

OGC CASE NO.: 15-0468
DOAH CASE NO.: 15-4975

On December 11, 2015, an Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH) submitted a Recommended Order (RO) to the Department of Environmental Protection (DEP or Department) in the above captioned administrative proceeding. A copy of the RO is attached hereto as Exhibit A. The RO shows that copies were sent to counsel for the Petitioner, WWALS Watershed Coalition, Inc. (Petitioner), and counsel for the Respondents, Sabal Trail Transmission, LLC (Sabal Trail), and the Department. On December 28, 2015, the Petitioner filed its Exceptions to the RO. Sabal Trail responded on January 4, 2016, and the Department responded on January 7, 2016. This matter is now before the Secretary for final agency action.¹

¹ The Secretary of the Department is delegated the authority to review and take final agency action on applications to use sovereignty submerged lands when the application involves an activity for which the Department has permitting responsibility. See Fla. Admin. Code R. 18-21.0051(2).

BACKGROUND

On July 10, 2015, the Department published its Consolidated Notice of Intent to Issue Environmental Resource Permit and Easement to Use Sovereign Submerged Lands to Sabal Trail for the Sabal Trail Natural Gas Pipeline. The Petitioner filed a petition for hearing on August 7, 2015, challenging the validity of these two authorizations. The Department dismissed the petition with leave to amend, and the Petitioner filed an amended petition, which added its subsidiary corporation, WWALS Watershed Coalition Florida, Inc. (WWALS-FL), as a second Petitioner. The Department dismissed the petition of WWALS-FL as untimely and struck portions of the amended petition. The Department then referred the amended petition to DOAH. At DOAH, the ALJ allowed the Petitioner to amend its petition again, but upon motion, certain claims in the last amended petition were struck because they were not cognizable in this state administrative proceeding.

On September 21, 2015, Sabal Trail filed a motion for summary hearing under Section 403.973(14)(b), Florida Statutes, which was granted. The final hearing was conducted on October 19 through 21, 2015, in Jasper, Florida. After filing of the hearing transcript and proposed recommended orders, the ALJ issued the RO on December 11, 2015.

SUMMARY OF THE RECOMMENDED ORDER

In the RO, the ALJ recommended that the Department enter a final order that approves issuance of the Environmental Resource Permit and grants an easement to use sovereign submerged lands to Sabal Trail for the Sabal Trail Natural Gas Pipeline. (RO at page 21). The ALJ concluded that Sabal Trail provided reasonable assurance

that the pipeline project will comply with all applicable regulatory criteria such that it is entitled to the Environmental Resource Permit. (RO ¶¶ 68, 69, 70). The ALJ further concluded that Sabal Trail proved the pipeline project will comply with all applicable criteria and it is entitled to the easement to use sovereign submerged lands. (RO ¶¶ 71, 72).

Standing

The ALJ found that, under the associational standing test, the Petitioner failed to establish its standing because it did not show that a substantial number of its members could be affected by the project. (RO ¶¶ 30, 36, 37, 59). The ALJ concluded that the speculative concerns of the Petitioner's members regarding the pipeline's impacts on their use and enjoyment of the Suwannee River, Santa Fe River, and surrounding areas, are not sufficient to confer standing. (RO ¶¶ 30, 31, 32, 33, 37, 57, 58).

Regulatory public interest test

The ALJ found that the Petitioner did not present any competent evidence to refute the evidence presented by Sabal Trail and the Department that the pipeline project would meet each of the seven public interest factors in Rule 62-330.302(1)(a). (RO ¶¶ 38-46, 68-70). The ALJ concluded that the proposed pipeline is not contrary to the public interest. (RO ¶¶ 47, 68). In the areas designated as Outstanding Florida Waters, the ALJ concluded that the proposed pipeline is clearly in the public interest. (RO ¶¶ 48, 49, 69).

Sovereign submerged lands easement

The ALJ found that the project creates a net public benefit when the public interest test for a sovereign submerged lands authorization under Rule 18-21.003(51) is

applied. (RO ¶¶ 50, 51, 72). The ALJ further found that the project will not conflict with Rule 18-21.004 because no sovereignty submerged lands will lose its essentially natural conditions, propagation of fish and wildlife will be maintained, and so will traditional recreational uses such as fishing, boating and swimming. (RO ¶ 52). The ALJ concluded that Sabal Trail proved the pipeline project will comply will applicable criteria and that it is entitled to the easement to use sovereign submerged lands. (RO ¶ 72).

STANDARDS OF REVIEW OF DOAH RECOMMENDED ORDERS

Section 120.57(1)(l), Florida Statutes, prescribes that an agency reviewing a recommended order may not reject or modify the findings of fact of an ALJ, “unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence.” § 120.57(1)(l), Fla. Stat. (2015); *Charlotte Cty. 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).

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

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

Section 120.57(1)(l), Florida Statutes, authorizes an agency to reject or modify an ALJ's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." See *Barfield v. Dep't of Health*, 805 So.2d 1008 (Fla. 1st DCA 2001); *L.B. Bryan & Co. v. Sch. Bd. of Broward Cty.*, 746 So.2d 1194 (Fla. 1st DCA 1999); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So.2d 1140 (Fla. 2d DCA 2001). Considerable deference should be accorded to these agency interpretations of statutes and rules within their regulatory jurisdiction, and such agency interpretations should not be overturned unless "clearly erroneous." See, e.g., *Falk v. Beard*, 614 So.2d 1086, 1089 (Fla. 1993); *Dep't of Env'tl. Regulation v. Goldring*, 477 So.2d 532, 534 (Fla. 1985). Furthermore, agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be the only reasonable interpretations. It is enough if such agency interpretations are "permissible" ones. See, e.g., *Suddath Van Lines, Inc. v. Dep't of Env'tl. Prot.*, 668 So.2d 209, 212 (Fla. 1st DCA 1996).

Agencies do not have jurisdiction, however, to modify or reject rulings on the admissibility of evidence. Evidentiary rulings of the ALJ that deal with “factual issues susceptible to ordinary methods of proof that are not infused with [agency] policy considerations,” are not matters over which the agency has “substantive jurisdiction.” See *Martuccio v. Dep’t of Prof’l Regulation*, 622 So.2d 607, 609 (Fla. 1st DCA 1993); *Heifetz v. Dep’t of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985); *Fla. Power & Light Co. v. Fla. Siting Bd.*, 693 So.2d 1025, 1028 (Fla. 1st DCA 1997). Evidentiary rulings are matters within the ALJ’s sound “prerogative . . . as the finder of fact” and may not be reversed on agency review. See *Martuccio*, 622 So.2d at 609.

