907-08).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

An agency has no authority to make independent or supplemental findings of fact, as requested by the City. *See, e.g., North Port, Fla. v. Consol. Minerals*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994*); Fla. Power & Light Co. v. Fla. Siting Bd.*, 693 So. 2d 1025, 1026-1027 (Fla. 1st DCA 1997). Moreover, for the reasons cited in the Department's response to the City's Exceptions No. 1 through 39 above, the City's Exception No. 40 is denied.

RULINGS ON DEP's EXCEPTIONS

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

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

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

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

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

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

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

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

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

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

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

Section 120.57(1)(l), Florida Statutes, prescribes that an agency reviewing a recommended order may reject the ALJ's findings of fact if the agency determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2019); *Charlotte Cty.,* 18 So. 3d at 1082; *Wills,* 955 So. 2d at 62. Since the Department cannot find any competent substantial evidence to support the ALJ's finding that Class III waters are restricted for shellfish harvesting, this portion of paragraph 32 of the RO is rejected.

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

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

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

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

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

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

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

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

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

DEP disagrees with the ALJ's findings and seeks to have the Department reweigh the evidence. However, the Department is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Constr. Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623. For the abovementioned reasons, DEP's exception to paragraph 35 of the RO is rejected.

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

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

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

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

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

Section 120.57(1)(l), Florida Statutes, authorizes an agency to reject or modify an ALJ's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." *See Barfield*, 805 So. 2d at 1012; *L.B. Bryan & Co.*, 746 So. 2d at 1196-97; *Deep Lagoon Boat Club, Ltd.*, 784 So. 2d at 1141-42. However, the Department does not have authority to reject the ALJ's interpretation of Section 120.569(2)(p), Florida Statutes, since this statutory provision is not one over which it has substantive jurisdiction. Even if the Department disagreed with the ALJ's interpretation of Section 120.569(2)(p), Florida Statutes, it does not have the authority to reject the ALJ's interpretation of this statutory provision. For the abovementioned reasons, DEP's exception to paragraph 71 of the RO is rejected.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

RULINGS ON PETITIONERS' AMENDED EXCEPTIONS

Petitioners' Exception No. 1 regarding Paragraph No. 106

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

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

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

Amended Order Limiting Issues, p. 2, April 9, 2019. The Department does not have jurisdiction to modify or reject the ALJ's rulings on the admissibility of evidence. Evidentiary rulings are matters within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. *See Martuccio*, 622 So. 2d at 609.

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

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

Petitioners' Exception No. 2 regarding Paragraph No. 108

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

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

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

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

Amended Order Limiting Issues, p. 2, April 9, 2019. The Department does not have jurisdiction to modify or reject the ALJ's rulings on the admissibility of evidence. Evidentiary rulings are matters within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. *See Martuccio*, 622 So. 2d at 609.

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

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

Petitioners' Exception No. 3 regarding Paragraph No. 109

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

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

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

Amended Order Limiting Issues, p. 2, April 9, 2019. The Department does not have jurisdiction to modify or reject the ALJ's rulings on the admissibility of evidence. Evidentiary rulings are matters within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. *See Martuccio*, 622 So. 2d at 609.

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

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

Petitioners' Exception No. 4 regarding Paragraph No. 110

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

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

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

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

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

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

Amended Order Limiting Issues, p. 2, April 9, 2019. The Department does not have jurisdiction to modify or reject the ALJ's rulings on the admissibility of evidence. Evidentiary rulings are matters within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. *See Martuccio*, 622 So. 2d at 609.

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

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

Petitioners' Exception No. 5 regarding Paragraph No. 111

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

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

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

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

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

Amended Order Limiting Issues, p. 2, April 9, 2019. The Department does not have jurisdiction to modify or reject the ALJ's rulings on the admissibility of evidence. Evidentiary rulings are matters within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. *See Martuccio*, 622 So. 2d at 609.

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

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

Petitioners' Exception No. 6 regarding Paragraph No. 112

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

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

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

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

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

Amended Order Limiting Issues, p. 2, April 9, 2019. The Department does not have jurisdiction to modify or reject the ALJ's rulings on the admissibility of evidence. Evidentiary rulings are matters within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. *See Martuccio*, 622 So. 2d at 609.

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

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

Petitioners' Exception No. 7 regarding Paragraph No. 115

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

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

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

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

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

Moreover, DEP has no authority to grant Petitioners' Exception No. 7. Section 120.595(1)(b), Florida Statutes, states that "[t]he final order in a proceeding pursuant to s. 120.57(1) shall award costs and a reasonable attorney's fees to the prevailing party ***only*** where the nonprevailing adverse party ***has been determined by the administrative law judge*** to have participated in the proceeding for an improper purpose." § 120.595(1)(b), Fla. Stat. (2019) (emphasis added). The ALJ's Recommended Order did not include a determination that the Petitioner had participated in the proceeding for an improper purpose. Moreover, DEP has no authority to make independent or supplemental findings of fact, such as a finding of improper purpose. *See, e.g., City of North Port, Fla.*, 645 So. 2d at 487 ("The agency's scope of review of the facts is limited to ascertaining whether the hearing officer's factual findings are supported by competent substantial evidence."); *Manasota 88, Inc.*, 545 So. 2d at 441, *citing Friends of*

Children, 504 So. 2d at 345 (Fla. 1st DCA 1987)(a state agency reviewing an ALJ's proposed order has no authority to make independent and supplementary findings of fact to support conclusions of law in the agency final order).

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

CONCLUSION

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

ORDERED that:

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

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

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

JUDICIAL REVIEW

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000;

and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the clerk of the Department.

DONE AND ORDERED this 11th day of March, 2020, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

NOAH VALENSTEIN
Secretary

Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

FILED ON THIS DATE PURSUANT TO § 120.52, FLORIDA STATUTES, WITH THE DESIGNATED DEPARTMENT CLERK, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.

Deputy CLERK

3/11/20
DATE

CERTIFICATE OF SERVICE

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

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

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

Stacey D. Cowley

STACEY D. COWLEY
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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MATLACHA CIVIC ASSOCIATION, INC., J. MICHAEL HANNON, KARL R. DEIGERT, YOLANDA OLSEN, ROBERT S. ZARRANZ, DEBRA HALL, MELANIE HOFF, AND JESSICA BLANKS,

Petitioners,

vs. Case No. 18-6752

CITY OF CAPE CORAL AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on April 11 and 12, 2019, and on May 10, 2019, in Cape Coral, Florida, before Francine M. Ffolkes, an Administrative Law Judge with the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioners:

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STATEMENT OF THE ISSUE

The issue in this case was whether the Respondent, City of Cape Coral (City), was entitled to an Individual Environmental Resource Permit (Permit) that would allow removal of the Chiquita Boat Lock (Lock) and associated uplands, and installation of a 165-foot linear seawall in the South Spreader Waterway in Cape Coral, Florida.

