STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

SUNCOAST WATERKEEPER, INC.; FLORIDA INSTITUTE FOR SALTWATER HERITAGE, INC.; AND JOSEPH MCCLASH,		
Petitioners,		
vs.	**OGC CASE Nos.**	**17-0002**
		17-0012
LONG BAR POINT, LLLP, and DEPARTMENT OF ENVIRONMENTAL PROTECTION,	**DOAH CASE Nos.**	**17-0795**
		17-0796
Respondents.		

FINAL ORDER

An Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH) on March 6, 2018, 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. DEP and the Petitioner Joseph McClash (McClash) timely filed Exceptions on March 12, 2018, and March 19, 2018, respectively.[1] Respondent Long Bar Pointe, LLLP filed responses to McClash's exceptions on March 29, 2018. DEP filed responses to McClash's exceptions on April 4, 2018. This matter is now before the Secretary of the Department for final agency action.

[1] On March 26 and 27, 2018, DEP timely filed a Motion for Extension of Time and an Amended Motion for Extension of Time, respectively, requesting a ten (10) day extension of time to file responses to the exceptions, and the agency's final order. The permit applicant Long Bar Point and petitioner McClash had no objection to either extension of time. Petitioners Suncoast Waterkeeper, Inc., and Florida Institute for Saltwater Heritage, Inc., advised DEP that they took no position on DEP's amended motion. DEP granted the motion on March 28, 2018.

BACKGROUND

By letter dated December 16, 2017, the Department of Environmental Protection (Department) issued its Notice of Intent to Issue Mitigation Bank Permit No. 0338349-002 (Notice) authorizing Long Bar to establish the Long Bar Pointe Mitigation Bank on a 260.80-acre site in Manatee County. The Notice indicates that a total of 18.01 potential mitigation bank credits will be awarded.

Petitioners, Suncoast Waterkeeper, Inc. (Suncoast), and Florida Institute for Saltwater Heritage, Inc. (FISH), timely filed a Verified Petition challenging the agency action. After the initial pleading was dismissed by the Department, an Amended Verified Petition was filed. The matter was referred to the Division of Administrative Hearings (DOAH) and assigned Case No. 17-0795. Petitioner, Joseph McClash (McClash), also timely filed a Verified Petition challenging the same action. After his initial pleading was dismissed by the Department, a First Amended Verified Petition for Formal Administrative Hearing was filed. This filing was referred to DOAH and assigned Case No. 17-0796. The two cases were then consolidated.

At the hearing, Petitioners jointly presented the testimony of seven witnesses, including Mr. McClash. Also, Petitioners' Exhibits 1 through 47, 55 (treated as hearsay only), 63, 67 (Land Use Map only), 78, and 81 (except the Key West photograph) were accepted in evidence. The remainder of Exhibit 67 and Exhibits 68, 69, and 75 were accepted on a proffer basis only. Long Bar presented the testimony of two witnesses. Long Bar Exhibits 1 through 12 were accepted in evidence. The Department presented no witnesses; however, Department Exhibit 1 was accepted in evidence. Finally, Joint Exhibit 1 was accepted in evidence.

A two-volume Transcript of the hearing was prepared. Proposed findings of fact and conclusions of law were filed by the parties on February 16 and 19, 2018, and they have been considered in the preparation of this Recommended Order.

SUMMARY OF THE RECOMMENDED ORDER

On December 16, 2017, the Department of Environmental Protection (Department) issued its Notice of Intent to Issue Mitigation Bank Permit No. 0338349-002 (Notice) authorizing Long Bar to establish the Long Bar Pointe Mitigation Bank on a 260.80-acre site in Manatee County. The Notice specifies that a total of 18.01 potential mitigation bank credits will be awarded. In the RO, the ALJ recommended that the Department enter a final order issuing the proposed Mitigation Bank Permit No. 0338349-002 (the Project) to Long Bar. (RO at page 26).

