SJR 2021-049

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

NED BOWERS,

Petitioner,

v.

DOAH Case No. 21-0432

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

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

Respondents.
_____/

FINAL ORDER

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

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

I. STATEMENT OF THE ISSUE

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

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

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

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

II. STANDARD OF REVIEW

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

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

B. Competent Substantial Evidence

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

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

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

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

C. Essential Requirements of Law

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

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

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

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

D. Subject Matter Jurisdiction

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

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

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

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

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

III. EXCEPTIONS AND RESPONSES

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

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

argument and citations to the record.

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

IV. RULINGS ON EXCEPTIONS[5]

A. Rulings on Petitioner's Exceptions

Petitioner's Exception No. 1

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

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

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

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

FOF 14 states as follows:

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

(RO at 11, emphasis supplied.)

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

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

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

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

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

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

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

Emphasis supplied.

[7] No exceptions were taken to COL 91.

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

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

Petitioner's Exception No. 2

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

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

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

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

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

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

FOFs 66 and 67 state as follows:

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

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

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

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

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

Petitioner's Exception No. 3

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

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

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

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

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

Petitioners' Exception No. 4

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

The District may not reject or modify a finding of fact unless a review of the entire record shows that the finding was not based upon competent substantial evidence. § 120.57(1)(*l*), F. S. The record shows that Orange County's expert in water resources engineering, including stormwater modeling and hydrology, Brian Mack, P.E., testified that he relied on NRCS soils information that characterized the soils for the entire area as Type-A soils. (Jt. Ex. 19; T. 660:18-661:2). He also testified that it is not standard practice for engineers to "ground-truth" the soils data and that the NRCS soils data was the best available data for the area. (Jt. Ex. 19; T 662:9-14; 179:13-17).

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

Petitioner argues that his expert provided testimony that constitutes competent substantial evidence contrary to Mr. Mack's testimony. (Pet. Exceptions at 4-5). It is the ALJ's function to consider the evidence presented, resolve conflicts, and judge witness credibility. *See Heifetz*, 475 So. 2d at 1281. The District may not reweigh record evidence. *Id. See also Walker v. Bd. of Prof'l Eng'r*, 946 So. 2d 604, 605 (Fla. 1st DCA 2006).

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

Petitioners' Exception No. 5

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

The District may not reject or modify a finding of fact unless a review of the entire record shows that the finding was not based upon competent substantial evidence. § 120.57(1)(*l*), F. S. The record shows that Orange County's expert, Mr. Mack, testified that he reviewed multiple documents, including a topographic map, LiDar data, and a survey to determine that the elevation on the north side of the Cooper Cross-drain was slightly higher than the south side (Jt. Ex.'s 5, 7; OC Ex.'s 16-1, 29-2; T. 648:2-655:22).

Petitioner argues that his expert gave competent substantial evidence contrary to Mr. Mack's testimony. (Pet. Exceptions at 5). It is the ALJ's function to consider the evidence presented, resolve conflicts, and judge witness credibility. *See Heifetz*, 475 So. 2d at 1281. The

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

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

Petitioners' Exception No. 6

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

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

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

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

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

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

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

Petitioners' Exception No. 7

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

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

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

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

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

Petitioners' Exception No. 8

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

The District may not reject or modify a finding of fact unless a review of the entire record shows that the finding was not based upon competent substantial evidence. § 120.57(1)(*l*), F. S. The record shows that Orange County's expert, Mr. Mack, testified about model inputs, including elevations and soil typing, for three different model scenarios. Scenario 1 modeled the conditions of the project site prior to 2010 (Jt. Ex.'s 6, 7, 8; T. 692:5-6; 733:20-734:2). Scenario 2 modeled the existing conditions (Jt. Ex.'s 6, 7, 8; T. 701:8-17, 903:9-11, 906:2-7, 919:1-8, 919:23-920:1, 940:15-23); and the Proposed Condition modeled the conditions after the Project is constructed (Jt. Ex.'s 6, 7, 8; T. 903:9-11, 906:2-7, 919:1-8, 919:23-920, 940:15-23).

Petitioner argues that his expert in engineering, Daniel L. Morris, P.E. provided testimony regarding model inputs. (Pet. Exceptions at 7). The record shows Mr. Morris did testify regarding model inputs and provide opinions contrary to Mr. Mack's. (T. 215:13-23, 217:15-24). It is the ALJ's function to consider the evidence presented, resolve conflicts, and judge witness credibility. *See Heifetz*, 475 So. 2d at 1281. The District may not reweigh record evidence. *Id*. *See also* *Walker v. Bd. of Prof'l Eng'r*, 946 So. 2d 604, 605 (Fla. 1st DCA 2006).

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

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

Petitioners' Exception No. 9

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

The District may not reject or modify a finding of fact unless a review of the entire record shows that the finding was not based upon competent substantial evidence. § 120.57(1)(*l*), F. S. The record shows the District's expert Ms. Dewey testified that in order to determine whether the application would meet applicable permitting criteria, she reviewed model Scenario 2, which compared existing conditions, or pre-development conditions, with the post-development condition. (T. 903:9-11, 906:2-7, 919:1-8, 919:23-920:1, 940:15-23). Ms. Dewey testified that model Scenario 1 was merely used for general informational purposes and was not required to determine whether the project met the applicable permitting criteria. (T. 903:8-14, 940:18-21).

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

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

Petitioners' Exception No. 10

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

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

(RO at 25).

The District may not reject or modify a finding of fact unless a review of the entire record shows that the finding was not based upon competent substantial evidence. § 120.57(1)(*l*), F. S. The record shows the application file was accepted into evidence, and that pursuant to § 120.569(2)(p), F. S., the application established Orange County's prima facie entitlement to the permit (Jt. Ex's. 1 through 10 and 14 through 32; T. 51:2-7). At that point, the burden of ultimate persuasion shifted to Petitioner to prove his case in opposition to the permit by a preponderance of the competent and substantial evidence, and thereby, prove that the applicant failed to provide reasonable assurance that the standards for issuance of the permit were met. (RO at 5; *Last Stand, Inc. and George Halloran v. Fury Mgmt., Inc. and Dep't of Envtl. Prot.*, DOAH Case No. 12-2574 (Fla. DOAH Dec. 31, 2012; Fla. DEP Feb. 7, 2013).

It is the ALJ's function to consider the evidence presented, resolve conflicts, and judge witness credibility. *See Heifetz*, 475 So. 2d at 1281. The District may not reweigh record evidence. *Id*. *See also Walker v. Bd. of Prof'l Eng'r*, 946 So. 2d 604, 605 (Fla. 1st DCA 2006). The record contains evidence that is sufficiently relevant and material, and adequately provides the factual basis to support the determination that the project met applicable permitting criteria. (Jt. Ex.1; T. 811:15-24, 902:7-15, 909:15-910-24). Accordingly, competent substantial evidence

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

Petitioners' Exception No. 11

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

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

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

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

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

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

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

Petitioners' Exception No. 12

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

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

The District may not reject or modify a finding of fact unless a review of the entire record shows that the finding was not based upon competent substantial evidence. § 120.57(1)(*l*), F. S. The record shows the ALJ addressed the project's existing conditions multiple times during the final hearing by ruling it was irrelevant to the proceeding. (T. 397:1-4 and 16-17, 419:7-11, 754:10-16, 922:23-923:7, 929:12-930:18).

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

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

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

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

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

Petitioners' Exception No. 13

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

The District may not reject or modify a finding of fact unless a review of the entire record shows that the finding was not based upon competent substantial evidence. § 120.57(1)(*l*), F. S. Petitioner argues the project "does not provide for any water quality treatment and will adversely affect the public health safety and welfare." (Pet. Exceptions at 11).

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

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

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

Petitioners' Exception No. 14

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

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

The District may not reject or modify a finding of fact unless a review of the entire record shows that the finding was not based upon competent substantial evidence. § 120.57(1)(*l*), F. S. The record shows the District's expert in wetland and wildlife ecology Nicole Martin testified there would not be any adverse impacts to the value and functions to fish and wildlife, based on the proposed project. (Jt. Ex. 1; T. 801:3-7, 868:19-869:4, 876:4-877:11). She testified the project area has been historically mowed and maintained as a residential lawn. (T. 801:10-11). Ms. Martin visited the project site twice: on June 5, 2020 and September 21, 2020 (T. 790: 23-791-5). She found no significant value to the functions of fish and wildlife within the project area, and no observation of fish and wildlife using the project area. (Jt. Ex. 1; T. 801: 11-15). Ms. Martin did not observe any areas within the proposed project area that would have been used for nesting or feeding. (T. 808: 18-25). Thus, the record contains evidence that is sufficiently relevant and material, and adequately provides the factual basis to support FOF 48. Accordingly, competent substantial evidence supports the ALJ's findings. *City of Hialeah Gardens*, 857 So. 2d at 204.