PRELIMINARY STATEMENT

On October 31, 2016, the City submitted an application for the Permit. The Department of Environmental Protection (Department) announced its intent to issue the Permit to the City on November 7, 2018.

On December 14, 2018, the Petitioners, Matlacha Civic Association, Inc. (Association), Karl Deigert, Debra Hall, Melanie Hoff, Robert S. Zarranz, Yolanda Olsen, Jessica Blanks, and Joseph Michael Hannon, timely filed a joint petition for administrative hearing. On December 21, 2018, the Department referred the petition to DOAH to conduct an evidentiary hearing and submit a recommended order.

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

The Department filed a motion to strike and/or in limine on January 4, 2019. On January 18, 2019, the Petitioners filed their motion for entry of a partial final order. The major issue raised by those motions concerned a Consent Order dated April 19, 1977 (CO 15), between the Department of Environmental Regulation and GAC Properties, Inc. CO 15 was thereafter amended on April 27, 1979. The subject matter of this administrative proceeding was a proposed agency action to allow removal of the Lock. The Lock and South Spreader Waterway were first constructed by GAC Properties, Inc., as a result of the requirements of CO 15, as amended. On March 7, 2019, the motions were denied without prejudice.

On April 1, 2019, the Department filed an amended second motion to strike and/or in limine, to which the Petitioners responded on April 5, 2019. By Order dated April 9, 2019,

evidence and argument on certain issues were excluded from this proceeding. Those issues included potential collateral attacks on final agency actions and alleged violations of federal law. The April 9, 2019, Amended Order Limiting Issues is incorporated herein.

The parties filed their Joint Pre-hearing Stipulation on April 1, 2019, which attempted to limit the issues for the final hearing.

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

A three-volume Transcript of the hearing was filed with DOAH on June 3, 2019. Proposed recommended orders were filed by the parties on July 3, 2019, and have been considered in the preparation of this Recommended Order. The Petitioners' motion to exceed page limit that was filed with their proposed recommended order is granted.

References to Florida Statutes are to the 2019 version, unless otherwise stated.

FINDINGS OF FACT

Based on the parties' stipulations and the evidence adduced at the final hearing, the following findings of fact are made:

The Parties

1. The Department is the administrative agency of the State of Florida statutorily charged with, among other things, protecting Florida's water resources. As part of the Department's performance of these duties, it administers and enforces the provisions of chapter 373, part IV, Florida Statutes, and the rules promulgated thereunder in the Florida Administrative Code. Pursuant to that authority, the Department determines whether to issue or deny applications for environmental resource permits.

2. The City is a Florida municipality in Lee County. The City is the applicant for the Permit allowing the removal of the Lock and installation of a seawall (Project). The Project is

located within the geographic boundary of the City. The South Spreader Waterway is a perimeter canal separating the City's canal system from shoreline wetlands to the west and south, which run the length of Matlacha Pass to the mouth of the Caloosahatchee River at San Carlos Bay.[1/]

3. The Association is a Florida non-profit corporation that was created in 1981. The Association was created to safeguard the interests of its members. The Association has approximately 150 members who reside in Matlacha and Matlacha Isles, Florida. A substantial number of its members have substantial interests in the use and enjoyment of waters adjacent to and surrounding Matlacha. The Association's members were particularly interested in protecting the water quality of the surface waters in the area.

4. Matlacha is an island community located to the northwest of Cape Coral, the South Spreader Waterway, and the Lock. Matlacha is located within Matlacha Pass Aquatic Preserve. Matlacha Pass is classified as a Class II waterbody designated for shellfish propagation or harvesting, and is an Outstanding Florida Water (OFW). See Fla. Admin. Code R. 62-02.400(17)(b)36; 62-302.700(9)(h).

5. Petitioner, Karl Deigert, is a resident and property owner in Matlacha. Mr. Deigert is the president of the Association. Mr. Deigert’s house in Matlacha is waterfront. He

holds a captain's license and has a business in which he gives sightseeing and ecological tours by boat of the waters around Matlacha. He fishes in the waters around his property and enjoys the current water quality in the area. He is concerned that removal of the Lock would have negative effects on water quality and would negatively impact the viability of his business and his enjoyment of the waters surrounding Matlacha.

6. Petitioner, Melanie Hoff, is a resident and property owner in St. James City. St. James City is located to the southwest of Cape Coral. Ms. Hoff's property is located within five nautical miles of the Lock. Ms. Hoff engages in various water sports and fishes in the waters around her property. She moved to the area, in part, for the favorable water quality. She is concerned that removal of the Lock would negatively impact water quality and her ability to use and enjoy waters in the area.

7. Petitioner, Robert S. Zarranz, is a resident and property owner in Cape Coral. Mr. Zarranz's house in Cape Coral is waterfront. He is an avid fisherman and boater. He is concerned that removal of the Lock would negatively impact water quality, and that the quality of fishing in the area would decline as a result.

8. Petitioner, Yolanda Olsen, is a resident and property owner in Cape Coral. Ms. Olsen's house in Cape Coral is

waterfront. She enjoys watersports and birdwatching in the areas around her property. She is concerned that removal of the Lock would negatively impact water quality, and that her ability to enjoy her property and the surrounding waters would suffer as a result.

9. Petitioner, Jessica Blanks, is a resident and property owner in Cape Coral. Ms. Blanks' house in Cape Coral is waterfront. She is concerned that removal of the Lock would negatively impact water quality, and that her ability to enjoy her property and the surrounding waters would suffer as a result.

10. Petitioner, Joseph Michael Hannon, is a resident and property owner in Matlacha. Mr. Hannon is a member of the Association. He enjoys boating, fishing, and kayaking in the waters surrounding Matlacha. He is concerned that removal of the Lock would negatively impact water quality, and that his ability to enjoy his property and the surrounding waters would suffer as a result.