RULINGS ON EXCEPTIONS

A party that files no exceptions to certain findings of fact “has thereby expressed its agreement with, or at least waived any objection to, those findings of fact.” *Env’tl. Coalition of Fla., Inc. v. Broward Cty.*, 586 So.2d 1212, 1213 (Fla. 1st DCA 1991); see also *Colonnade Medical Ctr., Inc. v. State of Fla., Agency for Health Care Admin.*, 847 So.2d 540, 542 (Fla. 4th DCA 2003). An agency head reviewing a recommended order is free to modify or reject any erroneous conclusions of law over which the agency has substantive jurisdiction, however, even when exceptions are not filed. See § 120.57(1)(l), Fla. Stat. (2012); *Barfield v. Dep’t of Health*, 805 So.2d 1008 (Fla. 1st DCA 2001); *Fla. Public Employee Council, 79 v. Daniels*, 646 So.2d 813, 816 (Fla. 1st DCA 1994).

PETITIONER'S EXCEPTIONS

Exception No. 1

The Petitioner takes exception to page 3 of the RO, where the ALJ lists Willard Randall as a member of WWALS, but not as an expert witness. See Petitioner's Exceptions at page 1. The Petitioner argues that the ALJ incorrectly weighed evidence provided by "expert witness Willard Randall" as that of a lay witness. *Id.* The ALJ accepted Mr. Randall as an "expert welder" at the hearing (Randall, T. Vol. V, p. 480, lines 5-6). However, the record shows that the ALJ was concerned whether the testimony was relevant (Randall, T. Vol. V, pp. 488-489), and that Mr. Randall did not review the Sabal Trail project (Randall, T. Vol. V, pp. 500-501).

The issues of relevance and weight of the evidence are within the province of the ALJ as the trier of fact. An agency reviewing a recommended order may not reweigh the evidence, resolve conflicts, or judge the credibility of witnesses. *See, e.g., Rogers v. Dep't of Health*, 920 So.2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep't of Env'tl. Prot.*, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997). Therefore, based on the foregoing reasons, Exception No. 1 is denied.

Exception No. 2

The Petitioner takes exception to the ALJ's finding in paragraph 14 of the RO that the "mud" used during HDD [Horizontal Directional Drilling] drilling is a "non-toxic . . . bentonite clay." (RO ¶ 14). The Petitioner does not argue that the finding is not supported by competent substantial evidence. Instead, the Petitioner contends that the ALJ failed to address "grouting material" and "other materials that will come into contact

with the water supply as a result of the installation of the pipeline. . .” See Petitioner’s Exceptions at page 2.

An agency has no authority to make independent or supplemental findings of fact in order to address matters that a party believes should be addressed by the ALJ. See, *North Port, Fla. v. Consol. Minerals*, 645 So.2d 485, 487 (Fla. 2d DCA 1994). The factual findings in paragraph 14 are supported by competent substantial record evidence (Joint Ex. 5, p. 1514; Means, T. Vol. V, p. 563; Jones, T. Vol. VI, p. 670).

Therefore, based on the foregoing reasons, Exception No. 2 is denied.

Exception No. 3

The Petitioner takes exception to paragraph 18 of the RO, where the ALJ found that “[t]he pipeline runs parallel to two existing natural gas pipelines that cross the Santa Fe River.” (RO ¶ 18). The Petitioner does not argue that the finding lacks competent substantial evidence support. Instead, the Petitioner alleges that the proposed pipeline crosses the two existing pipelines at multiple points other than at the Santa Fe River crossing. See Petitioner’s Exceptions at pages 2-3. The factual finding in paragraph 18 is supported by competent substantial record evidence (Bass, T. Vol. VI, p. 703; Malwitz-Jipson, T. Vol. III, pp. 248-249). An agency has no authority to make independent or supplemental findings of fact. *Id.*

The Petitioner also appears to take exception to paragraph 47 of the RO, where the ALJ concluded that “[c]onsidering the seven public interest factors listed [in Rule 62-330.302(1)(a)], the proposed pipeline is not contrary to the public interest.” (RO ¶ 47). The Petitioner argues that the ALJ’s recommendation that the Department presented evidence in support of the seven public interest factors is clearly erroneous. The

Petitioner contends that the agency's preliminary review of the pipeline proposal was cursory. However, this argument ignores the evidence presented in the *de novo* hearing conducted by the ALJ. It is well established that "Section 120.57 proceedings are intended to formulate final agency action, not to review action taken earlier and preliminarily." *McDonald v. Dep't of Banking and Fin.*, 346 So. 2d 569, 584 (Fla. 1st DCA 1977).

Therefore, based on the foregoing reasons, Exception No. 3 is denied.

Exception No. 4

The Petitioner takes exception to the ALJ's finding in paragraph 19 that the closest major spring to the pipeline route is 1.7 miles away. (RO ¶ 19). Competent substantial record evidence supports the finding that the closest **major** spring is the Madison Blue Spring, which is 1.7 miles from the pipeline route (Jones, T. Vol. VI, pp. 677, 687-688; Sabal Trail Ex. 22). As the Petitioner points out there are springs within a mile of the pipeline, however, those springs are not classified as **major** springs (Jones, T. Vol. VI, pp. 659-662, 664-665; Joint Ex. 5, pp. 26-27, 2313-2314; Sabal Trail Exs. 19 and 20).

Therefore, based on the foregoing reasons, Exception No. 4 is denied.

Exception No. 5

The Petitioner takes exception to paragraph 20, where the ALJ found that the pipeline would be only four to six feet below the land surface while the Falmouth Cave system is more than 100 feet below ground. (RO ¶ 20). Competent substantial record evidence supports the ALJ's findings in paragraph 20 (Jones, T. Vol. VI, p. 659, 681-682). The Petitioner points to contrary testimony from its own expert. See Petitioner's

Exceptions at page 3. However, the ALJ is free to accept the testimony of one expert witness over that of another expert. See *Peace River/Manasota Regional Water Supply Authority v. IMC Phosphates Co.*, 18 So.3d 1079, 1088 (Fla. 2d DCA 2009). In addition, when there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. See, e.g., *Arand Construction Co. v. Dyer*, 592 So.2d 276, 280 (Fla. 1st DCA 1991); *Conshor, Inc. v. Roberts*, 498 So.2d 622 (Fla. 1st DCA 1986).

Therefore, based on the foregoing reasons, Exception No. 5 is denied.

Exception No. 6

The Petitioner takes exception to paragraphs 23 and 24 of the RO, where the ALJ found:

23. Karst terrain, which is limestone undergoing dissolution and characterized by the formation in the limestone of holes, cracks, fissures, conduits, and sinkholes, is common in North Florida and throughout the State.