The Project Site

The location of the proposed mitigation bank is a 260.80-acre site in western Manatee County, west of El Conquistador Parkway and 75th Street West, and an adjacent unsurveyed portion of Sarasota Bay, an Outstanding Florida Water (OFW), Class II Waters. Around half of the site is adjacent to agricultural lands that may be developed with a mixed use residential/commercial project. The other half is contiguous with Sarasota Bay and/or existing conservation lands. The project site has more than two miles of shoreline making it the largest continuous mangrove shoreline along Sarasota Bay. The site is near other properties with high ecological value, such as Emerson Point, Robinson Preserve, Neal Preserve, Tidy Island, Sister Keys, and Legends Bay. All these properties are conservation lands. Long Bar has a sufficient real property interest to conduct the proposed activities. (RO ¶ 10).

Based on historic aerial photography, the area encompassing the Project site has remained essentially undeveloped since 1944, except for mosquito ditching conducted in the northwestern portion of the property from the 1940s to the 1970s, and agricultural ditching adjacent to and within some portions of the site. (RO ¶ 11).

The site is dissected by four, approximately 30-foot-wide strips of land owned by Manatee Fruit Company (MFC), which are excluded from the credit assessment. However, Long Bar has sufficient ownership interest in the MFC strips of land and will be required to maintain the area free of debris and nuisance and exotic vegetation. (RO ¶ 12).

The Town of Longboat Key also has a 30-foot-wide easement in the southeastern portion of the site, which will be preserved, enhanced, and maintained similar to the adjacent area of the project site, but is excluded from the credit assessment. (RO ¶ 13).

The project site consists of privately-owned submerged Sarasota Bay bottomlands that are dominated by seagrasses, mangrove swamps, mangrove hedges, areas of salt marsh/saltern, coastal freshwater herbaceous wetlands, and areas of coastal uplands. (RO ¶ 14).

The seagrass areas are dominated by shoal grass with patches of turtle grass in deeper pockets. The mangrove areas are predominately black mangroves, mixed with red mangroves closer to the shoreline and with white mangroves in the more landward mangrove areas. The salt marsh/saltern area is generally open and sandy, but supports some herbaceous vegetation, such as buttonwood, glasswort, and saltwort. The coastal freshwater herbaceous wetlands and much of the coastal uplands are currently dominated by a near monoculture of invasive exotic Brazilian Pepper, though areas of intact maritime hammock remain. Brazilian Pepper is present in the ecotone areas (the transition area between two communities) between the freshwater herbaceous

and mangrove swamp assessment areas. There are also spoil mounds within the mangrove swamp assessment areas. (RO ¶ 15).

Mitigation Bank Permits

Section 373.403(19), Florida Statutes, defines a mitigation bank as "a project permitted under Section 373.4136 undertaken to provide for the withdrawal of mitigation credits to offset adverse impacts authorized" by an environmental resource permit (ERP) issued under Part IV, chapter 373. A mitigation bank permit is a type of ERP. *See* Fla. Admin. Code R. 62-330.301(3). (RO ¶ 16).

Section 373.4136(1) authorizes the Department and water management districts to require an ERP to establish, implement, and operate a mitigation bank. A bank acts as a repository for wetland mitigation credits that can be used to offset adverse impacts to wetlands that occur as the result of future ERP projects. A bank is designed to "enhance the certainty of mitigation and provide ecological value due to the improved likelihood of environmental success associated with their proper construction, maintenance, and management," often within larger, contiguous, and intact ecosystems. (RO ¶ 17).

The Department and the water management districts are directed to participate in and encourage the establishment of mitigation banks. § 373.4135(1), Fla. Stat. (2017). Mitigation banks are intended to "emphasize the restoration and enhancement of degraded ecosystems and the preservation of uplands and wetlands as intact ecosystems." *Id.* [2] (RO ¶ 18).