11. Petitioner, Debra Hall, did not appear at the final hearing and no testimony was offered regarding her standing.

The Project and Vicinity

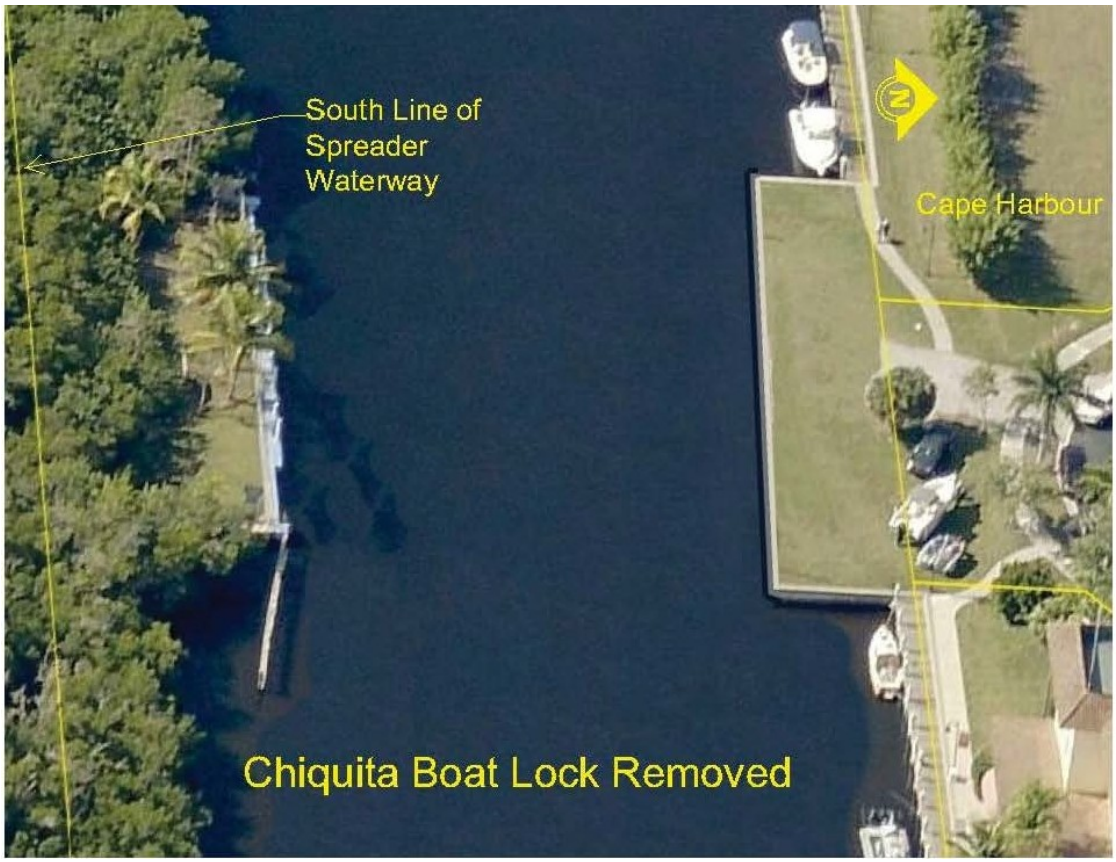
12. The Project site is 0.47 acres. At the Lock location, the South Spreader Waterway is 200 feet wide, and includes a 125-foot wide upland area secured by two seawalls, the 20-foot

wide Lock, a 32-foot wide upland area secured by one seawall, and 23 feet of mangrove wetlands.

13. The Lock is bordered to the north by property owned by Cape Harbour Marina, LLC, and bordered to the south by mangrove wetlands owned by the state of Florida. The 125-foot wide upland area and the 20-foot wide Lock form a barrier separating the South Spreader Waterway from the Caloosahatchee River. The preponderance of the competent substantial evidence established that the South Spreader Waterway behind the Lock is not tidally influenced, but would become tidally influenced upon removal of the Lock.

Joint Exhibit 1 at p. 46.

14. The City proposes to remove the Lock and one of the seawalls, reducing the 125-foot upland area to 20 feet. The proposed future condition of the area would include 125 feet of open canal directly connecting the South Spreader Waterway with the Caloosahatchee River.



Joint Exhibit 1 at p. 47.

15. The primary purpose of the Lock's removal is to alleviate safety concerns related to boater navigation. The Project's in-water construction includes demolition and removal of the existing Lock, removal of existing fill in the 125-foot upland area, removal of existing seawalls, and construction of replacement seawalls.

16. The City would employ Best Management Practices (BMPs) throughout the course of the Project, including sediment and erosion controls such as turbidity barriers. The turbidity barriers would be made of a material in which manatees could not become entangled.

17. All personnel involved with the Project would be instructed about the presence of manatees. Also, temporary signs concerning manatees would be posted prior to and during all in-water project activities.

History of the South Spreader Waterway

18. In the mid-1970's, the co-trustees of Gulf American Corporation, GAC Properties Credit, Inc., and GAC Properties, Inc., (collectively GAC) filed for after-the-fact permits from the Department's predecessor agency (DER), for the large dredge and fill work project that created the canal system in Cape Coral.

19. In 1977, DER entered into CO 15 with GAC to create the North and South Spreader Waterways and retention control systems, including barriers. The Lock was one of the barriers created in response to CO 15.

20. The Spreader Waterways were created to restore the natural hydrology of the area affected by GAC's unauthorized dredging and filling activity. The Spreader Waterways collected

and retained surface runoff waters originating from the interior of Cape Coral's canal system.

21. The South Spreader Waterway was not designed to meet water quality standards, but instead to collect surface runoff, then allow discharge of the excess waters collected over and through the mangrove wetlands located on the western and southern borders of the South Spreader Waterway.

22. This fresh water flow was designed to mimic the historic sheet flow through the coastal fringe of mangroves and salt marshes of the Caloosahatchee River and Matlacha Pass estuaries. The fresh water slowly discharged over the coastal fringe until it finally mixed with the more saline waters of the estuaries. The estuarine environments located west and south of the Lock require certain levels of salinity to remain healthy ecosystems. Restoring and achieving certain salinity ranges was important to restoring and preserving the coastal fringe.

23. In 1977 GAC finalized bankruptcy proceedings and executed CO 15. CO 15 required GAC to relinquish to the state of Florida the mangrove wetlands it owned on the western and southern borders of the South Spreader Waterway. This land grant was dedicated by a warranty deed executed in 1977 between GAC and the state of Florida.

24. The Petitioners' expert, Kevin Erwin, worked as an environmental specialist for DER prior to and during the

construction of the Spreader Waterways. Mr. Erwin was DER's main representative who worked with the GAC co-trustees to resolve the massive dredge and fill violation and design a system to restore the natural hydrology of the area.

25. Mr. Erwin testified that the Lock was designed to assist in retention of fresh water in the South Spreader Waterway. The fresh water would be retained, slowed down, and allowed to slowly sheet flow over and through the coastal fringe.

26. Mr. Erwin also testified that the South Spreader Waterway was not designed to allow direct tidal exchange with the Caloosahatchee River. In Mr. Erwin's opinion, the South Spreader Waterway appeared to be functioning today in the same manner as originally intended.