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

The District may not consider evidence not contained in the record, make additional findings, or reweigh record evidence. *See* § 120.57(1)(k)-(*l*), F. S., *Walker v. Bd. of Prof'l Eng'r*, 946 So. 2d 604, 605 (Fla. 1st DCA 2006) (weight of the evidence), *Fla. Power & Light v. State Siting Bd.*, 693 So. 2d 1025, 1026-27 (Fla. 1st DCA 1997) (additional findings). For the foregoing reasons, Petitioner's Exception No. 14 is rejected.

Petitioners' Exception No. 15

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

The District may not reject or modify a finding of fact unless a review of the entire record shows that the finding was not based upon competent substantial evidence. §120.57(1)(*l*), F. S. The record shows District expert Ms. Martin testified she evaluated environmental factors of the public interest test (Jt. Ex. 1; T. 805:3-19). Ms. Martin testified the project is within a historically mowed and maintained law, and it is not expected to have any environmental hazard for safety or hazards with respect to environmental conditions. (Jt. Ex. 1; T. 805: 3-19, 868:19-869:4, 876:4-877:11) District expert Ms. Dewey testified she evaluated the public interest test factors relating to flooding and erosion (Jt. Ex. 1; T. 915:4-916:7). Ms. Dewey testified the project is not expected to cause adverse flooding (Jt. Ex. 1; T. 915: 19-24) or harmful erosion (Jt. Ex. 1; T. 916:5-7).

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

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

Petitioners' Exception No. 16

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

The District may not reject or modify a finding of fact unless a review of the entire record shows that the finding was not based upon competent substantial evidence. § 120.57(1)(*l*), F. S. The record shows District expert Ms. Dewey testified that the Technical Staff Report refers to the project not causing a water quality violation. (Jt. Ex. 1; T. 914:20-21). Ms. Dewey further explained that because the Project does not propose any impervious surfaces, and because the proposed outfall pipe will not produce erosive velocities, the project will not result in any water quality violation. (T. 914:22-915:3).

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

Petitioners' Exception No. 17

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

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

The District may not reject or modify a finding of fact unless a review of the entire record shows that the finding was not based upon competent substantial evidence. § 120.57(1)(*l*), F. S. The record shows Petitioner's witness, David Russell, reviewed the results of soil samples and a water sample taken by ENCO Lab upstream of the proposed project area in 2015. (Pet. Ex.'s 64, 66; T. 422:21-424:11, 425:7-426-4, 434:5-10). Mr. Russell testified to his opinion that the soil samples show higher levels of phosphate and nitrate, and to the extent that those are contaminants, they are carried over and sent down to a Lake Ola outfall. (T. 436:15-18).

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

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

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

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

Petitioners' Exception No. 18

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

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

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

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

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

Petitioners' Exception No. 19

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

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

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

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

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

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

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

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

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

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

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

Petitioners' Exception No. 20

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

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

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

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

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

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

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

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

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

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

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

Initially, as noted in response to Petitioner's Exception No. 14 above, there is no evidence in the record regarding the eventual outfall of Lake Ola, nor is there evidence in the record regarding the water quality of Lake Apopka. The District may not consider evidence not contained in the record, make additional findings, or reweigh record evidence. *See* § 120.57(1)(k)-(*l*), F. S., *Walker v. Bd. of Prof'l Eng'r*, 946 So. 2d 604, 605 (Fla. 1st DCA 2006) (weight of the evidence), *Fla. Power & Light v. State Siting Bd.*, 693 So. 2d 1025, 1026-27 (Fla. 1st DCA 1997) (additional findings).

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

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

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

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

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

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

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

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

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

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

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

Petitioner's Exception No. 21(b)

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

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

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

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

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

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

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

Petitioner's Exception No. 22

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

The District may not reject or modify a finding of fact unless a review of the entire record shows that the finding was not based upon competent substantial evidence. § 120.57(1)(*l*), F. S. The record shows the application file was accepted into evidence, and that pursuant to § 120.569(2)(p), F. S., the application established Orange County's prima facie entitlement to the permit (Jt. Ex's. 1 through 10, 14 through 32; T. 51:2-7). At that point, the burden of ultimate persuasion shifted to Petitioner to prove his case in opposition to the permit by a preponderance of the competent and substantial evidence, and thereby, prove that the applicant failed to provide reasonable assurance that the standards for issuance of the permit were met.

It is the ALJ's function to consider the evidence presented, resolve conflicts, and judge witness credibility. *See Heifetz,* 475 So. 2d at 1281. The District may not reweigh record evidence. *Id*. *See also Walker v. Bd. of Prof'l Eng'r,* 946 So. 2d 604, 605 (Fla. 1st DCA 2006). The record contains evidence that is sufficiently relevant and material, and adequately provides

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

Petitioner's Exception No. 23

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

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

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

matters asserted in them, without being subject to hearsay objections. If these documents could not be admitted except through witnesses with personal knowledge and requisite expertise as to all statements contained within the documents, one of the primary purposes of the statute would be destroyed.

86. With Orange County having made its prima facie case for the Permit, the burden of ultimate persuasion was on Mr. Bowers to prove his case in opposition to the Permit by a preponderance of the competent and substantial evidence, and thereby prove that Orange County failed to provide reasonable assurance that the standards for issuance of the Permit were met.

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

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

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

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

B. Ruling on District's Exception

District's Exception No. 1

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

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

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

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

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

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

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

3.2.1 Water Quantity Revised 6/1/18

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

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

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

(Emphasis added)

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

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

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

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

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

Orange County's Exception No. 1

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

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

(RO at 8)

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

The District may not reject or modify a finding of fact unless a review of the entire record shows that the finding was not based upon competent substantial evidence. §120.57(1)(*l*), F.S.

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

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

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

The record contains evidence that is sufficiently relevant and material, and adequately provides the factual basis to support the last sentence of the ALJ's Finding of Fact 3. Accordingly, competent substantial evidence supports the ALJ's finding. *City of Hialeah Gardens v. Miami-Dade Charter Found., Inc.*, 857 So. 2d 202, 204 (Fla. 3d DCA 2003). Orange County's Exception No. 1 is rejected.

Orange County's Exception No. 2

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

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

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

Orange County's Exception No. 3

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

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

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

ACCORDINGLY, IT IS HEREBY ORDERED:

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

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

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT

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

RENDERED this 1ST day of September 2021.

BY: _____
Courtney Waldron
District Clerk

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Notice of Rights

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

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

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

EXHIBIT A

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NED BOWERS,

Petitioner,

VS. CASE NO. 21-0432

ORANGE COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF FLORIDA AND ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Respondents.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on May 10 through 13, 2021, by Zoom conference before E. Gary Early, a designated Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner Ned Bowers:

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West Palm Beach, Florida 33407

For Respondent Orange County, Florida:

Linda S. Brehmer-Lanosa, Esquire
Orange County Attorney's Office
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Orlando, Florida 32801

For Respondent St. Johns River Water Management District:

Sharon M. Wyskiel, Esquire
Erin H. Preston, Esquire
Steven J. Kahn, Esquire
Jessica Pierce Quiggle, Esquire
St. Johns River Water Management District
4049 Reid Street
Palatka, Florida 32177

STATEMENT OF THE ISSUE

The issue to be determined is whether the proposed construction and operation of an outfall drainage improvement project for a 0.167-acre project known as Lake Ola Circle Outfall Drainage Improvements meets the criteria in Florida Administrative Code Rules 62-330.301(1) and 62-330.302(1), and the Applicant's Handbook ("A.H.") for issuance of an Environmental Resource Permit.

PRELIMINARY STATEMENT

On December 18, 2020, the St. Johns River Water Management District ("SJRWMD" or "District") entered a notice of its intent to issue Environmental Resource Permit ("ERP") No. 154996-2 ("Permit"), to Respondent, Orange County, Florida ("Orange County"), for the proposed construction and operation of an outfall drainage improvement project for a 0.167-acre project known as Lake Ola Circle Outfall Drainage Improvements, and the related construction of an upgradient rock check dam in a swale along the north side of Lake Ola Drive ("Project").

On February 3, 2021, Ned Bowers ("Petitioner" or "Mr. Bowers") filed his Petition for Administrative Hearing Involving Disputed Issues of Material Fact Re: Permit No. 154996-2 ("Petition") challenging the Permit, which was referred to DOAH and assigned as DOAH Case No. 21-0432.

The final hearing was scheduled for May 10 through 14, 2021, by Zoom conference.

Prior to the final hearing, the parties filed a number of Motions in Limine seeking to exclude issues and evidence from consideration by the undersigned, disposition of which are contained in the docket.