A mitigation bank is to be awarded mitigation credits by the permitting agency. § 373.4136(4), Fla. Stat. (2017). A mitigation credit is a "standard unit of measure which

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[2] The ALJ inadvertently cited to subsection 373.4135(1), when it appears he intended to cite to subsection 373.4136(1), Florida Statutes. This final order is modified to reflect this corrected statutory citation.

represents the increase in ecological value resulting from restoration, enhancement, preservation, or creation activities." Fla. Admin. Code R. 62-345.200(8). The number of credits must be "based upon the degree of improvement in ecological value expected to result from the establishment and operation of the mitigation bank as determined using a functional assessment methodology." § 373.4136(4), Fla. Stat. (2017). In this case, the Department is proposing to issue 18.01 credits. (RO ¶ 19).

Mitigation Service Area (MSA)

Rule 62-342.600 requires the establishment of a MSA for a mitigation bank. An MSA is a geographical area within which adverse impacts may be offset by the bank credits. A single MSA is proposed for the Project, covering both freshwater and saltwater credits. The MSA includes portions of Charlotte, Manatee, and Sarasota Counties within the South Coastal Drainage Basin and portions of the Manatee River Basin west of Interstate 75 and the portion of the Tampa Bay Drainage Basin located west of Interstate 75 and south and west of Interstate 275. Credits are not allowed for use outside the MSA, except as authorized by section 373.4136(6)(d), Fla. Stat. (2017). (RO ¶ 20).

Criteria for a Mitigation Bank

Besides statutory criteria in section 373.4136(1), several Department rules applies to the creation of a mitigation bank. Rule 62-342.400 sets forth criteria specifically applicable to a mitigation bank. Rule 62-330.301 sets forth criteria for the issuance of an ERP, while rule 62-330.302 establishes additional ERP criteria that form the basis for the public interest test. In the Joint Pre-hearing Stipulation, Petitioners agree that only the criteria in rule 62-330.301(1)(d) and (f), rule 62-330.302(1)(a)2., 4., and 5., and rule 62-342.400(1)(a)-(f) are at issue. Petitioners also

agree that Long Bar has provided reasonable assurance regarding all requirements of financial responsibility. (RO ¶ 21).

The Project

Most of the proposed mitigation bank Project site is mangrove swamp and privately owned submerged seagrass bottomlands that are proposed for preservation only. The site also contains areas of coastal freshwater marsh and coastal uplands that are currently degraded by invasive exotic vegetation which will be enhanced through removal of invasive exotic vegetation, planting of desirable vegetation, and implementation of a perpetual management plan. No wetland creation or dredging or filling activities are proposed for the Project. (RO ¶ 23).

The Project has the potential to generate several credit types, including seagrass, mangrove swamp, mangrove hedge, salt marsh/saltern, and freshwater herbaceous credits. The credit release schedule provides for an initial credit release upon recordation of a conservation easement and establishment of financial assurance mechanisms, followed by a series of potential credit releases based on satisfactory completion of specified mitigation activities, and a final credit release once all success criteria are met. (RO ¶ 24).

Prior to the release of credits, the site will be preserved by a conservation easement in favor of both the Department and Southwest Florida Water Management District. Long Bar will establish financial assurance performance bonds for construction, implementation and perpetual management. Financial assurance is required to ensure the Project reaches success, it remains in compliance, and perpetual management activities have a dedicated funding source. (RO ¶ 25).

In addition to protection provided by the conservation easement, Long Bar proposes implementing a Seagrass Informational Buoy Placement Plan (Plan) to provide additional

protection to the submerged seagrass beds within and near the Project. The Plan contemplates installation of non-regulatory seagrass information buoys at approximately the three-foot bathymetric contour along the Project site, which follows the traditional unmarked navigational channel where they can be readily seen. The buoys will inform boaters of the presence of seagrasses surrounding the Project site, which support significant estuarine habitats and can be harmed or destroyed from vessel groundings or prop scarring. Installation of the buoys will provide a significant public benefit in that it should significantly reduce or eliminate prop scars within the seagrass beds along the Project site. The ALJ found no credible evidence that signage would attract inexperienced boaters who will damage the seagrasses in the area. (RO ¶ 26).