Breaches and Exchange of Waters

27. The Department's second amended notice of intent for the Project, stated that the Project was not expected to contribute to current water quality violations, because water in the South Spreader Waterway was already being exchanged with Matlacha Pass and the Caloosahatchee River through breaches and direct tidal flow. This second amended notice of intent removed all references to mitigation projects that would provide a net improvement in water quality as part of the regulatory basis for issuance of the permit. See Joint Exhibit 1 at pp. 326-333.

28. The Department's witnesses testified that waters within the South Spreader Waterway currently mix with waters of the Caloosahatchee River when the Lock remains open during incoming and slack tides. A Department permit allowed the Lock to remain open during incoming and slack tides. Department witness, Megan Mills, the permitting program administrator, testified that she could not remember the exact date that permit was issued, but that it had been "a couple years."

29. The location of breaches in the western and southern banks of the South Spreader Waterway was documented on another permit's drawings and pictures for a project titled "Cape Coral Spreader Waterway Restoration." See Cape Coral Ex. 9. Those documents located three breaches for repair and restoration identified as Breach 16A, Breach 16B, and Breach 20.

30. The modeling reports and discussion that support the City's application showed these three breaches connect to Matlacha Pass Aquatic Preserve. Breach 20 was described as a connected tidal creek. Breach 16A and 16B were described as allowing water movement between Matlacha Pass and the South Spreader Waterway only when relatively high water elevations occurred in Matlacha Pass or in the South Spreader Waterway.

31. The Department's water quality explanation of "mixing," was rather simplistic, and did not consider that the waterbody in which the Project would occur has three direct connections with

an OFW that is a Class II waters designated for shellfish propagation or harvesting. Such a consideration would require the Department to determine whether to apply the OFW permitting standards, and the Class II waters permitting criteria in section 10.2.5 of the Environmental Resource Permit Applicant's Handbook, Volume I. See Fla. Admin Code R. 62-330.302(1)(a); 62-4.242(2); and 62-302.400(17)(b)36.

32. The Caloosahatchee River, at its entrance to the South Spreader Waterway, is a Class III waters restricted for shellfish harvesting. The mouth of the Caloosahatchee River is San Carlos Bay, which is a Class II waters restricted for shellfish harvesting. There was no evidence that the Department's regulatory analysis considered that the waterbody in which the Project would occur directly connects to Class III waters that are restricted for shellfish harvesting, and is in close proximity to Class II waters that are restricted for shellfish harvesting. See Fla. Admin. Code R. 62-302.400(17)(b)36. and 62-330.302(1)(c).[2/]

Total Nitrogen

33. The City's expert, Anthony Janicki, Ph.D., testified that nitrogen concentrations in the Caloosahatchee River were higher than in the South Spreader Waterway in the years 2017 and 2018. Thus, he opined that if the Lock is removed, water from the South Spreader Waterway would not negatively impact the

Caloosahatchee River. However, the City's application was supported by an analysis, with more than a decade of monitoring data, which showed nitrogen concentration values were comparable inside the South Spreader Waterway and in the Caloosahatchee River.

34. Dr. Janicki also used the Department's Hydrologic Simulation Program – FORTRAN (HSPF) watershed model to estimate the Total Nitrogen (TN) loading that would enter the Caloosahatchee River through the Chiquita Lock. Dr. Janicki estimated that TN loading to the Caloosahatchee River, after removal of the Chiquita Lock, would amount to 30,746 pounds per year. The Caloosahatchee River is listed as impaired for nutrients and has a TN Total Maximum Daily Load (TMDL) that was set by the Department in 2009.

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

36. Dr. Janicki additionally testified that the potential TN loading to the Caloosahatchee River did not anticipate an actual impact to the River's water quality because the TN loads

from the South Spreader Waterway were already factored into the 2009 TMDL. He essentially testified that the Lock's removal was anticipated and was factored into the model when the TMDL was established in 2009.

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

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

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

Water Quantity and Salinity

40. The engineering report that supports the City's application stated that when the Lock is removed, the South

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

41. Dr. Janicki testified that Breach 20 was connected to a remnant tidal creek that meanders and eventually empties into an embayment. The evidence demonstrated that the embayment is Punta Blanca Bay, which is part of the Matlacha Pass Aquatic Preserve. Dr. Janicki opined that Breach 20 was an area of erosion risk and sediment transport into downstream mangroves that would be significantly reduced by removing the Lock. He explained that the reductions in flow would result in reductions in velocities through Breach 20 and in the South Spreader Waterway itself.

42. Mr. Erwin testified that Breach 20 was not a "breach."[3/] He described it as the location of a perpendicular intersection of the South Spreader Waterway with a small tidal creek, which connected to a tidal pond further back in the mangroves. Mr. Erwin testified that an "engineered sandbag concrete structure" was built at the shallow opening to limit the amount of flow into and out of this tidal creek system. But it was also designed to make sure that the tidal creek system "continued to get some

amount of water." As found above, Lock removal would drastically reduce the volume of daily water fluxes into and out of Breach 20's tidal creek system.

43. Mr. Erwin also testified that any issues with velocities or erosion would be exemplified by bed lowering, siltation, and stressed mangroves. He persuasively testified, however, that there was no such evidence of erosion and there were "a lot of real healthy mangroves."

44. Mr. Erwin opined that removal of the Lock would cause the South Spreader Waterway to go from a closed, mostly fresh water system, to a tidal saline system. He described the current salinity level in the South Spreader Waterway to be low enough to support low salinity vegetation and not high enough to support marine organisms like barnacles and oysters.

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

46. Dr. Janicki testified, and the model showed, that removal of the Lock would result in increased salinity above the Lock and decreased salinity downstream of the Lock. However, he generally opined that the distribution of salinities was well

within the normal ranges seen in this area. The City's application also concluded that the resultant salinities did not fall outside the preferred salinity ranges for seagrasses, oysters, and a wide variety of fish taxa. However, Dr. Janicki did not address specific changes in vegetation and encroachment of marine organisms that would occur with the increase in salinity within the South Spreader Waterway.

Secondary Impacts to the Mangrove Wetlands

47. Mr. Erwin testified that the mangroves located on the western and southern borders of the South Spreader Waterway are currently in very good health. He additionally testified that loss of the current fresh water hydraulic head and an increase in salinity within the South Spreader Waterway would negatively impact the health of the mangrove wetlands.

48. In addition, the City's application stated that removing the Lock would result in a drop in the water level of one to one and a half feet within the South Spreader Waterway. Mr. Erwin credibly and persuasively testified that a drop in water level of only a few inches would have negative effects on the health of mangroves, and that a drop of a foot could result in substantial mangrove die-off.