On May 5, 2021, Petitioner filed a Motion in Limine to Exclude Engineering Plans or Reports Signed and Sealed by Benjamin Pernezny, P.E., on May 3, 2021 ("Pernezny Motion"). The District filed a Response on May 6, 2021. The basis for the Pernezny Motion was, generally, that engineering plans had been signed by an engineer -- retained by Orange County as the engineer-of-record for the Permit application and as an expert witness in this case -- after the April 30, 2021, deadline for experts to have formulated their opinions. On May 7, 2021, the Pernezny Motion was denied without prejudice to raise issues of admissibility of evidence at the final hearing.

Among the more inflammatory allegations made in the Pernezny Motion was the suggestion by Petitioner that Mr. Pernezny's actions were violative of his professional standards of conduct, which "subjects him to disciplinary action." As a result of that allegation, Brian Bennett, Esquire, made a special appearance on behalf of Mr. Pernezny, and was allowed to participate in the discussion of Mr. Pernezny's participation as a witness in this proceeding.

At the final hearing, evidence was received that the prior engineer-of-record for the Permit application had retired. As a result, the District requested Mr. Pernezny, as the successor engineer, to sign the Permit application, which was done on May 3, 2021. The evidence demonstrated that, but for Mr. Pernezny's signature, the Permit application was

unchanged. The evidence also demonstrated that Petitioner was made aware that Mr. Pernezny was assuming responsibility as engineer-of-record by letter dated April 14, 2021, well prior to Mr. Pernezny's deposition, and that Mr. Pernezny had fully formed his opinions regarding the Project prior to his deposition.

Having heard the evidence and reviewed the relevant provisions of chapter 471, Florida Statutes, including, but not limited to, section 471.025(4), the undersigned finds that Mr. Pernezny's act of signing the Permit application documents did not make either the documents or his testimony unreliable. The act of affixing a signature to plans is not the formation of an "opinion," and so doing did not violate the provisions of the Order of Pre-hearing Instructions regarding expert opinions. Therefore, the Motion in Limine to Exclude Engineering Plans or Reports Signed and Sealed by Benjamin Pernezny, P.E. on May 3, 2021, is denied.

On May 7, 2021, after the initial denial of the Pernezny Motion, Respondent, Orange County, filed a Notice of Improper Purpose under Section 120.569(2)(e), Fla. Stat., arguing, *inter alia*, that Petitioner made "scandalous and baseless accusations against Orange County's expert witnesses for the purpose of harassing and intimidating the witnesses, which purposes are improper." The undersigned agrees that the language used in the Pernezny Motion was, at best, improvident; however, under the circumstances, which are unusual, it was not unreasonable for Petitioner to conclude that the signing of the Permit application documents violated the Order of Pre-hearing Instructions. Petitioner's unnecessarily inflammatory language notwithstanding, the undersigned does not conclude that the Pernezny Motion was "interposed for any improper purposes, such as to harass or to cause unnecessary delay, or for frivolous purpose or needless

increase in the cost of litigation." Thus, Orange County's Notice of Improper Purpose under Section 120.569(2)(e), Fla. Stat., is denied.

On May 10, 2021, the parties filed their Joint Pre-hearing Stipulation ("JPS"). The JPS contained two stipulations of fact, which are adopted and incorporated herein. The JPS also identified disputed issues of fact and law remaining for disposition.

The final hearing was convened on May 10, 2021, as scheduled.

The Permit was approved under the authority of chapter 373, Florida Statutes, and the modified burden of proof established in section 120.569(2)(p), Florida Statutes, is applicable. Under that burden of proof, an applicant for a permit may establish its prima facie case of entitlement to a permit "by entering into evidence the application and relevant material submitted to the agency in support of the application, and the agency's staff report or notice of intent to approve the permit." At that point, the burden of ultimate persuasion is on Petitioner to prove his case in opposition to the permit by a preponderance of the competent and substantial evidence and, thereby, prove that the applicant failed to provide reasonable assurance that the standards for issuance of the permit were met. Thereafter, the applicant and agency may present evidence on rebuttal to demonstrate that the application meets the conditions for issuance.

At the final hearing, Respondent, Orange County, offered Joint Exhibits 1 through 32, consisting of the Permit application and the District's Technical Staff Report ("TSR") and proposed Permit, which were received in evidence, and which established a prima facie case of entitlement for the Permit. Orange County also presented the testimony of Maricela Torres, and rested its initial case in chief.

Petitioner presented the testimony of Kimberly Buchheit, R.L.S., who possessed the knowledge, skill, education, training, and experience to offer testimony as an expert in surveying; and Daniel Morris, P.E., who possessed the knowledge, skill, education, training, and experience to offer testimony as an expert in engineering. Petitioner also presented the testimony of David Russell, who possessed a degree of knowledge, skill, education, training, and experience in engineering, though his background was primarily in chemical, industrial, and municipal engineering, with experience in remediation, industrial safety, and wastewater treatment, none of which are pertinent to the issues in this case. He is not a licensed Florida Professional Engineer. His only knowledge of Florida stormwater rules was that gained in conjunction with his preparation for testifying in this hearing. He was not familiar with the A.H. Questioning by Petitioner's counsel and on *voir dire* elicited no indication of any knowledge, skill, education, training, and experience in water quality or stormwater modeling, and he was, by admission, "not a wetlands expert." For those reasons, Mr. Russell's testimony regarding the District's stormwater regulatory standards, water quality, stormwater modeling, and wetlands has been given little weight. Petitioner's Exhibits 1, 37, 38, 47, 48 (minus editorial notations), 50 through 54, 64 (pages 1 through 11), 66 (minus editorial notations), 69 (pages 3 through 6), 71, 91, and 98 were received in evidence. Petitioners' Exhibits 31 through 33, and 43 were proffered, but not received in evidence, and accompany the record.

In rebuttal, Orange County presented the testimony of Benjamin Pernezny, P.E., who was proffered and accepted as an expert in water resources engineering and stormwater management; Julie Bortles, who was proffered and accepted as an expert in water quality testing and analysis; and Brian Mack, P.E., who was proffered and accepted as an expert in water resources engineering, including stormwater modeling and hydrology. Orange County's Exhibits 02-3, 10-1, 10-3 through 10-7, 10-9, 12-1, 12-2, 16-1, 16-2,

18, 19-1, 29-2, 35, 44, 47 (page 2), 62 (which includes Orange County Exhibit 46 as an attachment), and 65 were received in evidence. In addition, Orange County Exhibits 54 and 55 were accepted solely for the purpose of ruling on Orange County's Notice of Improper Purpose under Section 120.569(2)(e), Fla. Stat., discussed above, and not as substantive evidentiary exhibits. Orange County Exhibit 19-2 was proffered, but not received in evidence, and accompanies the record.

In rebuttal, the District presented the testimony of Nicole Martin, who was proffered and accepted as an expert in wetland and wildlife ecology; and Cameron Dewey, P.E., who was proffered and accepted as an expert in water resources engineering. SJRWMD Exhibits 1 through 4 and 12 were received in evidence.

A four-volume Transcript of the final hearing was filed on June 8, 2021. The parties requested 30 days from the filing of the Transcript to file their post-hearing submittals. The District and Orange County timely filed their Proposed Recommended Orders ("PRO") on July 8, 2021, and each has been considered in the preparation of this Recommended Order. On July 12, 2021, Petitioner filed his PRO. No motion for an extension of time to file Petitioner's PRO was filed, either prior to the July 8, 2021, PRO filing date or otherwise, as is required by Florida Administrative Code Rule 28-106.204(4). Nonetheless, Petitioner's PRO has been considered.

The law in effect at the time the District takes final agency action on the Permit application being operative, references to statutes are to their current versions, unless otherwise noted. *Lavernia v. Dep't of Prof'l Reg.*, 616 So. 2d 53 (Fla. 1st DCA 1993).

FINDINGS OF FACT

Based upon the demeanor and credibility of the witnesses, the stipulations of the parties, and the evidentiary record of this proceeding, the following Findings of Fact are made:

The Parties

1. Mr. Bowers resides at 7400 Lake Ola Circle, Tangerine, Florida. The property fronts Lake Ola. Petitioner's homesite includes Lots 1 and 2 of Block 8 in the Tangerine Terrace subdivision; the east 30 feet of a vacated street on its western side; and part of a vacated park south of Lots 1 and 2. The Tangerine Terrace subdivision was originally platted in 1926.

2. The District is a special taxing district created by chapter 373, and is authorized by sections 373.413, 373.414, and 373.416 to administer and enforce the ERP requirements for the management and storage of surface waters. The District has implemented these statutes, in pertinent part, through chapter 62-330. The District is the permitting authority in this proceeding and issued the Permit to Orange County.

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

Existing Conditions

4. Lake Ola is a freshwater lake located south of Mount Dora, Florida. Lake Ola is connected to Lake Carlton via a culvert passing underneath Dora Drive. Lake Ola is not designated as an impaired waterbody, an Outstanding Florida Water, or an Outstanding National Resource Water.

5. Tangerine Terrace is a rural residential area on the north side of Lake Ola. The main road serving the subdivision, Lake Ola Boulevard, has been in existence since the 1940s.