24. Although fragile in particular locations, karst terrain is able to support large linear facilities in North Florida such as Interstate 10, Interstate 75, and railroads, which bear loads of many tons without collapses occurring in the underlying limestone.

Competent substantial record evidence supports the ALJ's findings (Jones, T. Vol. VI, pp. 655-657, 684; Sabal Trail Ex. 18). The Petitioner does not argue that the findings are not supported by competent substantial evidence. Instead, the Petitioner contends that the ALJ failed to address other issues regarding the nature of karst geology. See Petitioner's Exceptions at page 4. The Department does not have the authority to make independent or supplemental findings of fact. See, *North Port, Fla. v. Consol. Minerals*, 645 So.2d 485, 487 (Fla. 2d DCA 1994).

Therefore, based on the foregoing reasons, Exception No. 6 is denied.

Exception No. 7

The Petitioner takes exception to the ALJ's finding in paragraph 26 of the RO that the pipeline design specifications provide reasonable assurance that the formation of a sinkhole along its path would not cause it to break. (RO ¶ 26). The Petitioner argues that the ALJ's conclusion "assumes facts not in evidence." See Petitioner's Exceptions at pages 4-5. However, competent substantial record evidence supports the ALJ's ultimate finding in paragraph 26 (Lambeth, T. Vol. VI, pp. 719-733; Jones, T. Vol. VI, pp. 692-694; Sabal Trail Ex. 32; Joint Ex. 12, p. 373). See § 120.57(1)(I), Fla. Stat. (2015).

Therefore, based on the foregoing reasons, Exception No. 7 is denied.

Exception No. 8

The Petitioner takes exception to paragraph 27 of the RO, where the ALJ found that it is in the interest of Sabal Trail to build and operate the pipeline so that disruptions of service do not occur. (RO ¶ 27). The Petitioner argues that the ALJ assumes facts that are not in evidence. See Petitioner's Exceptions at page 5. However, as the Respondents point out, the finding is a reasonable inference from the competent substantial record evidence (Shammo, T. Vol. VI, pp. 24-26; Joint Ex. 12, p. 34). See Sabal Trail's Response at page 9; DEP's Response at page 7. It is well established that it is the ALJ's function to draw permissible inferences from the competent substantial evidence and reach ultimate findings of fact. See *Belleau v. Dep't of Env'tl. Prot.*, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997).

Therefore, based on the foregoing reasons, Exception No. 8 is denied.

Exception No. 9

The Petitioner takes exception to paragraph 29 of the RO, where the ALJ found that it did not present any evidence of adverse impacts caused by similar pipelines in similar areas. (RO ¶ 29). The Petitioner cites testimony of its witness Richard Gamble. However, the testimony was excluded after Sabal Trail's objection that the testimony was speculative, vague, and lacked relevance (T. Vol. VI, pp. 593-595). The Department has no authority to overturn this evidentiary ruling of the ALJ. See *Martuccio v. Dep't of Prof'l Regulation*, 622 So.2d 607, 609 (Fla. 1st DCA 1993).

The Petitioner also takes exception to paragraph 40, where the ALJ found that it failed to refute the Respondents' evidence that the pipeline project would not result in adverse impacts on public health, safety, or welfare. (RO ¶ 40). The Petitioner asserts error by the ALJ in allowing "safety" testimony that was excluded in the Order dated October 15, 2015. See Petitioner's Exceptions at page 6. In the Order, the ALJ struck the Petitioner's allegations regarding pipeline safety as regulated under federal law. See DEP's Response at page 9. The ALJ reiterated the scope of his ruling during the hearing by stating that he was "not making any findings about safety, pipeline safety, except as it affects – potential effects on the environment and human use of the water resources." (T. Vol. VI, p. 735). Thus, the Petitioner's argument that the ALJ took "safety" evidence from the Respondents and did not allow any response from the Petitioner is not accurate. The type of pipeline "safety" testimony that the Petitioner tried to present was excluded by the ALJ's Order. See DEP's Response at page 9; T. Vol. VI, pp. 735-736. While the Respondents' evidence was directed at the first of the seven

public interest test factors in Rule 62-330.302(1)(a), Florida Administrative Code.

(RO ¶ 40).

Because paragraph 40 is supported by competent substantial record evidence (Prather, T. Vol. II, pp. 230, 361-364), and based on the foregoing reasons, Exception No. 9 is denied.

Exception Nos. 10, 14, 21, 22, and 23

The Petitioner takes exception to paragraphs 30, 33, 36, and 37 of the RO, where the ALJ found that the testimony of the Petitioner's members did not establish that a substantial number of its members would be substantially affected by the pipeline. See Petitioner's Exceptions at pages 7-8 and 9. The Petitioners essentially argue that the Department should reweigh the evidence and draw conclusions contrary to those drawn by the ALJ. As outlined above, it is well established that it is the ALJ's function to draw permissible inferences from the competent substantial evidence and reach ultimate findings of fact. See *Belleau v. Dep't of Env'tl. Prot.*, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997). In addition, competent substantial record evidence supports the ALJ's conclusion that the pipeline's location and potential impacts from a sinkhole had no relation to alleged interference with use of area waters by the Petitioner's members (Prather, T. Vol. IV, pp. 374-375, 369; Bass, T. Vol. VI, p. 713). (RO ¶¶ 30, 33, 36, and 37).

The Petitioners also take exception to the ALJ's conclusions in paragraphs 56, 57, 58, and 59 that under applicable case law the Petitioner failed to establish standing because it did not show that a substantial number of its members could be affected by the project. See *St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist.*, 54

So. 3d 1051, 1054 (Fla. 5th DCA 2011). The Petitioner's arguments do not establish that the ALJ's conclusions of law in paragraphs 56, 57, 58, and 59 are clearly erroneous.

Therefore, based on the foregoing reasons, Exception Nos. 10, 14, 21, 22, and 23, are denied.

Exception No. 11

The Petitioner takes exception to paragraph 31 of the RO, where the ALJ found that use of drilling mud and grout for HDD operations is unlikely to affect residential wells of the Petitioner's members or non-members. (RO ¶ 31). The Petitioner argues that the Department's Final Order should not adopt this paragraph because the ALJ applied the incorrect standard. See Petitioner's Exceptions at page 8. The Petitioner asserts that in this factual finding the ALJ should have used the legal standard regarding reasonable assurance that water quality standards will not be violated. *Id.*

Contrary to the Petitioner's assertion, the ALJ's ultimate legal conclusions in paragraphs 67 and 68 show that the ALJ did apply the correct legal standard. (RO ¶¶ 67 and 68). Also, competent substantial evidence supports the ALJ's findings in paragraph 31 (Means, T. Vol. V, p. 557; Lambeth, T. Vol. VI, p. 735).

Therefore, based on the foregoing reasons, Exception No. 11 is denied.