No mangrove trimming is authorized by the permit. Pursuant to a Conceptual Mangrove Trimming Plan, attached to the permit as Attachment A, Long Bar has reserved the right to trim approximately 30 percent of the onsite mangrove acreage to a minimum height of 12 feet, as measured from the substrate. No trimming will be allowed within the Project's mangrove swamps that are greater than 500 feet in width from the shoreline, and no trimming can result in fragmentation of the remaining intact mangrove forest into more than four individual fragments. Prior to the initial release of credits, Long Bar must develop and submit a Final Mangrove Trimming Plan and modify the permit to substitute the final plan for the conceptual plan, adjust the assessment area configuration and acreages, and recalculate the total potential mitigation credits. (RO ¶ 28). Any future mangrove trimming must be conducted by a licensed professional mangrove trimmer in accordance with a mangrove trimming permit issued under section 373.327, Fla. Stat. (2017). Long Bar's reserved right to conduct limited mangrove trimming was accounted for in the credit scores. (RO ¶ 29).

Many of the current communities on the site are similar to the types of communities that would have been present historically but have been adversely affected by invasion of nuisance and exotic vegetation, including Brazilian Pepper and Australian Pine. Accordingly, the Project involves a number of enhancement activities on the site. Approximately 17.35 acres of degraded coastal freshwater marsh will be enhanced by removing invasive exotic vegetation and replanting with appropriate native vegetation. Approximately 13.13 acres of degraded coastal uplands will be enhanced by removing invasive exotic vegetation and replanting with appropriate native vegetation. Approximately 6.44 acres of relatively intact coastal uplands will be enhanced by removing nuisance vines and exotic vegetation. All areas of preserved mangroves and salt marsh/saltern will be treated to remove existing low levels of nuisance and invasive exotic vegetation. (RO ¶ 30).

Although the proposed activities are expected to maintain and enhance site conditions in perpetuity, Long Bar will employ other strategies, based on continual evaluation of environmental data collected from the site, to ensure the goals of the Project continue to be met in perpetuity. (RO ¶ 31).

Long Bar will implement a Security Plan to take all measures necessary to ensure the integrity of the Project is upheld in perpetuity. Large hole 50-inch high hog fencing will be installed at the Project boundary where it interfaces with offsite areas to ensure separation and protection from any future development on adjacent lands. Fencing will act as a barrier to deter trespassing, but will still allow wildlife to move across and into the Project site. Conservation easement signage will also be installed at a minimum of every 300 feet, and at every bank boundary turn along the fence line. Long Bar will conduct quarterly inspections of the fencing and signage, as well as Project site lands, and repair or replace fencing as soon as the need is

discovered. Any trash and other debris will be removed during site inspections either by hand or by a method that minimizes disturbances to Project lands. If habitat impacts are discovered during an inspection, adaptive management actions will be implemented. (RO ¶ 32)

After the Project's final success criteria are met, the Perpetual Management Plan will ensure that the Project is managed by Long Bar in a manner that ensures all permit conditions are maintained. The Perpetual Management Plan includes quarterly inspections of the Project site, and security measures. (RO ¶ 33).

The Calculation of Credits

The Department's chapter 62-345, known as the Uniform Mitigation Assessment Method (UMAM) rule, provides a standardized procedure to assess the functions provided by wetlands and other surface waters, the amount those functions are decreased by a proposed project, and the amount of mitigation necessary to offset that loss. UMAM is the sole means to determine the amount of mitigation credits to be awarded to mitigation banks, such as Long Bar. (RO ¶ 34).

When applying UMAM, reasonable scientific judgment must be used. Even though UMAM is a standardized procedure, UMAM is not a precise assessment, and in the exercise of reasonable scientific judgment, two scientists can arrive at different results. (RO ¶ 35).

In general terms, the UMAM analysis consists of two parts. Part I is a qualitative characterization of the property, which divides the property into assessment areas. Part II assigns mitigation bank credits to those areas based on scoring criteria established in UMAM. (RO ¶ 36).