6. The stormwater management system that currently drains to the outfall on Mr. Bowers's property serves a catchment area of eight drainage sub-basins with a combined area of approximately 46.3 acres (collectively the "catchment area"). The area is rural-residential in nature, consisting of relatively large residential homesites, and wooded and agricultural areas.

7. The soils in the catchment area consist of Type-A soils as described by the U.S. Department of Agriculture. Such soils are sandy and pervious in nature. Homes, driveways, and roads in the area are impervious.

8. Stormwater from the catchment area generally flows south to Lake Ola Boulevard, where it is intercepted by the Lake Ola Boulevard roadside swales. There is a culvert crossing from the north side to the south side of Lake Ola Boulevard, the Cooper Cross-drain, that was installed at or near the time that the road was first constructed. The evidence was not sufficient to determine whether water flows from the south side of the drain to the north, or from the north side to the south. For purposes of this case, that determination is unnecessary.

9. Stormwater from the upland basins flows along the Lake Ola Boulevard swales to a point at or near the driveway of the Holstrom property, across the road from the western leg of Lake Ola Circle. At that point, stormwater enters into a 15-inch diameter High Density Polyethylene (HDPE) pipe that is 407 feet in length. The best evidence indicates that the pipe was installed by Orange County in 2010.[1] Stormwater then is directed under Lake Ola Boulevard to a ditch (with one driveway culvert) running along the east side of the eastern leg of Lake Ola Circle. From there, a 15-inch diameter HDPE

[1] The permitting status of the pipe is unknown. In any event, there is no evidence that the pipe is the subject of any governmental enforcement or compliance action, and no evidence of a citizen suit for injunctive relief regarding the pipe.

pipe carries stormwater to the northeast corner of Mr. Bowers's property, and the northern end of the drainage easement.

10. Existing stormwater discharge/outfall facilities on property owned by Petitioner and by the adjoining landowner to the east, Mr. Bloodworth, consist of a portion of the buried 15-inch HDPE pipe which empties into an upland asphalt-lined swale running between the two properties. The asphalt-lined swale has, by appearance, accumulated sufficient sediment to support lawn grasses. Water discharged from the southern terminus of the swale flows overland to Lake Ola.

11. Wetlands, as evidenced by hydric, organic soils, exist near the end of the existing asphalt-lined swale. The wetlands within the Project area have been mowed and maintained as a residential St. Augustine grass lawn. There is some scattered hydrocotyle (dollarweed) that has come up through the St. Augustine grass, though the wetland delineation was determined through the hydric soils, rather than wetland vegetative species. The preponderance of the evidence demonstrates that the wetland delineation was appropriate and consistent with the best evidence, that being wetland soils. There is a wetland scrub community along the shoreline of Lake Ola that is outside of the Project boundary, but within the easement limits.

Proposed Project

12. Orange County proposes to replace a 22-foot segment of the existing buried 15-inch HDPE pipe and the existing asphalt-lined swale, with an underground 18-inch concrete drainage outfall pipe with a shallow surface swale, three ditch bottom inlets, and a baffled endwall. The remaining 15-foot segment of the 15-inch HDPE pipe will connect to the first of the ditch bottom inlets and discharge to the 18-inch culvert.

13. At the point at which it connects to the 15-inch pipe at the first ditch bottom inlet, the 18-inch pipe will be eight feet west of the centerline of the

existing asphalt-lined swale. At its outfall at the baffled endwall, the 18-inch pipe will be 14 feet west of the centerline of the existing asphalt-lined swale.

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

15. Stormwater from the catchment area into the proposed improvements will maintain the current runoff patterns. In simple terms, the Project (exclusive of the upstream rock check dam) entails little more than enclosing the existing asphalt lined swale with an outfall pipe, overlain by a pervious surface swale and inlets.

16. Water flowing from the 15-inch pipe into the 18-inch outfall pipe will decrease in velocity as the conveyance pipe volume is increased. Thus, despite Petitioner's contention that the increase in pipe size is unnecessary, it serves a benefit. In addition, the terminal endwall for the 18-inch concrete pipe will incorporate baffles to further dissipate flows. Water discharged from the baffled endwall will then flow overland to Lake Ola, much as it does now from the end of the asphalt swale. There was no persuasive evidence introduced that water discharged from the Lake Ola discharge portion of the Project will reasonably be expected to result in scour or erosion.

17. The outfall pipe and associated endwall will result in 0.001 acres of permanent wetland impact, limited to the footprint of the baffled endwall, and 0.031 acres of temporary wetland impact from the installation of the pipe waterward of the wetland delineation line. The calculation of temporary wetland impact is restricted to the temporary effects associated with the construction of the outfall structure, and has no relation to the waters to be discharged from the outfall pipe.

18. The Project also includes construction of an upgradient rock check dam to be placed across the roadside swale along Lake Ola Boulevard west of its intersection with Lake Ola Circle. The rock check dam is proposed to be constructed with relatively large pieces of rock to an elevation of six inches above the bottom of the swale. The rock check dam is designed to slow the passage of low velocity stormwater resulting from minor rain events, allowing energy dissipation of the stormwater, and a "small amount" of water being held up behind the dam to infiltrate into the soil, thereby incrementally reducing the volume of stormwater downgradient. The purpose of the rock check dam is not to enhance or promote water quality treatment, or to affect the flow of water in the existing stormwater system during periods of significant rainfall. In higher flow storm events, the rock check dam will have little or no attenuating effect on stormwater moving down the Lake Ola Boulevard swale. In no event will the rock check dam increase the volume or velocity of stormwaters through the Lake Ola Boulevard swale, or affect existing water quality in the overall stormwater management system.

19. The proposed Project will not add to, diminish, or change any existing land use, soil types, or impervious areas in the 48.3-acre catchment area. Except for the rock check dam and the grading of the proposed swale over the proposed 18-inch outlet pipe, the Project will not change the existing topography in the 48.3-acre catchment area.

Stormwater Permitting Standard and Modeling Calculations

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

21. Predevelopment, i.e., existing, stormwater volumes are those conditions that existed when ERP Application No. 154996-2 was submitted in March 2020.

22. Petitioner has argued that predevelopment volumes should be calculated based on conditions in the catchment area that existed as far back as 2010. Petitioner has not, nor could he, provide any authority to support the assertion that existing conditions in an area subject to a permit application are those conditions existing a decade prior. Thus, Petitioner's argument is rejected.

23. In order to calculate pre- and post-development volumes, Orange County utilized the Interconnected Channel and Pond Routing (ICPR) model to calculate flows. The preponderance of the evidence established that the ICPR is an accepted and reliable method for determining stormwater flows and volumes.

Scenario 1

24. Ms. Dewey met with Mr. Bowers at his property in June 2020 to discuss the Project. Afterwards, in order to satisfy certain of Mr. Bowers's inquiries, Ms. Dewey asked Orange County to run the ICPR model using reasonably available data to estimate runoff conditions that existed in the area prior to 2010, an exercise dubbed Scenario 1.

25. Ms. Dewey testified convincingly that the Scenario 1 exercise "was really for historical context," and was not an effort to determine "existing conditions" for purposes of the District's pre- and post-development calculations.

26. Much of the testimony and evidence offered by Petitioner concerned disagreements in the model inputs for Scenario 1, particularly as related to

elevations at the Cooper Cross-drain and the Holstrom driveway. Though the disagreements were in inches, differences in inches can affect the direction and volume of stormwater flows.

27. Mr. Morris opined that the outfall pipe at Mr. Bowers's property could not be properly sized without a determination of the full volume of water to be introduced into it. However, Mr. Morris's testimony is predicated on conditions that existed in the area in 2010 and before. It was not based on conditions that currently exist in the area, as is required by the District rules. Furthermore, Petitioner's witnesses did not opine as to a more appropriate size for the discharge pipe because they ran no models of their own.

28. Mr. Morris's testimony was also based on his conclusion that surface elevation inputs at the Cooper Cross-drain and the Holstrom driveway were incorrectly calculated. As his solution, he suggested that "all that needs to be done is for CDM to connect -- correct two points, rerun the model, and we'll see what the real scenario one is." Mr. Morris, however, did not run the model to substantiate his testimony.

29. Mr. Mack testified regarding the elevations disputed by Mr. Morris. His opinions were based on surveys and methods of calculating elevation that were reasonable and reliable, and led him to conclude that the model inputs for Scenario 1 were accurate, and reasonably depicted conditions and elevations that existed in the area in 2010 and before. His testimony is accepted.

30. Mr. Pernezny testified that, even under Scenario 1 conditions, the proposed 18-inch discharge pipe will be able to accommodate the flows for the 10-year and 25-year drainage storm events without exceeding the capacity of the pipe. A smaller pipe, matching the existing 15-inch input, would result in discharges at its terminal end having a higher velocity, and higher erosive potential, while the 18-inch pipe is designed to result in a decreased velocity and reduced erosive potential at the outfall.