Exception No. 12

The Petitioner takes exception to paragraph 32 of the RO, where the ALJ found that there was "[n]o competent evidence . . . presented about the possibility that HDD drilling under the rivers could result in adverse impacts to fish and wildlife." (RO ¶ 32). The Petitioner asserts that its argument in Exception No. 2 and a statement from the

ALJ during the hearing that includes the phrase “[i]f the drilling fluid is a pollutant,” constitutes the competent evidence that drilling mud will have an adverse impact to fish and wildlife. See Petitioner’s Exceptions at page 8.

Contrary to the Petitioner’s assertions, the ruling on Exception No. 2 above found that the ALJ’s factual finding that drilling mud is a non-toxic, naturally occurring bentonite clay, is supported by competent substantial evidence. Therefore, based on the foregoing reasons, Exception No. 12 is denied.

Exception No. 13

The Petitioner takes exception to paragraph 34 of the RO, where the ALJ found that air quality is not a cognizable issue in this proceeding because there is a separate permit associated with air quality impacts of the pipeline. (RO ¶ 34). Competent substantial evidence showed that air quality impact concerns are not addressed in this type of environmental resource permit proceeding (Prather, T. Vo. III, p. 313). See, e.g., *FINR II, Inc. v. CF Industries, Inc., and Dep’t of Env’tl. Protection*, Case No. 11-6495 (Fla. DOAH April 30, 2012; Fla. DEP June 6, 2012), *aff’d* 118 So. 3d 809 (Fla. 1st DCA 2013) (“FINR’s allegations regarding air impacts, . . . are likewise beyond the scope of the Department’s permitting criteria for ERPs . . .”).

Therefore, based on the foregoing reasons, Exception No. 13 is denied.

Exception Nos. 15 and 16

The Petitioner takes exception to paragraphs 40-47 of the RO, where the ALJ found that the Petitioner did not present any competent evidence to refute Sabal Trail’s and the Department’s evidence that the project satisfies the seven public interest factors. (RO ¶¶ 40-47). Competent substantial record evidence supports the ALJ’s

findings in paragraphs 40-47 (Prather, T. Vol. II, pp. 220-221, 226, 229-234; T. Vol. IV, pp. 360-376; Joint Ex. 9; Joint Ex. 10, pp. 3-4; Ambrosino, T. Vol. II, pp. 189-193; Sabal Trail Ex. 9). See § 120.57(1)(l), Fla. Stat. (2015). The weight to be given any contrary evidence from the Petitioner is within the province of the ALJ as the trier of fact. The Department's review of the recommended order may not include reweighing the evidence, resolving conflicts, or judging the credibility of witnesses. See, e.g., *Rogers v. Dep't of Health*, 920 So.2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep't of Env'tl. Prot.*, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997).

Therefore, based on the foregoing reasons, Exception Nos. 15 and 16 are denied.

Exception No. 17

In this exception, the Petitioner states that the ALJ's paragraphs 48 and 49 properly apply the heightened "clearly in the public interest" standard with regard to the Suwannee and Santa Fe Rivers, which are Outstanding Florida Waters. The remainder of the Petitioner's exception focuses on its arguments regarding the Department's preliminary review of Sabal Trail's application prior to agency action. As previously discussed, this argument ignores the evidence presented in the *de novo* hearing conducted by the ALJ. It is well established that "Section 120.57 proceedings are intended to formulate final agency action, not to review action taken earlier and preliminarily." *McDonald v. Dep't of Banking and Fin.*, 346 So. 2d 569, 584 (Fla. 1st DCA 1977).

In addition, competent substantial record evidence supports the ALJ's findings in paragraphs 48 and 49 (Jones, T. Vol. VI, pp. 672-675; Prather, T. Vol. II, p. 221, 223;

Joint Ex. 10, p. 4). Therefore, based on the foregoing reasons, Exception No. 17 is denied.

Exception No. 18

The Petitioner appears to take exception to paragraph 51, where the ALJ found that the pipeline's need determination by the Public Service Commission is a public benefit under the public interest test for sovereign submerged lands authorizations. (RO ¶ 51). The Petitioner argues that the ALJ's finding is a fact not in evidence. However, competent substantial record evidence supports the ALJ's finding (Shammo, T. Vol. I, pp. 25-27, 34-35; Joint Ex. 12, p. 34).

In addition, the Petitioner ignores the public interest test in Rule 18-21.003(51), Florida Administrative Code, for authorizing the pipeline easement, which the ALJ outlined in paragraph 50 of the RO. The Petitioner erroneously contends that the sovereign submerged lands easement is governed by the regulatory "reasonable assurance" standard that governs the environmental resource permit. See Petitioner's Exceptions at page 11. This is contrary to well established statutory and rule criteria applicable to the regulatory environmental resource permit program (Section 373.414, Florida Statutes, and Rule 62-330.302, Florida Administrative Code) versus the sovereignty submerged lands authorizations (chapter 253, Florida Statutes, and Rule chapter 18-21, Florida Administrative Code). See, e.g., *Last Stand, Inc. v. Fury Mgmt., Inc., and Dep't of Env'tl. Protection*, Case No. 12-2574 (Fla. DOAH Dec. 31, 2012; Fla. DEP Feb. 7, 2013).

Therefore, based on the foregoing reasons, Exception No. 18 is denied.

Exception No. 19

The Petitioner takes exception to paragraph 52 of the RO, where the ALJ found that the Petitioner did not present competent evidence “to show that any sovereignty submerged lands would lose their essential natural conditions, that fish and wildlife propagation would be diminished, or that traditional recreational uses would be interfered with.” (RO ¶ 52). The Petitioner argues that it did present evidence on these issues. See Petitioner’s Exceptions at page 12.

The weight to be given any contrary evidence from the Petitioner is within the province of the ALJ as the trier of fact. The Department’s review of the recommended order may not include reweighing the evidence, resolving conflicts, or judging the credibility of witnesses. See, e.g., *Rogers v. Dep’t of Health*, 920 So.2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep’t of Env’tl. Prot.*, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997).

Because competent substantial evidence supports the ALJ’s findings in paragraph 52 (Prather, T. Vol. IV, pp. 374-375), and based on the foregoing reasons, Exception No. 19 is denied.

Exception No. 20

The Petitioner takes exception to paragraph 55 of the RO, where the ALJ states a legal conclusion and cites case law that, “[e]conomic or business interests are not substantial interests in this environmental permitting proceeding.” See *Agrico Chem. Co. v. Dep’t of Env’tl. Reg.*, 406 So. 2d 478, 482 (Fla. 2d DCA 1981). The Petitioner argues that “[p]aragraph 55 insinuates that WWALS seeks standing due to economic injury,” and goes on to argue that it seeks standing based on members’ use and

enjoyment of the Santa Fe and Suwannee Rivers. See Petitioner's Exceptions at page 12.