The mitigation proposal for the Long Bar Mitigation Bank was assessed by the Department using UMAM. The Department determined that the Project had the potential to generate a total of 18.01 credits. These credits are differentiated as 7.38 for seagrass-dominated

submerged bottomlands, 0.23 for salt marsh/saltern, 7.07 for mangrove swamps, 0.68 for trimmed mangrove hedge, and 2.65 for coastal freshwater marsh. (RO ¶ 37).

The environmental communities present at the site are subdivided into 47 different assessment areas. The assessment areas were established by Long Bar's expert, Mr. Hoffner, who has worked on the Project since 2014 and has spent hundreds of hours evaluating the site. The assessment areas were generally grouped into seagrass, mangrove, saltwater, salt marsh, freshwater marsh, and uplands, and then sub-assessed based on their proximity to different habitats and different activities within the bank. (RO ¶ 38).

Assessment area boundaries were based upon aerial photography interpretation, the Florida Land Use, Cover and Forms Classification System, habitat maps, Natural Resources Conservation Service soil maps, site inspections, a formal wetlands jurisdiction determination, surveys performed by professional land surveyors, field verification, and reasonable scientific judgment. The record shows that ecotone community boundaries in the environment do not often have distinct lines of demarcation. Two adjacent communities can be identified as unique assessment areas and yet have ecotone areas that share characteristics of both communities. (RO ¶ 39).

The Department's expert, Mr. Rach, verified the boundaries of the bank and assessment areas both in the field and through aerial photographs and descriptions provided by the applicant. Mr. Rach reiterated that the determination of assessment areas is not an exact science and requires the use of scientific judgment. He determined that Long Bar provided sufficient information for each assessment area to be evaluated under the second part of the UMAM analysis and they provided an appropriate frame of reference to use in the Part II evaluation. (RO ¶ 40).

While Petitioners' expert, Mr. Hull, disagreed with the assessment area boundaries, he agreed that UMAM is not an exact science. He conceded that he was not sure whether he visited every assessment area on the site, and he was unable to provide an explanation of where he believed each specific boundary should be located. (RO ¶ 41).

The ALJ found that the Petitioners did not establish by a preponderance of the evidence that the assessment areas are in contravention of Department rules. (RO ¶ 42).

The Department's scoring of the Project was determined by review of the UMAM scores provided by Long Bar, review of available information provided, numerous discussions with Long Bar, and field work. The Department's summary of the credit evaluation for each of the 47 assessment areas is contained in Condition 11 of the permit and was accepted by the ALJ as being the most persuasive on this issue. The actual scores for each assessment area are contained in Exhibit H of the draft permit. (RO ¶ 43).

While Mr. Hull disagreed with the scoring of the project, the ALJ found that the difference between Mr. Hull's and Long Bar's numbers are a reflection in the difference in the application of reasonable scientific judgment. (RO ¶ 44).

The ALJ found that the Petitioners failed to prove by a preponderance of the evidence that the Department's determination that the project could generate 18.01 credits was incorrect. (RO ¶ 45).

Petitioners' Objections

Petitioners raise three broad objections in their PROs. First, they contend no credits should be awarded to Long Bar for seagrasses, or that a much smaller number is appropriate. Second, they contend fewer credits should be awarded for areas where mature mangroves that are 40 to 50 feet in height could be trimmed to 12 feet simply to provide a view for future

residents of the adjacent upland residential development conceptually proposed by Long Bar. Finally, they contend the site is bisected by a 100-foot gap that is excluded from the bank because Long Bar intends to allow future access from the planned adjacent upland residential development to the shoreline. They argue that by creating this gap, Long Bar fails to maintain an intact ecosystem. Given these considerations, Suncoast and FISH contend that no more than 4.18 mitigation credits should be awarded, while Mr. McClash argues that the application should be denied. (RO ¶ 46).