31. As indicated, Scenario 1 conditions are not relevant to a determination of whether the Permit meets District permitting standards, because Scenario 1 does not reflect existing or predevelopment conditions in the catchment area or at the discharge structure. Nonetheless, the preponderance of the evidence establishes that the proposed Project, even under Scenario 1, meets the standards for issuance of the ERP.

Scenario 2

32. In order to provide predevelopment and post-development conditions, Orange County ran Scenario 2 to calculate existing conditions, i.e., those conditions that existed in the catchment area at the time the Permit application was filed.

33. The existing conditions were then compared to the conditions that will be expected after the construction of the permitted activities. The only permitted activities consist of the outfall pipe and baffled endwall at Mr. Bowers's property, and the rock check dam.

34. A preponderance of the evidence, including the ICPR modeling results, establish that the Project will not cause adverse water quantity impacts to receiving waters and adjacent lands because the post-development peak rate of discharge will not exceed the predevelopment peak rate of discharge.

35. A preponderance of the evidence, including the ICPR modeling results, establish that the Project will not cause flooding to on-site or off-site property because the peak stages of the discharge will not extend beyond the limits of Orange County's easement.

36. A preponderance of the evidence, including the ICPR modeling results, establish that the Project will not cause adverse impacts to existing water storage and conveyance capabilities because the post-development peak rate of discharge will not exceed that of the predevelopment peak rate of discharge, and the peak stages of discharge during a 25-year, 24-hour storm event will not extend beyond the limits of Orange County's easement.

37. The modeling inputs for Scenario 2 were not disputed by Petitioner's experts. In that regard, Mr. Morris testified that he had "no issue with the input data for Scenario 2." His objection was limited to the characterization of the Scenario 2 data and, in particular, the 407 feet of pipe installed in 2010, as "existing" conditions. Mr. Russell, in addition to the general lack of weight given his testimony, admitted that he looked only "briefly" and "not in great depth" at the Scenario 1 modeling, and not at all at Scenario 2.

Water Quality

38. The Project does not propose a change in drainage patterns, runoff volumes, or land uses that would change the pollutant loading to Lake Ola. Soil types and conditions, and areas that are impervious, are completely unchanged from existing predevelopment conditions to conditions that will exist after completion of the Project. There is no proposed change in runoff from the predevelopment condition to the post-development condition. Water flowing to Lake Ola in the existing condition is the same as the water that will be flowing to Lake Ola after the Proposed Project is constructed. Mr. Pernezny testified that there would be no appreciable difference in the overall hydraulics of the system as a result of the replacement of the asphalt-lined swale with the 18-inch pipe, and that there will be "no change in water quality characteristics between existing and proposed." His testimony is credited. As a result, the preponderance of competent substantial evidence demonstrates that the Project will not cause adverse water quality impacts to Lake Ola.

39. Because the Project is not adding pollutants to the stormwater, water quality treatment is not required. Nonetheless, Orange County proposed construction of a rock check dam upstream, which will help slow down water flow and thereby promote infiltration for smaller storm events. Increased infiltration, even marginally, will result in more stormwater being absorbed into the ground, and fractionally less traveling towards the point of discharge

to Lake Ola. Under no possible circumstance will the rock check dam cause or contribute to any adverse impact to the quality of waters flowing from the catchment area to the point of discharge.

40. Orange County has proposed the deployment of erosion, sediment, and turbidity control measures to be utilized during construction. Thus, there is expected to be no temporary water quality impacts related to the construction or period of stabilization of the proposed Project.

Wetland Impacts

41. The Project footprint contains a total of 0.167 acres within an existing drainage easement. The wetlands are defined as such due solely to the presence of hydric soils. The area within the Project boundaries have been mowed and maintained as a single-family residential lawn dominated by St. Augustine grass, thus, effectively eliminating any beneficial wetland function or value. Although the area in which construction is to occur includes sparse emergence of scattered dollarweed, it is not defined as a wetland due to the dominance of any wetland plant species.

42. The existing asphalt-lined swale provides no significant value to functions provided to fish and wildlife and their habitat.

43. Given the lack of existing wetland values in the Project area, the 0.001 acres of permanent impacts and 0.031 acres of temporary impacts are not adverse. Thus, Orange County was not required to eliminate or reduce the impacts. Since the Project will not cause adverse impacts and the area has no significant ecological value, mitigation is not required.

Secondary Impacts

44. Rule 62-330.301(1)(f) and A.H. Volume I, section 10.1.1,[2] provide that "[a] regulated activity will not cause adverse secondary impacts to the water

[2] The Environmental Resource Permit Applicant's Handbook has been adopted as a rule for use by DEP and the state's five water management districts. Fla. Admin. Code R. 62-

resources." As set forth in the Findings of Fact herein, 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." There was no competent substantial evidence offered that the Project will "adversely impact the ecological value of uplands for bald eagles, and aquatic or wetland dependent listed animal species for enabling existing nesting or denning by these species." The Project will not affect significant historical and archaeological resources. Finally, there is no indication that future phases or activities closely linked or causally related to the Project will result in water quality violations or adverse impacts to wetlands or other surface waters.

45. A preponderance of the competent substantial evidence received in this case establishes that Orange County provided reasonable assurance that the Project will not cause adverse secondary impacts to wetlands and other surface waters as defined in A.H. Volume I, section 10.2.7.

Public Interest Test

46. Rule 62-330.302(1)(a), as supplemented by A.H. Volume I, section 10.2.3, requires that projects:

> 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.

What follows are seven listed criteria. Lake Ola is not an Outstanding Florida Water. Thus, the standard applicable to those elements of the Project that are to be constructed in, on, or over wetlands or other surface waters is that they not be contrary to the public interest.

330.010(4). The A.H. was developed "to help persons understand the rules, procedures, standards, and criteria that apply to the environmental resource permit (ERP) program under Part IV of Chapter 373 of the Florida Statutes (F.S.)." A.H. Vol. I, § 1.0.

47. The first public interest factor is whether the Project "will adversely affect the public health, safety, or welfare or the property of others." The part of the Project located in, on, or over wetlands or other surface waters is within a mowed and maintained residential lawn. The Project will not cause an environmental hazard to public health or safety; is not located in a shellfish harvesting area; and will not cause flooding or environmental impacts to the property of others. A preponderance of the competent substantial evidence established that the Project will meet all water quantity standards, and that the Project will cause no increase in water volume or velocity from existing predevelopment conditions. The prima facie case established by Orange County established, for purposes of this proceeding, that the proposed drainage pipe and outfall will be contained entirely within Orange County's easement. Nonetheless, as set forth previously, and as will be discussed in the Conclusions of Law, disputes over the scope, extent, and rights under the easement are left to a court of competent jurisdiction.

48. The second public interest factor is whether the Project "will adversely affect the conservation of fish and wildlife, including endangered or threatened species or their habitats." There was nothing received in evidence to support a finding that the Project area is utilized by wildlife, or that it supports nesting or denning.

49. The third public interest factor is whether the Project "will adversely affect navigation or the flow of water or cause harmful erosion or shoaling." The Project is located landward of the waters of Lake Ola and, therefore, will not impede navigability. A preponderance of the competent substantial evidence established that neither the discharge from the pipe and endwall structure, nor the effects of the rock check dam, will cause erosion or shoaling.

50. The fourth public interest factor is whether the Project "will adversely affect the fishing or recreational values of marine productivity in the vicinity of the project." A preponderance of the competent substantial evidence

established that there will be no impacts to fisheries, boating, or swimming activities on Lake Ola.

51. The fifth public interest factor is whether the Project "will be of a temporary or permanent nature." The Project will result in 0.001 acres of permanent impacts and 0.031 acres of temporary impacts associated with construction of the outfall structure. A.H. Volume I, section 10.2.3.5 establishes that "[t]emporary impacts will be considered less harmful than permanent impacts of the same nature and extent." Given that Petitioner has maintained the hydric-soil wetlands as a residential St. Augustine grass covered lawn, there is no significant ecological value to the wetlands. Once the installation of the drainage pipe is complete and stabilized, it will have no impact on the residential lawn. The ecological effect of the 0.001 acres of permanent impact is, given the nature of the affected wetland, insignificant.

52. The sixth public interest factor is whether the Project "will adversely affect or will enhance significant historical and archaeological resources." A preponderance of the competent substantial evidence established that there are no known historical or archaeological resources in the area. The proposed Permit also contains a condition for Orange County to cease activities and contact the Division of Historical Resources if any artifacts are encountered during construction.

53. The seventh public interest factor is the "current condition and relative value of functions being performed by areas affected by the proposed activities." As set forth herein, the area affected by the Project has no wetland value due to its conversion to use as Petitioner's residential lawn.