Contrary to the Petitioner's argument, there was evidence presented concerning impacts to business interests on which the ALJ made factual findings in paragraph 35. (RO ¶ 35) ("A few members believe there could be impacts that would adversely affect their business interests, which are not interests that this proceeding was designed to protect."). The Petitioner did not take exception to paragraph 35. A party that files no exceptions to certain findings of fact "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Env'tl. Coalition of Fla., Inc. v. Broward Cty.*, 586 So.2d 1212, 1213 (Fla. 1st DCA 1991); see also *Colonnade Medical Ctr., Inc. v. State of Fla., Agency for Health Care Admin.*, 847 So.2d 540, 542 (Fla. 4th DCA 2003).

Therefore, based on the foregoing reasons, Exception No. 20 is denied.

Exception No. 24

The Petitioner takes exception to the second sentence in paragraph 65 of the RO, where the ALJ quotes a definition of "reasonable assurance" from the case *Metro. Dade Cnty. v. Coscan Fla.*, 609 So. 2d 644, 648 (Fla. 3d DCA 1992). The Petitioner essentially argues that the definition (successful implementation of a project) by itself does not fully explain the "reasonable assurance" standard. See Petitioner's Exceptions at page 14. However, the Petitioner both misstates the Court's holding in *Coscan* and the ALJ's conclusion in paragraph 65.

Coscan held that the "reasonable assurance" standard contemplates "a substantial likelihood that the project will be successfully implemented." *Id.* In paragraph

65, the ALJ stated that “[a]n applicant must provide reasonable assurance that it will comply with all applicable regulatory criteria. Reasonable assurance means a ‘substantial likelihood that the project will be successfully implemented.’” (RO ¶ 65). The Petitioner’s argument that the ALJ misstated the law is not accurate.

Therefore, based on the foregoing reasons, Exception No. 24 is denied.

Exception No. 25

The Petitioner takes exception to paragraph 69 of the RO, where the ALJ concluded that “[b]ecause Sabal Trail clearly demonstrated compliance with all applicable regulatory criteria, the project is clearly in the public interest.” (RO ¶ 69). The Petitioner again argues that the sovereign submerged lands easement is subject to the regulatory seven factors in section 373.414, Florida Statutes. However, as outlined in the ruling on Exception No. 18 above, this is not the case.

Contrary to the Petitioner’s other assertions, the ALJ clearly understood that the regulatory “public interest test” is found in section 373.414, and Rule 62-330.302. See RO ¶¶ 38-48 and 65-70. “All applicable regulatory criteria,” of course, includes satisfying the public interest test (i.e., the seven public interest factors) and other criteria dealing with water quality.

Therefore, based on the foregoing reasons, Exception No. 25 is denied.

CONCLUSION

Having reviewed the matters of record and being otherwise duly advised,

It is therefore ORDERED that:

- A. The Recommended Order (Exhibit A) is adopted in its entirety and is incorporated by reference herein.

B. Sabal Trail's application for an Environmental Resource Permit in File No. 0328333-001 is APPROVED.

C. Sabal Trail's application for an Easement to use Sovereign Submerged Lands is GRANTED.

JUDICIAL REVIEW

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by filing a Notice of Appeal pursuant to Rules 9.110 and 9.190, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the clerk of the Department.

DONE AND ORDERED this 15th day of January, 2016, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



JONATHAN P. STEVERSON
Secretary

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

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



CLERK

1-15-16
DATE

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing Final Order has been furnished by electronic mail to the following persons on this 15th day of January, 2016.

William R. Wohlsifer, Esquire
Leighanne C. Boone, Esquire
William R. Wohlsifer, P.A.
1100 East Park Avenue
Suite B
Tallahassee, Florida 32301
william@wohlsifer.com
lboone@wohlsifer.com
paralegal@wohlsifer.com

Richard S. Brightman, Esquire
Timothy M. Riley, Esquire
H. French Brown, IV
Hopping, Green and Sams
Post Office Box 6526
Tallahassee, Florida 32314-6526
richardb@hgslaw.com
timothy@hgslaw.com
frenchb@hgslaw.com

Jack Chisolm, Esquire
Sidney C. Bigham, III
Department of Environmental Protection
3900 Commonwealth Boulevard
Mail Station 35
Tallahassee, Florida 32399-3000
Jack.chisolm@dep.state.fl.us
Sidney.bigham@dep.state.fl.us
dep.defense@dep.state.fl.us

and by electronic filing:

Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



FRANCINE M. FFOLKES
Administrative Law Counsel

3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000
Telephone 850/245-2242
francine.ffolkes@dep.state.fl.us

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WWALS WATERSHED COALITION, INC.,

Petitioner,

vs.

Case No. 15-4975

SABAL TRAIL TRANSMISSION, LLC,
AND DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Respondents.

RECOMMENDED ORDER

The final hearing in this case was held on October 19 through 21, 2015, in Jasper, Florida before Bram D. E. Canter, an Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner WWALS Watershed Coalition, Inc. ("WWALS"):

William R. Wohlsifer, Esquire
Leighanne C. Boone, Esquire
William R. Wohlsifer, P.A.
1100 East Park Avenue, Suite B
Tallahassee, Florida 32301

For Respondent Sabal Trail Transmission, LLC ("Sabal Trail"):

Richard S. Brightman, Esquire
Timothy M. Riley, Esquire
H. French Brown, IV, Esquire
Hopping, Green and Sams
Post Office Box 6526
Tallahassee, Florida 32314

For Respondent Department of Environmental Protection
("Department"):

Jack Chisolm, Esquire
Sidney C. Bigham, III, Esquire
Department of Environmental Protection
Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

The issue to be determined in this case is whether Sabal Trail is entitled to the proposed Environmental Resource Permit and Easement to Use Sovereign Submerged Lands to construct a natural gas pipeline.

PRELIMINARY STATEMENT

On July 10, 2015, the Department published its Consolidated Notice of Intent to Issue Environmental Resource Permit and Easement to Use Sovereign Submerged Lands to Sabal Trail. On August 7, 2015, WWALS filed a petition for hearing with the Department to challenge the validity of these two authorizations.

The Department dismissed WWALS' petition, but granted leave to amend. WWALS filed an amended petition, which added its subsidiary corporation, WWALS Watershed Coalition Florida, Inc. ("WWALS-FL"), as a second Petitioner. The Department dismissed the petition of WWALS-FL as untimely and struck portions of WWALS' amended petition. The Department then referred the amended petition to DOAH. WWALS was permitted to amend its petition again, but upon motion, certain claims in the last

amended petition were struck because they were not cognizable in this state administrative proceeding.