As to the first issue, Petitioners generally contend that in the seagrass areas, the bank is focused on preservation only, and not restoration, and therefore no additional protection or functional lift will be provided for any seagrass assessment areas. To begin with, preservation is a goal expressly included in the UMAM rule, which emphasizes preservation of undegraded areas and restoration of degraded systems over alteration of existing landscapes to create artificial wetlands. The proposed conservation easement increases protection to the wetlands and other surface waters in the site by preventing structures (such as docks or piers) within the seagrass assessment areas. As previously found, there will also be enhancement activities in adjacent assessment areas. In short, the steps being proposed by Long Bar provide additional protection to the seagrasses. Consequently, the ALJ found that the proposed UMAM seagrass score is appropriate. (RO ¶ 47).

As to the second issue, no mangrove trimming is authorized by the permit. Long Bar has, however, reserved the right to modify the permit to trim approximately 30 percent of the onsite mangrove acreage to a minimum height of 12 feet, as measured from the substrate. The potential trimming was properly accounted for in the UMAM scores. If Long Bar chooses not to implement the proposed trimming, it would likely receive more credits. Notably, no trimming

can fragment the remaining intact mangrove forest into more than four individual fragments. Also, prior to the release of credits, Long Bar must develop and submit a final mangrove trimming plan, modify the permit, adjust the assessment area configuration and acreages, and recalculate the total potential mitigation credits. The ALJ found the Petitioners did not prove by a preponderance of the evidence that mangrove trimming affects the Department's assessment of the number of credits to be awarded. (RO ¶ 48).

Finally, the exclusion of a 100-foot gap from the conservation easement does not diminish the value of the bank as an intact system as a whole. While this area will not be included in the recorded plans, this will not fragment an intact ecosystem. No construction is proposed in the gap, and current Manatee County regulations do not allow for dredging in this area. Therefore, wildlife using the site will be able to continue to use the excluded area and traverse the gap, regardless of the lines drawn on a set of plans. The net effect of the Project is to preserve approximately two miles of intact shoreline. The ALJ found that the more persuasive evidence supports a finding that the 100-foot wide strip does not affect the overall suitability of the site as a mitigation bank. The ALJ also found the Petitioners did not prove by a preponderance of the evidence that the so-called "gap" impacts the number of credits to be awarded. (RO ¶ 49).

Compliance with Applicable Criteria

The ALJ found that the preponderance of the evidence supports a finding that Long Bar has satisfied all criteria in rule 62-330.301 for the issuance of an ERP. (RO ¶ 50).

The ALJ also found that the preponderance of the evidence supports a finding that Long Bar has established that the Project is clearly in the public interest, as required by rule 62-330.302(1), Florida Statutes. (RO ¶ 51).

The ALJ furthermore found that the preponderance of the evidence supports a finding that Long Bar has satisfied all criteria for establishing a mitigation bank, as required by rule 62-342.400, Florida Statutes. (RO ¶ 52).

STANDARDS OF REVIEW OF DOAH RECOMMENDED ORDERS

Section 120.57(1)(l), Florida Statutes, prescribes that an agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2017); *Charlotte County 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). The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value or weight of the evidence. Rather, "competent substantial evidence" refers to the existence of some evidence as to each essential element and as to its admissibility under legal rules of evidence. *See e.g., Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm'n*, 671 So. 2d 287, 289 n.3 (Fla. 5th DCA 1996); *Nunez v. Nunez*, 29 So. 3d 1191, 1192 (Fla. 5th DCA 2010).

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

The ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. *See, e.g., Peace River/Manasota Reg'l Water Supply 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); *Fla. Power & Light Co. v. Fla. Siting Bd.*, 693 So. 2d 1025, 1026-1027 (Fla. 1st DCA 1997).

Section 120.57(1)(l), Florida Statutes, authorizes an agency to reject or modify an ALJ's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." *See Barfield v. Dep't of Health*, 805 So. 2d 1008 (Fla. 1st DCA 2001); *L.B. Bryan & Co. v. Sch. Bd. of Broward County*, 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 Envtl. Reg. 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 Envtl. Prot.*, 668 So. 2d 209, 212 (Fla. 1st DCA 1996).