54. A preponderance of the competent substantial evidence received in this case establishes that Orange County provided reasonable assurance that the Project will not be contrary to the public interest as defined in A.H. Volume I, section 10.2.3.

Cumulative Impacts

55. Rule 62-330.302(1)(b), as supplemented by A.H. Volume I, section 10.2.8, establish that an applicant must provide reasonable assurance that a project "will not cause unacceptable cumulative impacts to wetlands and other surface waters" within the same drainage basin. The impacts on wetlands and surface waters are reviewed by evaluating the impacts to water quality wetland functions. As set forth herein, the Project will have no effect on water quality, and the affected hydric-soil wetlands have no functional wetland value due to their conversion to a mowed and maintained residential grass lawn.

56. A preponderance of the competent substantial evidence received in this case establishes that Orange County provided reasonable assurance that the Project will not cause unacceptable cumulative impacts to wetlands and other surface waters as defined in A.H. Volume I, section 10.2.8.

Special Basins

57. Petitioner argues that the Project does not meet the applicable special basin criteria for the Ocklawaha River Hydrologic Basin or the special basin criteria for the Wekiva Recharge Protection Area due to the perceived errors in the ICPR model inputs and results. The argument is largely based on the assumption that existing predevelopment conditions for the Permit should be based on those existing in 2010, rather than those existing at the time of the Permit application. As set forth herein, that argument is rejected.

58. The applicable special criterion for the Ocklawaha River Hydrologic Basin provides that "[t]he system shall meet applicable discharge criteria for 10-year and 25-year frequency storms." Competent substantial evidence established that Orange County applied those discharge criteria in its ICPR modeling, and that the data demonstrated that the post-development peak rate of discharge to Lake Ola will not exceed the predevelopment or existing condition peak rate of discharge for 10-year and 25-year frequency storms.

59. The applicable special criterion for the Wekiva Recharge Protection Area requires retention storage of three inches of runoff "from all impervious areas proposed to be constructed on soils defined as Type 'A' soils." The Project proposed no construction of impervious surfaces on Type A soils.

60. A preponderance of the competent substantial evidence received in this case establishes that the proposed Project does not violate special basin criteria for the Ocklawaha River Hydrologic Basin or the Wekiva Recharge Protection Area pursuant to A.H. Volume II (SJRWMD), sections 13.2 and 13.3.

Plan Certification

61. Petitioner argues that Orange County failed to provide signed and sealed plans and calculations in support of its Permit application as required by A.H. Volume II (SJRWMD), section 2.3. The evidence in this case established that the original professional engineer assigned to the Permit retired. Mr. Pernezny, as the successor engineer, was asked by the District to sign the Permit application, which was done on May 3, 2021. But for Mr. Pernezny's signature, the Permit application was unchanged. Petitioner was aware that Mr. Pernezny was assuming responsibility as engineer-of-record well prior to the final hearing in this case.

62. This proceeding, being de novo in nature, is intended to formulate final agency action and not to review action taken earlier and preliminarily. The documents received in evidence at the final hearing were signed, sealed, and dated as required, and are sufficient to provide reasonable assurance that the project meets District permitting standards.

Legal Authorization

63. Rule 62-330.060(3), entitled Content of Applications for Individual and Conceptual Approval Permits, provides, in pertinent part, that:

> The applicant must certify that it has sufficient real property interest over the land upon which the activities subject to the application will be conducted, as required in Section A of Form 62-330.060(1) and Section 4.2.3(d) of the Applicant's Handbook Volume I.

64. Similarly, A.H. Volume I, section 4.2.3 provides, in pertinent part, that an application for an ERP include:

> (d) Documentation of the applicant's real property interest over the land upon which the activities subject to the application will be conducted. Interests in real property typically are evidenced by:
>
> * * *
>
> 2. The applicant being the holder of a recorded easement conveying the right to utilize the property for a purpose consistent with the authorization requested in the permit application.

65. A.H. Volume II (SJRWMD), section 2.5, entitled Legal Authorization, further provides that:

> Applicants which propose to utilize offsite areas not under their control to satisfy the criteria for evaluation listed in section 2.0 must obtain sufficient legal authorization prior to permit issuance to use the area. For example, an applicant who proposes to locate the outfall pipe from the stormwater basin to the receiving water on an adjacent property owner's land must obtain a drainage easement or other appropriate legal authorization from the adjacent owner. A copy of the legal authorization must be submitted with the permit application.

66. Neither the rule nor the A.H. require proof as would be necessary to adjudicate disputes in property rights and boundaries in circuit court. Rather, they require a good faith certification. That certification was provided by Orange County in the Permit application.

67. Orange County also submitted, along with its certification, documentation, including copies of the drainage easement and survey, sufficient to meet the criteria in the rule and the A.H., that it has sufficient real property interest over the land upon which the Project is to be conducted. That documentation, on its face, established Orange County's prima facie right to use the recorded drainage easement and, thus, entitlement to the Permit. The evidence submitted by Petitioner was not sufficient, even if accepted as true, to demonstrate that Orange County was proposing to construct the drainage improvements outside of the boundary of the easement.

68. Rule 62-330.350(1)(i), which has been incorporated verbatim as Condition 9 of the Permit, provides that, as a general condition:

> This permit does not:
>
> a. Convey to the permittee any property rights or privileges, or any other rights or privileges other than those specified herein or in Chapter 62-330, F.A.C.;
>
> b. Convey to the permittee or create in the permittee any interest in real property;
>
> c. Relieve the permittee from the need to obtain and comply with any other required federal, state, and local authorization, law, rule, or ordinance; or
>
> d. Authorize any entrance upon or work on property that is not owned, held in easement, or controlled by the permittee.

69. As set forth in the Conclusions of Law, disputes as to property boundaries and rights are to be resolved outside of the context of this proceeding.

Ultimate Findings of Fact

70. The greater weight of the competent substantial evidence establishes that neither the rock check dam nor the 0.167-acre outfall drainage improvement at Lake Ola Circle are reasonably expected to adversely impound or obstruct existing water flow, cause adverse impacts to existing surface water storage and conveyance capabilities, or otherwise cause adverse water quantity or flooding impacts to receiving waters and adjacent lands. Evidence to the contrary was not persuasive.

71. The greater weight of the competent substantial evidence establishes that neither the rock check dam nor the 0.167-acre outfall drainage improvement at Lake Ola Circle are reasonably expected to cause or contribute to a violation of state water quality standards. Evidence to the contrary was not persuasive.

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

CONCLUSIONS OF LAW

Jurisdiction

73. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat.

Standing

74. Section 120.52(13) defines a "party," in pertinent part, 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."

75. Standing under chapter 120 is guided by the two-pronged test established in the seminal case of *Agrico Chemical Corporation v. Department of Environmental Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981). In that case, the court held that:

> We believe that before one can be considered to have a substantial interest in the outcome of the proceeding, he must show 1) that he will suffer an injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury.

Id. at 482.

76. *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; rather, "[t]he intent of *Agrico* was to preclude parties from intervening in a proceeding where those parties' substantial interests are totally unrelated to the issues that are to be resolved in the administrative proceedings." *Mid-Chattahoochee River Users v. Fla. Dep't of Envtl. Prot.*, 948 So. 2d 794, 797 (Fla. 1st DCA 2006)(citing *Gregory v. Indian River Cty.*, 610 So. 2d 547, 554 (Fla. 1st DCA 1992)).

77. The standing requirement established by *Agrico* has been refined, and now stands for the proposition that standing to initiate an administrative proceeding is not dependent on proving that the proposed agency action would violate applicable law. Instead, standing requires proof that the petitioner has a substantial interest and that the interest could reasonably be affected by the proposed agency action. Whether the effect would constitute a violation of applicable law is a separate question.

> Standing is "a forward-looking concept" and "cannot 'disappear' based on the ultimate outcome of the proceeding.". . . When standing is challenged during an administrative hearing, the petitioner must offer proof of the elements of standing, and it is sufficient that the petitioner demonstrate by such proof that his substantial interests "could reasonably be affected by . . . [the] proposed activities."

Palm Beach Cty. Envtl. Coal. v. Fla. Dep't of Envtl. Prot., 14 So. 3d 1076, 1078 (Fla. 4th DCA 2009) (citing *Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1083 (Fla. 2d DCA 2009); and *Hamilton Cty. Bd. of Cty. Comm'rs v. Dep't of Envtl. Reg.*, 587 So. 2d 1378 (Fla. 1st DCA 1991)); *see also, St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist.*, 54 So. 3d 1051, 1055 (Fla. 5th DCA 2011) ("Ultimately, the ALJ's conclusion adopted by the Governing Board that there was no proof of harm or that the harm would be offset went to the merits of the challenge, not to standing.").