49. Mr. Erwin testified that the mangrove wetlands adjacent to the South Spreader Waterway consist of a variety of plants and algae in addition to mangroves. He described the wetlands as a

mangrove community made up of different types of mangroves, and epiphytic vegetation such as marine algae. This mangrove community provides habitat for a "wide range of invertebrates." He further testified that these plants and algae uptake and transform the nutrients that flow over and through the mangrove wetlands before they reach the receiving waters. Thus, the mangrove wetlands on the western and southern borders of the South Spreader Waterway serve to filter nutrients out of the water discharged from the Waterway before it reaches Matlacha Pass and the Caloosahatchee River.

50. Mr. Erwin's credible and persuasive testimony was contrary to the City's contention that Lock removal would not result in adverse impacts to the mangrove wetlands adjacent to the South Spreader Waterway.

51. The City and the Department failed to provide reasonable assurances that removing the Lock would not have adverse secondary impacts to the health of the mangrove wetlands community adjacent to the South Spreader Waterway.

Impacts to Fish and Wildlife, Including Endangered and Threatened Species

52. The Florida Fish and Wildlife Conservation Commission (FWC) reviewed the City's application and determined that if BMPs for in-water work were employed during construction, no significant adverse impacts on fish and wildlife were expected.

For example, temporary signs concerning manatees would be posted prior to and during all in-water project activities, and all personnel would be instructed about the presence of manatees.

53. The FWC determination only addressed direct impacts during in-water construction work. The City's application contained supporting material that identified the major change resulting from removal of the Lock that may influence fish and wildlife in the vicinity of the Project, was the opportunity for movement to or from the South Spreader Waterway canal system. Threatened and endangered species of concern in the area included the Florida manatee and the smalltooth sawfish.

54. The City's application stated that literature review showed the smalltooth sawfish and the Florida manatee utilized non-main-stem habitats, such as sea-wall lined canals, off the Caloosahatchee River. The City cited studies from 2011 and 2013, which showed that non-main-stem habitats were important thermal refuges during the winter, and part of the overall nursery area for smalltooth sawfish. The City concluded that removal of the Lock "would not be adverse, and would instead result in increased areas of useable habitat by the species."

55. However, the Petitioner's expert witness, John Cassani, who is the Calusa Waterkeeper, testified that there is a smalltooth sawfish exclusion zone downstream of the Lock. He testified that the exclusion zone is a pupping area for

smalltooth sawfish, and that rapid salinity fluctuations could negatively impact their habitat.

56. The City also concluded that any impacts to the Florida manatee would not be adverse, "and would instead result in increased areas of useable habitat by the species, as well as a reduction in risk of entrapment or crushing in a canal lock system." At the same time, the City acknowledged that "watercraft collision is a primary anthropogenic threat to manatees."

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

Boater Navigation Concerns

58. Oliver Clarke was the City’s principal engineer during the application process, and signed the application as the City's authorized agent. Mr. Clarke testified that he has witnessed

boater congestion at the Lock. He also testified that lack of boating experience and weather concerns can exacerbate the boater congestion issues at the Lock.

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

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

CONCLUSIONS OF LAW

Standing

61. Section 120.52(13), Florida Statutes, defines a "party," as a person "whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party." Section 120.569(1) provides, in pertinent part, that "[t]he provisions of this section apply in all proceedings in which the substantial interests of a party are determined by an agency."

62. It is well-established that to demonstrate that a person or entity has a substantial interest in the outcome of a proceeding, two things must be shown. First, there must be an injury-in-fact of sufficient immediacy to entitle one to a hearing. Second, it must be shown that the substantial injury is of a type or nature which the proceeding is designed to protect. The first has to do with the degree of the injury and the second with the nature of the injury. See Agrico Chem. Co. v. Dep't of Envtl. Reg., 406 So. 2d 478, 482 (Fla. 2d DCA 1981), rev. den., 415 So. 2d 1359 (Fla. 1982).

63. Agrico was not intended as a barrier to the participation in proceedings under chapter 120 by persons who are affected by the potential and foreseeable results of agency action. See Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co., 18 So. 3d 1079, 1082-1083 (Fla. 2d DCA 2009)

("[S]tanding is a legal concept that requires a would-be litigant to demonstrate that he or she reasonably expects to be affected by the outcome of the proceedings, either directly or indirectly." (quoting Hayes v. Guardianship of Thompson, 952 So. 2d 498, 505 (Fla. 2006))). Rather, the intent of Agrico was to preclude parties from intervening in a proceeding where those parties' substantial interests are remote and speculative. See Vill. Park v. Dep't of Bus. Reg., 506 So. 2d 426, 433 (Fla. 1st DCA 1987).

64. In Reily Enterprises, LLC v. Florida Department of Environmental Protection, 990 So. 2d 1248 (Fla. 4th DCA 2008), the court found that a challenger to a permit, alleged to adversely affect a nearby water body, met the Agrico test for standing. The facts upon which the court found standing for the petitioner in that case were comparable to the types of concerns and issues raised by the individual Petitioners in this case. Therefore, Petitioners Karl Deigert, Melanie Hoff, Robert S. Zarranz, Yolanda Olsen, Jessica Blanks, and Joseph Michael Hannon demonstrated their individual standing. Petitioner Debra Hall did not attend the hearing and so failed to demonstrate her individual standing.

65. The Association must prove its associational standing by satisfying the three-prong test for environmental associational standing established in Friends of the Everglades,

Inc., v. Board of Trustees of the Internal Improvement Trust Fund, 595 So. 2d 186 (Fla. 1st DCA 1992). In Friends of the Everglades, the court held that an environmental organization must meet both the two-pronged test for standing of Agrico and the test for standing of associations under Florida Home Builders Association v. Department of Labor and Employment Security, 412 So. 2d 351 (Fla. 1982)(extended to administrative proceedings under section 120.57(1), Florida Statutes, by Farmworker Rights Organization v. Department of Health and Rehabilitation Services, 417 So. 2d 753 (Fla. 1st DCA 1982)).

66. The Association proved its environmental associational standing by demonstrating: (1) that a substantial number of its members could substantially be affected by the challenged agency action; (2) that the agency action it sought to challenge was within the Association's general scope of interest and activity; and (3) that the relief it requested was of the type appropriate for it to receive on behalf of its members. See St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist., 54 So. 3d 1051, 1054 (Fla. 5th DCA 2011). The Association's burden was not whether it has or will prevail on the merits, but rather whether it has presented sufficient proof of injury to its asserted interests within the two-prong standing test. See Bd. of Comm'rs of Jupiter Inlet Dist. v. Thibadeau, 956 So. 2d 529 (Fla. 4th DCA 2007).