On September 21, 2015, Sabal Trail filed a motion for summary hearing pursuant to section 403.973(14)(b), Florida Statutes (2015), which was granted.

At the final hearing, WWALS presented the testimony of: Dennis Price, an expert in geology; Donald M. Thieme, an expert in geomorphology; Richard Gamble, Suwannee County Commissioner; Carlos Herd, Director of the Water Supply Division for the Suwannee River Water Management District; Dale Jenkins, Bureau Chief of the Bureau of Project Management with the Saint Johns River Water Management District; Guy Means, Florida Geological Survey; Lisa Prather, environmental consultant for the Department's Central District; and 13 WWALS members: David Shields, John Quarterman, Joe McClung, Thomas Edwards, Deanna Mericle, Christopher Mericle, Donna Ellison, Wayne Ellison, Merrilee Malwitz-Jipson, Dana Stevens, Debra Johnson, Richard Gamble, Willard Randall, and Lori McCraney.

Sabal Trail presented the testimony of: Jim Abrosino, an expert in archeology; David Dickson, senior consultant for Cardno, Inc., and part of the Permit team responsible for putting together the application; David Shammo, corporate representative of Spectra Energy Partners, LP; Marty Bass, an expert in pipeline construction management; Gregg Jones, an expert in geology and

hydrogeology; and Alan K. Lambeth, an expert in natural gas pipeline design and operations.

The Department presented the testimony of Lisa Prather.

Joint Exhibits 1 through 12 were admitted into evidence. Sabal Trail's Exhibits 1 through 55 were admitted into evidence. Petitioner's Exhibits 1 through 12 were admitted into evidence.

The six-volume Transcript of the final hearing was filed with DOAH. The parties submitted proposed recommended orders that were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

The Parties

1. Petitioner, WWALS, is a Georgia not-for-profit corporation registered with the Florida Department of State as a Foreign Not For Profit Corporation. Its mailing address is in Hahira, Georgia.

2. WWALS' mission is to advocate for conservation and stewardship of the Withlacoochee, Willacoochee, Alapaha, Little, and Upper Suwannee River watersheds in South Georgia and North Florida.

3. WWALS stated in its petition that it has a total of 85 members, 36 of whom reside in Florida. The total number of WWALS members was not established at the final hearing. If members that joined WWALS after it filed its petition for hearing are

included, WWALS has about 40 members living in Hamilton County and Suwannee County.

4. Sabal Trail is a Delaware limited liability company that is registered to do business in the State of Florida. It is the applicant for the authorizations that are challenged by Petitioner.

5. The Department is the state agency charged with administering the Environmental Resource Permitting program under chapter 373, Florida Statutes, and Florida Administrative Code Chapters 62-4 and 62-330.

6. The Department is also the state agency authorized by chapter 253, Florida Statutes, and Florida Administrative Code Chapter 18-21, to review and authorize certain uses of state-owned submerged lands.

General Project Description

7. Sabal Trail proposes to construct an interstate natural gas pipeline. The primary purpose of the pipeline is to support electric power generation in Florida.

8. The pipeline would start in the vicinity of a Transcontinental Gas Pipeline Company station in Tallapoosa County in Alabama. The portion of the pipeline in Florida would cross twelve Florida counties, entering the state in Hamilton County and terminating in Osceola County.

9. The pipeline would include 232.75 miles of 36-inch diameter pipe for the Mainline Route, 13.1 miles of 36-inch diameter pipe for the Hunter's Creek Line, and 21.5 miles of 24-inch pipe for the Citrus County Line.

10. The pipe used would be made of high-strength ductile carbon steel.

11. The project would include construction and operation of three compressor stations and three meter and regulation stations in Florida. There would also be access roads, pig launcher and receiver stations, mainline valves, and pipe storage/work areas.

12. Most of the pipeline would be installed using a conventional "cut and cover" technique, which means a trench is excavated, sections of pipe are placed in the trench and connected, and the trench is backfilled with soil excavated from the trench.

13. However, waterbodies along the route, including the Suwannee River and Santa Fe River, would be crossed using Horizontal Directional Drilling ("HDD"). The HDD method involves boring a pilot hole beneath the waterbody and then enlarging the hole with one or more passes of a reamer until the hole is large enough to pull a prefabricated pipe segment through the hole. The pipeline would be installed more than 40 feet beneath the Suwannee River and Santa Fe River.

14. During HDD operations, drilling fluid or "mud" is used to lubricate the drill head, and remove cuttings from the hole. Drilling mud is a non-toxic, naturally occurring, bentonite clay, which is commonly used for drilling water wells.

15. The pipeline will require a permanent 50-foot right-of-way.

16. Because the construction would require digging trenches through wetlands, drilling under riverbeds, and construction of stormwater management systems for the various stations, an environmental resource permit from the Department must be obtained for the work. Because some construction is over state-owned submerged lands, authorization from the Trustees of the Internal Improvement Trust Fund is also required.

Route Selection

17. The pipeline route was selected based on environmental and cultural resource factors and co-location opportunities with existing utility rights-of-way. The proposed route was modified many times to reduce environmental impacts and respond to landowner requests.

18. The pipeline runs parallel to two existing natural gas pipelines that cross the Santa Fe River.

19. The closest major spring to the pipeline route would be Madison Blue Spring, 1.7 miles away. The route is closer to some

smaller springs, but it would not cross near spring vents or areas of concentrated spring flow.

20. The pipeline would cross above the Falmouth Cave system. However, the pipeline would be only four-to-six feet beneath the land surface. The cave system is more than 100 feet below ground.

21. Sabal Trail reduced or eliminated impacts to wetlands and waterbodies along the pipeline route, but the project would result in unavoidable temporary and permanent losses of portions of wetlands along the route. The functional loss of wetland functions, as calculated under the Uniform Mitigation Assessment Method ("UMAM"), would be offset by Sabal Trail's purchase of credits from approved wetland mitigation banks.

Petitioner's Objections

22. The primary concern of WWALS and its members is the possibility of environmental impacts arising from the construction of the pipeline in karst terrain.

23. Karst terrain, which is limestone undergoing dissolution and characterized by the formation in the limestone of holes, cracks, fissures, conduits, and sinkholes, is common in North Florida and throughout the State.

24. Although fragile in particular locations, karst terrain is able to support large linear facilities in North Florida such as Interstate 10, Interstate 75, and railroads, which bear loads

of many tons without collapses occurring in the underlying limestone.

25. Sabal Trail conducted geophysical tests, evaluated the potential for sinkhole formation, developed drilling best management practices, and prepared a karst mitigation plan to address potential adverse circumstances that might arise during construction of the pipeline.