78. Mr. Bowers alleged standing based on his ownership of the property encumbered by the drainage easement. This proceeding is designed to protect property owners from potential pollution, water quality and quantity violations, and other adverse impacts caused by permitted activities, impacts that are the subject of chapter 373 and the rules adopted thereunder. Mr. Bowers's status as the owner of the underlying fee over which Orange County holds its easement, and that the permitted activities will cause or contribute to flooding of his land; impacts to physical structures on his land; deposits of excessive sediments on his land and shoreline; water quality violations in Lake Ola; algal blooms on Lake Ola; adverse effects on wildlife; impairment of boating, fishing, and recreational interests; and an imbalance of flora and fauna, including the rapid growth of invasive plant species that impair the Lake Ola shoreline and its scenic views, meet the second prong of the *Agrico* test.

79. "[T]he injury-in-fact standard is met by a showing that the petitioner has sustained actual or immediate threatened injury at the time the petition was filed, and '[t]he injury or threat of injury must be both real and immediate, not conjectural or hypothetical.'" *S. Broward Hosp. Dist. v. Ag. for Health Care Admin.*, 141 So. 3d 678, 681 (Fla. 1st DCA 2014)(citing *Vill. Park Mobile Home Ass'n v. Dep't of Bus. Reg.*, 506 So. 2d 426, 433 (Fla. 1st DCA 1987)). Mr. Bowers's allegations that the activities are expected to result in the adverse impacts described above are sufficient to meet the standard of an "injury in fact which is of sufficient immediacy to entitle [him] to a section 120.57 hearing."

80. Orange County has standing as the applicant for the Permit. *Ft. Myers Real Estate Holdings, LLC v. Dep't of Bus. & Prof'l Reg.*, 53 So. 3d 1158, 1162 (Fla. 1st DCA 2011); *Maverick Media Group, Inc. v. Dep't of Transp.*, 791 So. 2d 491, 492 (Fla. 1st DCA 2001).

Nature of the Proceeding

81. This is a de novo proceeding, intended to formulate final agency action and not to review action taken earlier and preliminarily. § 120.57(1)(k), Fla. Stat; *Young v. Dep't of Cmty. Aff.*, 625 So. 2d 831, 833 (Fla. 1993); *Hamilton Cty. Bd. of Cty. Comm'rs v. Dep't of Envtl. Reg.*, 587 So. 2d 1378, 1387 (Fla. 1st DCA 1991); *McDonald v. Dep't of Banking & Fin.*, 346 So. 2d 569, 584 (Fla. 1st DCA 1977).

Burden and Standard of Proof

82. Section 120.569(2)(p) provides that:

> For any proceeding arising under chapter 373, chapter 378, or chapter 403, if a nonapplicant petitions as a third party to challenge an agency's issuance of a license, permit, or conceptual approval, the order of presentation in the proceeding is for the permit applicant to present a prima facie case demonstrating entitlement to the license, permit, or

> conceptual approval, followed by the agency. This demonstration may be made by entering into evidence the application and relevant material submitted to the agency in support of the application, and the agency's staff report or notice of intent to approve the permit, license, or conceptual approval. Subsequent to the presentation of the applicant's prima facie case and any direct evidence submitted by the agency, the petitioner initiating the action challenging the issuance of the permit, license, or conceptual approval has the burden of ultimate persuasion and has the burden of going forward to prove the case in opposition to the license, permit, or conceptual approval through the presentation of competent and substantial evidence.

83. The Permit was issued pursuant to rules promulgated under chapter 373. Therefore, the Permit is subject to the abbreviated presentation and burden-shifting described in section 120.569(2)(p).

84. Orange County and the District made the prima facie case of entitlement to the Permit by entering into evidence the application file and supporting documentation, and the District's TSR and proposed Permit.

85. As to the issue of the hearsay nature of the engineering plans and reports, the nature of evidence that is sufficient to establish prima facie entitlement to an ERP was discussed in *Last Stand, Inc., and George Halloran v. Fury Management, Inc., and Department of Environmental Protection*, DOAH Case No. 12-2574 (Fla. DOAH Dec. 31, 2012; Fla. DEP Feb. 7, 2013), in which Judge Bram D.E. Canter stated:

> 90. When an agency's intent to issue a permit has been challenged, the procedure and burden of proof established in section 120.569(2)(p) provides for a logical and efficient proceeding. The permit application and supporting material that the agency determined was satisfactory to demonstrate the applicant's entitlement to the permit retains its status as satisfactory when it is admitted into evidence at the final hearing, and it does not lose that status unless the challenger proves that specific

aspects of the application are unsatisfactory.

> 91. It follows that the permit application and supporting material submitted to the agency may be received into evidence for the truth of the matters asserted in them, without being subject to hearsay objections. If these documents could not be admitted except through witnesses with personal knowledge and requisite expertise as to all statements contained within the documents, one of the primary purposes of the statute would be destroyed.

86. With Orange County having made its prima facie case for the Permit, the burden of ultimate persuasion was on Mr. Bowers to prove his case in opposition to the Permit by a preponderance of the competent and substantial evidence, and thereby prove that Orange County failed to provide reasonable assurance that the standards for issuance of the Permit were met.

87. The standard of proof is by a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.

88. "Surmise, conjecture or speculation have been held not to be substantial evidence." *Dep't of High. Saf. & Motor Veh. v. Trimble*, 821 So. 2d 1084, 1087 (Fla. 1st DCA 2002) (*citing Fla. Rate Conf. v. Fla. R.R. & Pub. Utils. Comm'n*, 108 So. 2d 601, 607 (Fla. 1959)).

Reasonable Assurance

89. Approval of the Permit is dependent upon there being reasonable assurance that the activities authorized will meet applicable standards.

90. Reasonable assurance means "a substantial likelihood that the project will be successfully implemented." *Metro. Dade Cty. v. Coscan Fla., 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. Furthermore, 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. *FINR II, Inc. v. CF Indus., Inc.*, Case No. 11-6495 (Fla. DOAH Apr. 30, 2012; Fla. DEP June 8, 2012).

Real Property Interest

91. A.H. Volume I, section 4.2.3(d) provides that:

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

92. Orange County submitted documentation that, on its face, and in accordance with section 120.569(2)(p), established its prima facie entitlement to the Permit. The evidence submitted by Petitioner was not sufficient, even if accepted as true, to demonstrate that Orange County was proposing to construct the drainage improvements on Mr. Bowers's property outside of the boundary of the easement.

93. The issue for determination in this proceeding is simply whether Orange County provided prima facie evidence to establish a right to use the

property on which it intends to construct its drainage outfall. Unlike substantive issues of environmental impacts and public interest over which DOAH has substantive jurisdiction, the issue of property control is simply a matter of whether the applicant provided facially sufficient documentation of its real property interest over the land upon which the activities subject to the application will be conducted. Orange County submitted such facially sufficient evidence.[3]

94. A regulatory agency with jurisdiction over environmental matters, as is the District, does not have jurisdiction to determine issues:

> outside an environmental context in light of the jurisdiction to adjudicate all actions involving the title and boundaries of real property conferred upon circuit courts by section 26.012(2), Florida Statutes. And, as noted by appellee, agencies would not, by their nature, ordinarily have jurisdiction to decide issues of law inherent in evaluation of private property impacts.

Miller v. Dep't of Envtl. Reg., 504 So. 2d 1325, 1327-28 (Fla. 1st DCA 1987); *see also Buckley v. Dep't of HRS*, 516 So. 2d 1008, 1009 (Fla. 1st DCA 1987) (An administrative hearing is not the appropriate forum for a property dispute and that a "court of competent jurisdiction is more appropriate"). The permit in this case, if issued, conveys no title, and affects no real property interests. Thus, once prima facie evidence of a sufficient real property interest is provided, disputes over the scope, extent, and rights conferred are

[3] Obviously, if the evidence submitted does not, on its face, relate to a proposed project area, e.g., a survey for subdivision Lot A instead of subdivision Lot F, there is nothing to prevent a finding that, on its face, the documentation of an applicant's real property interest is insufficient. That is not the case here. It is undisputed that Mr. Bowers owns Lots 1 and 2 of Block 8 in the Tangerine Terrace subdivision, and that Orange County holds an easement over the eastern 20 feet of the property. The dispute is over subtle differences in the angle of the northeast corner of the property amounting to less than 1.5 degrees. Accepting Petitioner's evidence of the property/easement boundary, the dispute would, on its face, result in a potential difference at the end of the project area of little more than 5 feet in width, with the Project area remaining within the uncontested limits of the easement. (Petitioner's Exhibit 38). However, a definitive determination of the line remains within the province of the circuit court.

to be left to a court with jurisdiction over any conflicting property claims. § 26.012(2)(g), Fla. Stat. ("Circuit courts shall have exclusive original jurisdiction: (g) In all actions involving the title and boundaries of real property."); *Cope v. City of Gulf Breeze and Dep't. of Envtl. Prot.*, Case No. 10-8893, R.O. para. 50 (Fla. DOAH Apr. 20, 2011; DEP June 6, 2011)("Because a dispute over the exact boundary lines of Lot 37 exists, this issue must be resolved in the appropriate circuit court.").