Burden of Proof

67. The Petitioners challenged the issuance of an individual environmental resource permit issued under chapter 373, Florida Statutes. Therefore, section 120.569(2)(p) governed this proceeding. Under this provision, the permit applicant must present a prima facie case demonstrating entitlement to the permit. Thereafter, a third party challenging the issuance of the permit has the burden "of ultimate persuasion" and the burden "of going forward to prove the case in opposition to the . . . permit." If the third party fails to carry its burden, the applicant prevails by virtue of its prima facie case.

68. The standard of proof is a preponderance of the evidence. See § 120.57(1)(j), Fla. Stat. Section 120.569(2)(p) "clearly contemplates an abbreviated presentation of the applicant's prima facie case." Last Stand, Inc., v. Fury Mgmt., Inc., Case No. 12-2574, RO ¶89 (Fla. DOAH Dec. 31, 2012; Fla. DEP Feb. 7, 2013). The abbreviated presentation occurs because the statute outlines the information that may constitute the applicant's prima facie case, which includes the application and supporting materials on which the agency concluded that the applicant provided reasonable assurances of compliance with applicable environmental resource permitting (ERP) criteria.

69. This is also a de novo proceeding, designed to formulate final agency action, and not to review action taken

preliminarily. See Capeletti Bros. v. Dep't of Gen. Servs., 432 So. 2d 1359, 1363-1364 (Fla. 1st DCA 1983). The de novo nature of this proceeding allowed the parties to make changes to the proposed project and the draft permit after the Department had referred the matter to DOAH for adjudication. The Department filed a second amendment to the intent to issue and draft permit on March 1, 2019. This second amendment eliminated the Department's previous finding that the City demonstrated mitigation of adverse water quality impacts through its achievement of current and future project credits in the BMAP process. See Joint Exhibit 1 at pp. 329 and 330. Section 120.569(2)(a) provides that once a petition is referred to DOAH for a hearing, "[t]he referring agency shall take no further action with respect to a proceeding under s.120.57(1), except as a party litigant, as long as the division has jurisdiction over the proceeding under s.120.57(1)."

70. As a party litigant, the Department may not seek to reacquire jurisdiction over the proposed agency action but may change its position by agreement of all parties, or by offering proof in support of its new position at the hearing. See Disc Vill., Inc. v. Dep't of Corr., Case No. 92-7321, RO ¶18 (Fla. DOAH Feb. 26, 1993; Fla. DOC Apr. 6, 1993). An agency's change of position is neither proposed nor final agency action, as long as the matter remains pending at DOAH. See Red and White

Invs., Inc. v. Dep't of Transp., Case No. 90-4326, RO ¶44 (Fla. DOAH Nov. 20, 1990).

71. An agency must offer proof in support of the agency's changed position during the evidentiary proceeding, in order for the new position to provide the potential basis for a recommended or final order. See Disc Vill., Inc., RO at ¶18. Thus, the second amended intent to issue was a change of position, and not proposed agency action. The Department's changed position, therefore, was not part of the City's prima facie case as contemplated by section 120.569(2)(p). See City of W. Palm Beach v. Palm Beach Cnty., Case No. 16-1861, RO ¶136 (Fla. DOAH March 31, 2017; Fla. SFWMD May 9, 2017), rev'd. on other grounds, 253 So. 3d 623 (Fla. 4th DCA 2018).

Permitting Standard

72. Issuance of the Permit is dependent upon there being reasonable assurances that the Project will meet applicable statutory and regulatory standards. See §§ 373.413(1) and 373.414(1), Fla. Stat.

73. "Reasonable assurance" means the upfront demonstration that there is a substantial likelihood of compliance with standards, or "a substantial likelihood that the project will be successfully implemented." See Metro. Dade Cnty. v. Coscan Florida, Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992). Reasonable assurance does not require absolute guarantees that

the applicable conditions for issuance of a permit have been satisfied. Further, speculation or subjective beliefs are not sufficient to carry the burden of presenting contrary evidence or proving a lack of reasonable assurance necessary to demonstrate that a permit should not be issued. See FINR II, Inc. v. CF Indus., Inc., Case No. 11-6495 (Fla. DOAH Apr. 30, 2012; Fla. DEP June 8, 2012).

74. The City was responsible for establishing its prima facie case of entitlement to the Permit by entering into evidence the complete application files and supporting documentation and testimony, and the Department's notice of intent to issue and draft permit. The burden of ultimate persuasion was on Petitioners to prove their case in opposition to the Permit by a preponderance of the competent and substantial evidence. See Washington Cnty. v. Bay Cnty. & NW Fla. Water Mgmt. Dist., Case Nos. 10-2983, 10-2984, 10-10100 (Fla. DOAH July 26, 2012; Fla. NWFWMD Sep. 27, 2012).

75. While a petitioner bears the ultimate burden, a petitioner can prevail by illustrating the failures inherent in the applicant's proposed project. The petitioner need only show that the applicant and the agency failed to provide reasonable assurances of compliance with the required criteria, and does not need to demonstrate that the proposed project would harm the environment. See Id.

76. When the petitioner demonstrates that "specific aspects of the application are unsatisfactory," the applicant loses its presumption of entitlement to the permit. See Last Stand, Inc., v. Fury Mgmt., Inc., Case No. 12-2574, RO ¶90 (Fla. DOAH Dec. 31, 2012; Fla. DEP Feb. 7, 2013). The applicant must then present a rebuttal case refuting the petitioner's evidence and demonstrating reasonable assurance of compliance with all permit criteria and entitlement to the permit. See § 120.569(2)(p), Fla. Stat.

ERP Permit Criteria

77. In order to provide reasonable assurances that the Project will not be harmful to the water resources, the City must satisfy the conditions for issuance set forth in rules 62-330.301 and 62-330.302, and the applicable sections of Volumes I and II of the Environmental Resource Permit Applicant's Handbook.

A. Water Quality

78. Rule 62-330.301(1)(e) requires that the City provide reasonable assurance that the proposed Project:

> 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.

79. Petitioners proved by a preponderance of the competent and substantial evidence that the Department and the City were not aligned regarding how the City's application met applicable water quality standards. The Petitioners proved by a preponderance of the competent and substantial evidence that the City relied on future projects to provide reasonable assurance that the removal of the Lock would not cause or contribute to violations of water quality standards in the Caloosahatchee River and Matlacha Pass Aquatic Preserve.