26. The pipeline design specifications provide reasonable assurance that the formation of a sinkhole along the path of the pipeline would not cause it to break.

27. It is in the interests of Sabal Trail to build and operate the pipeline so that breaks or disruptions of service do not occur.

28. There are existing natural gas pipelines that were constructed under the Suwannee River and Santa Fe River. A geologist with the Florida Geological Survey testified that he was unaware of any adverse impacts that have been associated with these other pipelines.

29. WWALS presented no evidence of adverse impacts that have been caused by similar pipelines in similar areas.

30. Petitioner's members are afraid the pipeline will cause adverse impacts because of its construction in karst terrain, but with the exception of four WWALS members whose properties would be crossed by the pipeline, the concerns expressed by members

about how they would be affected were vague and speculative. Not all of the potential pipeline impacts described by WWALS members were vague or speculative, but the members' injuries were vague and speculative. For example, it was not adequately explained how a sinkhole, if one were to occur along the route of the pipeline, would affect them.

31. WWALS expressed concerns about water quality, but the use of drilling mud and grout for the HDD operations is unlikely to affect the residential water wells of any member or non-member. Nor would it affect the water quality of the rivers under which the pipeline is installed, because the amount of drilling mud and grout is so small in relation to groundwater volumes.

32. WWALS expressed general concerns about fish and wildlife impacts, but no member identified any particular wetland impact caused by construction of the pipeline that would directly affect him or her and Petitioner presented no competent evidence to refute the UMAM assessment or the reasonableness of the proposed mitigation. No competent evidence was presented about the possibility that HDD drilling under the rivers could result in adverse impacts to fish and wildlife.

33. Some WWALS members testified they use and enjoy the rivers and surrounding area, but the concerns about adverse impacts to their use and enjoyment were speculative, being based

on the proposition that a sinkhole or other disruption of the limestone will be caused by the construction of the pipeline and it will cause a change in the rivers or land to a degree that their use and enjoyment of the rivers or land will be materially diminished. Petitioner did not establish the connection between pipeline impacts and interference with members' use of area waters.

34. One member testified he has an organic farm and believes it would be adversely affected by air pollution from a proposed compressor station for the pipeline, but there is a separate permit associated with the air quality impacts of the pipeline. Air quality is not a cognizable issue in this proceeding.

35. A few members believe there could be impacts that would adversely affect their business interests, which are not interests that this proceeding was designed to protect.

36. Although a substantial number of WWALS members have substantial interests in the use and enjoyment of the waters and environment of Hamilton County and Suwannee County, a showing of potential injury to those interests was only established in the record for four WWALS members--the four who own land that the pipeline will cross.

37. Four members is not a substantial number when compared to the total number of WWALS members living in Hamilton County and Suwannee County, which is about forty.

Public Interest

38. For projects located in, on, or over wetlands or other surface waters, an applicant must provide reasonable assurance that the project 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 criteria set forth in rule 62-330.302.

39. Rule 62-330.302(1)(a) lists seven public interest factors to be considered and balanced:

1. Whether the activity will adversely affect the public health, safety, or welfare or the property of others;
2. Whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;
3. Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;
4. Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;
5. Whether the activity will be of a temporary or permanent nature;

6. Whether the activity will adversely affect or will enhance significant historical and archaeological resources under the provisions of s. 267.061; and

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

40. Petitioner presented no competent evidence to refute the evidence presented by Sabal Trail and the Department that the pipeline project would not result in adverse impacts on public health, safety, or welfare. Beyond general, undisputed evidence about the characteristics of karst geology, no competent evidence was presented by Petitioner to show that a karst-related impact could occur that would affect its members.

41. Petitioner presented no competent evidence to refute the evidence presented by Sabal Trail and the Department that the pipeline would not cause adverse impacts to fish and wildlife.

42. Petitioner presented no competent evidence to refute the evidence presented by Sabal Trail and the Department that the project would not cause adverse impacts to navigation or the flow of water or cause harmful erosion or shoaling.

43. Petitioner presented no competent evidence to refute the evidence presented by Sabal Trail and the Department that the project would not cause adverse impacts to fishing or recreational values or marine productivity.

44. It is undisputed that some of the pipeline impacts and the pipeline, itself, will be of a permanent nature.

45. Petitioner presented no competent evidence to refute the evidence presented by Sabal Trail and the Department that the proposed pipeline would not adversely affect significant historical and archaeological resources.

46. Petitioner presented no competent evidence to refute the evidence presented by Sabal Trail and the Department that the proposed pipeline would not adversely affect the current condition and relative value of environmental functions being performed in the area that would not be fully mitigated.

47. Considering the seven public interest factors listed above, the proposed pipeline is not contrary to the public interest.

48. The Suwannee River and Santa Fe River have been designated as Outstanding Florida Waters. Any activities that would affect them must be shown to be clearly in the public interest. As discussed in the Conclusions of Law, demonstrating that a project is clearly in the public interest requires greater assurance that all permitting requirements will be complied with. Sabal Trail showed clearly that it will comply with all permitting criteria.

49. Rule 62-4.242 prohibits the degradation of water quality in an Outstanding Florida Water. Sabal Trail and the

Department showed the construction and operation of the pipeline would not degrade the water quality of the Suwannee River or Santa Fe River.

50. Rule 18-21.004(1)(a) requires that activities on sovereignty submerged lands not be contrary to the public interest. Rule 18-21.003(51) defines public interest in this context as:

Demonstrable environmental, social, and economic benefits which would accrue to the public at large as a result of a proposed action, and which would clearly exceed all demonstrable environmental, social, and economic cost of the proposed action.

Therefore, to obtain authorization to use sovereignty submerged lands easement, an applicant must create a net public benefit.

51. Sabal Trail and the Department demonstrated the project creates a net public benefit because it would not have adverse environmental impacts that would not be fully mitigated and the project addresses a need determined by the Public Service Commission for additional natural gas transportation capacity into Florida, enhancement of natural gas supply diversity and reliability, and increased competition for natural gas transportation services.

52. WWALS contends the proposed project would conflict with rule 18-21.004(2)(a), which requires that all sovereignty submerged lands be primarily managed to maintain "essentially

natural conditions, propagation of fish and wildlife, and traditional recreational uses such as fishing, boating, and swimming." However, WWALS presented no competent evidence to show that any sovereignty submerged lands would lose their essential natural conditions, that fish and wildlife propagation would be diminished, or that traditional recreational uses would be interfered with. The proposed project complies with the requirement of rule 18-21.004(2).

CONCLUSIONS OF LAW

Standing

53. Standing to participate in a section 120.57(1) proceeding is afforded to persons whose substantial interests will be affected by proposed agency action. See § 120.52(13)(b), Fla. Stat. (2015).