Standards

95. Rule 62-330.020(2) provides, in pertinent part, that:

> a permit is required prior to the construction, alteration, operation, maintenance, removal, or abandonment of any project that, by itself or in combination with an activity conducted after October 1, 2013, cumulatively results in any of the following: (a) Any project in, on, or over wetlands or other surface waters; ... or (j) Any modification or alteration of a project previously permitted under part IV of chapter 373, F.S.

96. Petitioner argues that other "threshold" elements of rule 62-330.020(2) apply in this case, which would require that the Permit include swales, pipes, and impervious and semi-impervious areas installed or constructed in 2010. Petitioner's argument requires that conditions existing in 2010 be accepted as constituting "existing" or "predevelopment" conditions on the March 2020 date of the Permit application. They are not.

97. A.H. Volume 1, section 2.0(b) provides, in pertinent part, that "[d]efinitions and terms that are not defined above ... will be defined using published, generally accepted dictionaries." The generally accepted definition of "existing" is "in existence or operation at the time under consideration; current." Lexico - Powered by Oxford, *available at* https://www.lexico.com/en/definition/existing (last visited July 12, 2021). The

existing, or current, predevelopment conditions are those that existed when ERP Application No. 154996-2 was submitted in March 2020.

98. Rule 62-330.301(1) provides, in pertinent part, that:

> (1) To obtain an individual or conceptual approval permit, an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, removal, or abandonment of the projects regulated under this chapter:
>
> (a) Will not cause adverse water quantity impacts to receiving waters and adjacent lands;
>
> (b) Will not cause adverse flooding to on-site or off-site property;
>
> (c) Will not cause adverse impacts to existing surface water storage and conveyance capabilities;
>
> (d) Will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters;
>
> (e) Will not adversely affect the quality of receiving waters such that the state water quality standards set forth in chapters 62-4, 62-302, 62-520, and 62-550, F.A.C., including the antidegradation provisions of paragraphs 62-4.242(1)(a) and (b), F.A.C., subsections 62-4.242(2) and (3), F.A.C., and rule 62-302.300, F.A.C., and any special standards for Outstanding Florida Waters and Outstanding National Resource Waters set forth in subsections 62-4.242(2) and (3), F.A.C., will be violated;
>
> (f) Will not cause adverse secondary impacts to the water resources. In addition to the criteria in this subsection and in subsection 62-330.301(2), F.A.C., in accordance with section 373.4132, F.S., an applicant proposing the construction, alteration, operation, maintenance, abandonment, or removal of a dry storage facility for 10 or more vessels that is functionally associated with a boat launching area must also provide reasonable assurance that the facility, taking into consideration any secondary

impacts, will meet the provisions of paragraph 62-330.302(1)(a), F.A.C., including the potential adverse impacts to manatees;
(g) Will not adversely impact the maintenance of surface or ground water levels or surface water flows established pursuant to section 373.042, F.S.;

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

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

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

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

99. Rule 62-330.302(1) provides, in pertinent part, that:

(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.

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

Entitlement to the Permit

100. A preponderance of the competent substantial evidence presented in this proceeding, as set forth in the Findings of Fact herein, establishes that the Project, as designed, will not cause adverse water quantity impacts to receiving waters and adjacent lands. Thus, the Project meets the standards established in rule 62-330.301(1)(a).

101. A preponderance of the competent substantial evidence presented in this proceeding, as set forth in the Findings of Fact herein, establishes that the Project, as designed, will not cause adverse flooding to on-site or off-site

property. Thus, the Project meets the standards established in rule 62-330.301(1)(b).

102. A preponderance of the competent substantial evidence presented in this proceeding, as set forth in the Findings of Fact herein, establishes that the Project, as designed, will not cause adverse impacts to existing surface water storage and conveyance capabilities. Thus, the Project meets the standards established in rule 62-330.301(1)(c).

103. A preponderance of the competent substantial evidence presented in this proceeding, as set forth in the Findings of Fact herein, establishes that the Project, as designed, will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters. Thus, the Project meets the standards established in rule 62-330.301(1)(d) and A.H. Volume I, section 10.1.1(a).

104. A preponderance of the competent substantial evidence presented in this proceeding, as set forth in the Findings of Fact herein, establishes that the Project, as designed, will not adversely affect the quality of receiving waters such that the state water quality standards will be violated. Thus, the Project meets the standards established in rule 62-330.301(1)(e) and A.H. Volume I, section 10.1.1(c).

105. A preponderance of the competent substantial evidence presented in this proceeding, as set forth in the Findings of Fact herein, establishes that the Project, as designed, will not cause adverse secondary impacts to the water resources. Thus, the Project meets the standards established in rule 62-330.301(1)(f) and A.H. Volume I, sections 10.1.1(f) and 10.2.7.

106. A preponderance of the competent substantial evidence presented in this proceeding, as set forth in the Findings of Fact herein, establishes that the Project, as designed, will be capable, based on generally accepted engineering and scientific principles, of performing and functioning as proposed. Thus, the Project meets the standards established in rule 62-330.301(1)(i).

107. A preponderance of the competent substantial evidence presented in this proceeding, as set forth in the Findings of Fact herein, establishes that the Project, as designed, will be conducted by a person with the financial, legal, and administrative capability of ensuring that the activity will be undertaken in accordance with the terms and conditions of the permit, if issued. Thus, the Project meets the standards established in rule 62-330.301(1)(j), subject to a determination as to any disputes regarding the boundary to or rights conferred under the easement by a court of competent jurisdiction.

108. A preponderance of the competent substantial evidence presented in this proceeding, as set forth in the Findings of Fact herein, establishes that the Project, as designed, will comply with applicable special basin or geographic area criteria. Thus, the Project meets the standards established in rule 62-330.301(1)(k) and A.H. Volume II (SJRWMD), sections 13.2 and 13.3.

109. A preponderance of the competent substantial evidence presented in this proceeding, as set forth in the Findings of Fact herein, establishes that the Project, as designed, will not be contrary to the public interest. Thus, the Project meets the standards established in rule 62-330.302(1)(a) and A.H. Volume I, section 10.2.3.

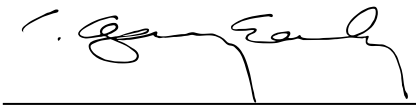
110. A preponderance of the competent substantial evidence presented in this proceeding, as set forth in the Findings of Fact herein, establishes that the Project, as designed, will not cause unacceptable cumulative impacts upon wetlands and other surface waters. Thus, the Project meets the standards established in rule 62-330.302(1)(b) and A.H. Volume I, sections 10.1.1(g) and 10.2.8.

111. As established in the Findings of Fact, reasonable assurance was provided that Orange County complied with all applicable standards for the Permit established by rules 62-330.301 and 62-330.302, and the A.H., and that Orange County is entitled to issuance of the Permit.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the St. Johns River Water Management District enter a final order issuing Environmental Resource Permit No. 154996-2, as proposed, to Respondent, Orange County, Florida, for the construction and operation of an outfall drainage improvement project for a 0.167-acre project known as Lake Ola Circle Outfall Drainage Improvements, and the related construction of an upgradient rock check dam in a swale along the north side of Lake Ola Drive.

DONE AND ENTERED this 19th day of July, 2021, in Tallahassee, Leon County, Florida.



E. GARY EARLY
Administrative Law Judge
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of July, 2021.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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

EXHIBIT B

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

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

Owner: Maricela Torres
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Consultant: Brian Williams
CDM Smith
101 Southhall Ln
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(239) 938-9630

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

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

Receiving Water Body:

Name	Class
Lake Ola	III Fresh

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

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

Recommendation: Approval
Reviewers: Cammie Dewey; Nicole Martin

Staff Comments

Project Applicant and Sufficient Real Property Interest:

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

Project Location and Brief Description:

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

Permitting History:

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

This proposed modification will supersede permit #154996-1.

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

Engineering

Description of Project:

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

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

Conditions for Issuance (Engineering):

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

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

Water Quantity:

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

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

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

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

Water Quality:

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

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

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

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

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

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

No works of the District are within the project area.

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

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

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

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

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

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

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

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

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

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

Environmental

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

Conditions for Issuance (Environmental):

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

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

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

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

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

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

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

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

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

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

Additional Conditions for Issuance

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

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

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

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

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

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

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

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

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

(d) Environmental impacts to property of others.

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

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

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

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

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

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

(b) Cause or alleviate harmful erosion or shoaling.

(c) Significantly impact or enhance water flow.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mitigation:

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

Financial Assurance Mechanism:

None.

Off-Site Mitigation:

None.

Lake Ola Circle Outfall Drainage Improvements
Governmental/Institutional

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

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

Conditions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9. This permit does not:

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

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

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

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

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

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

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

12. The permittee shall notify the District in writing:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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