80. Such reliance on future projects does not satisfy the required upfront demonstration that there is a substantial likelihood of compliance with standards, or "a substantial likelihood that the project will be successfully implemented." See Metro. Dade Cnty. v. Coscan Florida, Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992). Those future projects were part of the BMAP process under Section 403.067, Florida Statutes, which the Department had recognized and incorporated into its original intent to issue and draft permit. See Joint Exhibit 1 at pp. 329 and 330. The March 1, 2019, second amendment eliminated the Department's previous finding that the City demonstrated mitigation of adverse water quality impacts through its achievement of future project credits in the BMAP process.

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

82. The City's reliance on the BMAP process to satisfy reasonable assurance for the ERP Permit was further exemplified by this argument in its proposed recommended order:

"By operation of section 403.067(7)(b)2.i., Florida Statutes, the City is presumed to be in compliance with the TMDL requirements."

83. Section 403.067(7)(b)2.i., Florida Statutes, provides:

> A landowner, discharger, or other responsible person who is implementing applicable management strategies specified in an adopted basin management action plan may not be required by permit, enforcement action, or otherwise to implement additional management strategies, including water quality credit trading, to reduce pollutant loads to attain the pollutant reductions established pursuant to subsection (6) and shall be deemed to be in compliance with this section. (Emphasis added).

84. Thus, the presumptive fact of compliance flows from the basic fact that a "responsible person" is "implementing

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

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

86. Section 10.2.5 of the Environmental Resource Permit Applicant's Handbook, Volume I, provides:

> The special value and importance of shellfish harvesting waters to Florida's economy as existing or potential sites of commercial and recreational shellfish harvesting and as a nursery area for fish and shellfish is recognized by the Agencies. In accordance with section 10.1.1(d), above, the Agency shall deny a permit for a regulated activity located:
>
> * * *
>
> (c) In any class of waters where the location of the activity is adjacent or in close proximity to Class II waters, unless the applicant submits a plan or proposes a procedure that demonstrates that the regulated activity will not have a negative effect on the Class II waters and will not result in violations of water quality standards in the Class II waters. (Emphasis added).

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

B. Water Quantity

88. Rules 62-330.301(1)(a) and (c) require that the City provide reasonable assurance that the proposed Project will not

cause adverse water quantity impacts to receiving waters and adjacent lands; and will not cause adverse impacts to existing surface water storage and conveyance capabilities.

89. The preponderance of the competent substantial evidence demonstrated that the volume of flow through Breach 20, an adjacent tidal creek connected to Matlacha Pass, will drastically decrease. Mr. Erwin testified that Breach 20 was designed to maintain water flow to this adjacent tidal creek system. He also persuasively testified that there was no evidence of erosion at Breach 20, and there were currently "a lot of real healthy mangroves."

90. Since the City's position was that the decrease in flow volume and in velocity at Breach 20 would cure a perceived "erosion" problem, any potential adverse impacts to the tidal creek system and mangrove wetlands were not addressed. The undersigned's reasonable inferences from the record evidence are that the flow in the adjacent tidal creek system will be adversely impacted, and those "healthy mangroves" will also be adversely impacted. See Heifetz v. Dep't of Bus. Reg., 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985)("It is the hearing officer's function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence.");

Berry v. Dep't of Envtl. Reg., 530 So. 2d 1019, 1022 (Fla. 4th DCA 1988)("[T]he agency may reject the findings of the hearing officer only when there is no competent substantial evidence from which the finding could reasonably be inferred." (citations omitted)).

C. Secondary Impacts

91. Rule 62-330.301(1)(f) requires that the City provide reasonable assurance that the proposed Project will not cause adverse secondary impacts to the water resources.

92. Section 10.2.7 of the Environmental Resource Permit Applicant's Handbook, Volume 1, provides that an applicant must provide reasonable assurance regarding secondary impacts. Those secondary impacts are regulated in the same manner as direct impacts and are analyzed using the same criteria.

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

94. Section 10.2.2 of the Environmental Resource Permit Applicant's Handbook, Volume 1, requires that an applicant must provide reasonable assurance 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. Section 10.2.2.3 requires the Department to assess impacts on the values of functions by reviewing the ecologic condition, hydrologic connections, uniqueness, location, and fish and wildlife utilization of the wetland or other surface water.

95. Mr. Erwin's credible and persuasive testimony regarding adverse secondary impacts to the ecological health of the mangrove ecosystem adjacent to the South Spreader Waterway was in stark contrast to the City's contention that Lock removal was not expected to result in impacts to those mangrove wetlands.[4/]

96. The credible and persuasive evidence demonstrated that Lock removal would adversely affect the smalltooth sawfish and its nursery habitat. The credible and persuasive evidence also demonstrated that Lock removal would increase the already high risk of manatee-motorboat collisions by inviting manatees into the South Spreader Waterway, a non-main-stem refuge, where novice boaters would present "a bigger hazard than the [L]ock ever has."[5/]

97. The preponderance of the competent substantial evidence demonstrated that the City failed to provide reasonable assurances that the Project will not impact the values of wetland and other surface water functions.

D. Public Interest Test

98. Section 373.414(1)(a), Florida Statutes, requires that in determining whether a proposed project is not contrary to the public interest or is clearly in the public interest, the Department "shall consider and balance" seven factors. All seven factors are collectively considered to determine whether, on balance, a proposed project satisfies the public interest test. See 1800 Atlantic Developers v. Dep't of Envtl. Reg., 552 So. 2d 946, 953, 957 (Fla. 1st DCA 1989), rev. den., 562 So. 2d 345 (Fla. 1990); Last Stand, Inc. v. Fury Mgmt., Inc., Case No. 12-2574 (Fla. DOAH Dec. 31, 2012; Fla. DEP Feb. 7, 2013).

99. The seven factors are also found in rule 62-330.302, and provide:

> (1) In addition to the conditions in rule 62-330.301, F.A.C., to obtain an individual or conceptual approval permit under this chapter, 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, 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 of Volume I:
>
> 1. Whether the activities will adversely affect the public health, safety, or welfare or the property of others;
>
> 2. Whether the activities will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;
>
> 3. Whether the activities will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;
>
> 4. Whether the activities will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;
>
> 5. Whether the activities will be of a temporary or permanent nature;
>
> 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
>
> 7. The current condition and relative value of functions being performed by areas affected by the proposed activities.

100. As found above, the Department's exchange of waters position failed to consider the three direct connections to the Matlacha Pass Aquatic Preserve OFW. This is also important, not just for the water quality analysis, but for the public interest

test. If the direct or secondary impacts of the Project are in, or significantly degrade an OFW, then the Project must be "clearly in the public interest," to obtain approval. Either review requires the Department to consider and balance the seven factors in rule 62-330.302(1)(a).

101. Factors one and three of the public interest test, address whether the Project will cause adverse impacts, not whether adverse impacts are currently occurring and will be cured by the Project. Also, factor one does not include a consideration of non-environmental issues.