54. For an association to establish standing as a party, it must prove that a substantial number of its members, but not necessarily a majority, have a substantial interest that reasonably could be affected, that the subject matter of the proposed activity is within the general scope of the interests and activities for which the organization was created, and that the relief requested is of the type appropriate for the organization to receive on behalf of its members. Fla. Home Builders Ass'n v. Dep't of Labor & Emp. Sec., 412 So. 2d 351 (Fla. 1982).

55. Economic or business interests are not substantial interests in this environmental permitting proceeding. Agrico Chem. Co. v. Dep't of Env'tl. Reg., 406 So. 2d 478, 482 (Fla. 2d DCA 1981).

56. An association cannot establish its standing based on its corporate mission or solely on the substantial interests of its members. Fla. Home Builders, supra. A "riverkeeper" organization like WWALS cannot establish its standing in a case involving the very rivers it keeps without demonstrating that a substantial number of its members could be injured.

57. At hearing, a petitioner establishes its standing by offering evidence to prove its substantial interests could be affected by the agency's action. St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist., 54 So. 3d 1051, 1054 (Fla. 5th DCA 2011). However, the evidence offered must be "good" evidence; that is, competent and non-speculative.

58. The speculative concerns of WWALS members regarding the pipeline's impacts on their use and enjoyment of the Suwannee River, Santa Fe River, and surrounding areas, are not sufficient to confer standing. See Menorah Manor, Inc. v. Ag. for Health Care Admin., 908 So. 2d 1100, 1104 (Fla. 1st DCA 2005).

59. WWALS failed to establish its standing because it did not show that a substantial number of its members could be affected by the project.

60. In its amended petition, WWALS cites section 403.412(5), which allows a citizen of the state to intervene in an ongoing section 120.569 or section 120.57 proceeding by filing a verified pleading. However, section 403.412(5) does not authorize a citizen to initiate a proceeding under section 120.569 or 120.57. Furthermore, WWALS is not a "citizen of the state" because it is a Georgia corporation. Therefore, section 403.412(5) does not provide WWALS another basis for standing.

61. WWALS failed to demonstrate standing. However, because an evidentiary hearing was held and evidence on the merits was received, findings and fact and conclusions of law on the merits are presented in this Recommended Order.

Burden and Standard of Proof

62. A chapter 120 proceeding is a de novo proceeding intended to formulate final agency action, not to review action taken earlier and preliminarily. McDonald v. Dep't of Banking Fin., 346 So. 2d 569, 584 (Fla. 1st DCA 1977).

63. Because chapter 373, Florida Statutes, governs the issuance of the Environmental Resource Permit, subsection 120.569(2)(p) applies and it places the ultimate burden of persuasion upon WWALS to prove Sabal Trails is not entitled to the permit.

64. The authorization to use sovereign submerged lands was issued under chapter 253. Under that chapter, the applicant has

the burden of ultimate persuasion to demonstrate its entitlement to the authorization. See Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

65. An applicant must provide reasonable assurance that it will comply with all applicable regulatory criteria. Reasonable assurance means a "substantial likelihood that the project will be successfully implemented." See Metro. Dade Cnty. v. Coscan Fla., Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992). Reasonable assurance does not require absolute guarantees. See Save Anna Maria, Inc. v. Dep't of Transp., 700 So. 2d 113, 117 (Fla. 2d DCA 1997).

66. If an activity significantly degrades or is in an Outstanding Florida Water, the applicant must provide reasonable assurance that the activity will be clearly in the public interest. Fla. Admin. Code R. 62-4.242. To be clearly in the public interest does not require a demonstration of need or net public benefit. See 1800 Atlantic Developers v. Dep't of Env'tl. Reg., 552 So. 2d 946, 957 (Fla. 1st DCA 1989). It requires greater assurance that a project will comply with applicable criteria. See Angelo's Aggregate Materials, Ltd. v. Dep't of Env'tl. Prot., Case No. 09-1543 (Fla. DOAH June 28, 2013) (The quantum of assurance that is deemed reasonable by the Department should depend on the potential harm.).

67. The standard of proof is a preponderance of the evidence. See § 120.57(1)(j), Fla. Stat. (2015).

68. Chapter 373, Part IV, rule chapter 62-330, and the Environmental Resource Permit Applicant's Handbook establish the criteria for issuance or denial of a requested Environmental Resource Permit. Sabal Trail provided reasonable assurance that the pipeline project will comply with all applicable permitting criteria.

69. Because Sabal Trail clearly demonstrated compliance with all applicable regulatory criteria, the project is clearly in the public interest.

70. WWALS failed to prove that Sabal Trail is not entitled to the Environmental Resource Permit.

71. Pursuant to Florida Administrative Code Rule 18-21.004(1)(a)-(b), activities on sovereignty lands must not be contrary to the public interest, and all easements for sovereignty land activities must contain such terms, conditions, or restrictions as deemed necessary to protect and manage those sovereignty lands. Sabal Trail's proposed project meets these requirements.

72. Sabal Trail proved the pipeline project will comply with all applicable criteria and that it is entitled to the easement for use of sovereign submerged lands.

RECOMMENDATION

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

RECOMMENDED that the Department of Environmental Protection issue a final order that approves issuance of Environmental Resource Permit No. 0328333-001 and grants an easement to use sovereign submerged lands to Sabal Trail Transmission, LLC, for the Sabal Trail Natural Gas Pipeline.

DONE AND ENTERED this 11th day of December, 2015, in Tallahassee, Leon County, Florida.



BRAM D. E. CANTER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of December, 2015.

COPIES FURNISHED:

Richard S. Brightman, Esquire
Timothy M. Riley, Esquire
H. French Brown, IV, Esquire
Hopping, Green and Sams
Post Office Box 6526
Tallahassee, Florida 32314
(eServed)

Gus McLachlan
Sabal Trail Transmission, LLC
Suite 300
400 Colonial Center Parkway
Lake Mary, Florida 32746

John S. Quarterman, President
WWALS Watershed Coalition, Inc.
Post Office Box 88
Hahira, Georgia 31632
(eServed)

Jack Chisolm, Esquire
Sidney C. Bigham, III, Esquire
Department of Environmental Protection
Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399
(eServed)

William R. Wohlsifer, Esquire
Leighanne C. Boone, Esquire
William R. Wohlsifer, P.A.
1100 East Park Avenue, Suite B
Tallahassee, Florida 32301
(eServed)

Jonathan P. Steverson, Secretary
Department of Environmental Protection
Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399
(eServed)

Craig Varn, General Counsel
Department of Environmental Protection
Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399
(eServed)

Lea Crandall, Agency Clerk
Department of Environmental Protection
Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399
(eServed)

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.