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

103. In addition, the preponderance of the evidence also supports a finding under factor one that there will be adverse secondary impacts to the property of Cape Harbour Marina.

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

on the negative side of the balancing test. Factor six is neutral.

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

CO 15 and Res Judicata/Collateral Estoppel

106. Petitioners have maintained throughout this proceeding, the legal position that the doctrines of res judicata and collateral estoppel precluded the Department from considering the City's application to remove the Lock.

107. The doctrine of res judicata stands for the principle that once "a cause of action has been decided by a court of competent jurisdiction," the same issue cannot be re-litigated by the same parties so long as the judgment stands unreversed. See Selim v. Pan American Airways Corp., 889 So. 2d 149, 153 (Fla. 4th DCA 2004). The related doctrine of collateral estoppel prevents identical parties from re-litigating identical issues that have been determined in a prior litigation. See Burns v. DaimlerChrysler Corp., 914 So. 2d 451, 453 (Fla. 4th DCA 2005)("Collateral estoppel bars a claim only when the issues have

been fully litigated and decided in a court of competent jurisdiction.").

108. Res judicata applies when four identities are met: (1) identity in the thing sued for; (2) identity of the cause of action; (3) identity of the parties; and (4) identity of the quality in the person for or against whom the claim is made. See Topps v. State, 865 So. 2d 1253, 1255 (Fla. 2004) (citing McGregor v. Provident Trust Co. of Philadelphia, 162 So. 323, 328 (Fla. 1935)). Thus, before res judicata becomes applicable, there must have been a final judgement on the merits in a former suit. Id.

109. In this case, CO 15, as amended, and the 1977 warranty deed to the state of Florida were not final judgments after adjudication on the merits, for purposes of the doctrine of res judicata. Petitioners argued that res judicata applied because CO 15 as amended was a binding contract involving the same parties, the same ecosystem, the same science, and the same laws. However, even assuming a binding contract, it did not arise from an adjudication that led to a final judgment on the merits. See Hicks v. Hoagland, 953 So. 2d 695, 698 (Fla. 5th DCA 2007)("For res judicata to apply, there must exist in the prior litigation a 'clear-cut former adjudication' on the merits.").

110. Even if, CO 15, as amended, was settlement of an enforcement action by DER against GAC, contrary to the

Petitioners' claim, the parties were not the same. The parties to CO 15, as amended, were GAC and DER. The parties to the warranty deed were GAC and the state of Florida. Even if the former DER constitutes the same party as the Department, the City and the Petitioners were not parties to CO 15, as amended. See Palm AFC Holdings v. Palm Beach Cnty., 807 So. 2d 703 (Fla. 4th DCA 2002)(holding that the identity of parties test is not met because the prior decision was between appellants and Palm Beach County while this decision is between appellants and Minto Communities).

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

112. In conclusion, the doctrines of res judicata and collateral estoppel did not apply to preclude the Department from considering the City's application to remove the Lock. Most importantly, there was no prior proceeding that led to a final

judgment on the merits, which is required to invoke the doctrines in the first place. In addition, the elements were not met with regard to the identity of parties, causes of action, facts, and issues.

Attorney's Fees

113. In their proposed recommended order, Petitioners sought an award of attorney's fees and costs under section 120.595(1)(d). Petitioners argued that the City and the Department participated in this proceeding, initiated by Petitioners' challenge, for an "improper purpose," as that term is defined in section 120.595(1)(e).

114. Section 120.595(1)(e) defines "improper purpose" as "participation in a proceeding pursuant to s. 120.57(1) primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of litigation, licensing, or securing the approval of an activity."

115. Although the findings and conclusions of this Recommended Order are not favorable to the City and the Department, no "improper purpose" under section 120.595(1)(e) is found. Simply losing a case at trial is insufficient to establish a frivolous purpose in the non-prevailing party, let alone an improper purpose. See Schwartz v. W-K Partners, 530 So. 2d 456, 458 (Fla. 5th DCA 1988)(For an award of attorney's fees, the trial court must make a finding that there

was a complete absence of a justiciable issue raised by the losing party.).

Summary

116. Petitioners met their ultimate burden of persuasion to prove that the Project does not comply with all applicable permitting criteria. The City failed to demonstrate its compliance with all applicable permitting criteria and its entitlement to the Permit.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is,

RECOMMENDED that:

1. The Department of Environmental Protection enter a final order denying Individual Environmental Resource Permit Number 244816-005 to the City of Cape Coral for removal of the Chiquita Boat Lock.

2. The final order deny Petitioners' request for an award of attorney's fees and costs.

DONE AND ENTERED this 12th day of December, 2019, in Tallahassee, Leon County, Florida.

FRANCINE M. FFOLKES
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of December, 2019.

ENDNOTES

[1/] References throughout this proceeding to the "estuary" or the "Caloosahatchee estuary" include the Matlacha Pass, Caloosahatchee River, and San Carlos Bay. "[I]t's all one piece basically." Janicki, Tr. p. 846, lines 8-13.

[2/] Id.

[3/] Mr. Erwin defined a "breach" in two ways. First, as a natural opening that has been exacerbated by man, so that velocities are increased causing erosion, bed lowering and widening. Second, a section actually dug out by man that allows water to flow in an unnatural manner into adjacent wetlands. Erwin, Tr. p. 557, lines 13-25.

[4/] The decision to accept one expert's testimony over that of another expert, is a matter within the sound discretion of the administrative law judge (ALJ) and cannot be altered absent a complete lack of competent substantial evidence from which the finding could be reasonably inferred. See Collier Med. Ctr. v. State, Dep't of HRS, 462 So. 2d 83, 85 (Fla. 1st DCA 1985). The sufficiency of the facts required to form the opinion of an expert must normally reside with the expert, and any purported deficiencies in such facts relate to the weight of the evidence,

a matter also exclusively within the province of the ALJ as the trier of the facts. See Gershanik v. Dep't of Prof'l Reg., 458 So.2d 302, 305 (Fla. 3rd DCA 1984), rev. den. 462 So. 2d 1106 (Fla. 1985).

[5/] It is the case law of Florida that if there is competent substantial evidence to support the ALJ's findings, then it is irrelevant that there may also be competent substantial evidence to support a contrary finding. See Arand Constr. Co. v. Dyer, 592 So. 2d 276, 280 (Fla. 1st DCA 1991). The appellate courts of Florida have also observed that the evidence presented at an administrative hearing may support two inconsistent findings and have concluded that, in such cases, "it is the hearing officer's role to decide the issue one way or the other." Heifetz, 475 So. 2d at 1281.

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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.