If an ALJ improperly labels a conclusion of law as a finding of fact, the label should be disregarded, and the item treated as though it were actually a conclusion of law. *See, e.g., Battaglia Properties v. Fla. Land and Water Adjudicatory Comm'n*, 629 So. 2d 161, 168 (Fla. 5th DCA 1994). However, neither should the agency label what is essentially an ultimate factual determination as a "conclusion of law" in order to modify or overturn what it may view as an unfavorable finding of fact. *See, e.g., Stokes v. State, Bd. of Prof'l Eng'rs*, 952 So. 2d 1224 (Fla. 1st DCA 2007).

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 Reg.*, 622 So. 2d 607, 609 (Fla. 1st DCA 1993); *Heifetz v. Dep't of Bus. Reg.*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). Evidentiary rulings are matters within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. *See Martuccio*, 622 So. 2d at 609.

RULINGS ON EXCEPTIONS

In reviewing a recommended order and any written exceptions, the agency's final order "shall include an explicit ruling on each exception." *See* 120.57(1)(k), Fla. Stat. (2017). However, the agency need not rule on an exception that "does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." *Id.*

A party that files no exceptions to certain findings of fact "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Envtl. Coal. of Fla., Inc. v. Broward County*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Med. Ctr., Inc. v. State of Fla., Agency for Health Care Admin.*, 847 So. 2d 540, 542 (Fla. 4th DCA 2003). However, an agency head reviewing a recommended order is free to modify or reject any erroneous conclusions of law over which the agency has substantive jurisdiction, even when exceptions are not filed. *See* § 120.57(1)(l), Fla. Stat. (2017); *Barfield v. Dep't of Health*, 805 So. 2d 1008 (Fla. 1st DCA 2001); *Fla. Public Employee Council, v. Daniels,* 646 So. 2d 813, 816 (Fla. 1st DCA 1994).

RULINGS ON MCCLASH'S EXCEPTIONS

The ALJ concluded that McClash's objections to the mitigation bank permit are "too speculative to give rise to standing under chapter 120." (RO ¶ 55). However, the Department is ruling on McClash's exceptions in accordance with the requirements of Section 120.57(1)(k), Florida Statutes. *See* the Department's ruling on McClash's Exception No. 7 below.

MCCLASH's Exception No. 1 regarding Paragraph 21

McClash takes exception to the findings of fact in paragraph 21, which states in pertinent part, that "[i]n the Joint Pre-hearing Stipulation, Petitioners agree that only the criteria in rule 62-330.301(1)(d) and (f), rule 62-330.302(1)(a)2., 4., and 5., and rule 62-342.400(1)(a) – (f) are at issue." McClash contends that rule Chapter 62-345, known as the Uniform Mitigation Assessment Method (UMAM) should have been included in the list of rules listed in RO paragraph 21. However, paragraph 21 of the RO is titled "Criteria for a Mitigation Bank." Upon reviewing the RO in its entirety, paragraph 21 appears intended to identify the rule criteria the Department applies to review a mitigation bank permit application, but it is not intended as an

exhaustive list of rules in dispute in the case. Contrary to McClash's assertions, the ALJ does address application of the UMAM rule in the RO under a subheading titled "Calculation of Credits" on pages 16-20.

An agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2017); *Charlotte County 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). Contrary to McClash's arguments, the ALJ's findings of fact in paragraph 21 are supported by competent substantial record evidence. Joint Pre-Hearing Stipulation, ¶¶ 35-49, 54-55, 57, 60-96).

Based on the foregoing reasons, including the ALJ's findings of fact, McClash's Exception No. 1 is denied.

MCCLASH's Exception Nos. 2, 2a, 2b, 2c, and 2d regarding Paragraphs 43, 44, and 45

McClash takes exception to findings of fact in paragraphs 43, 44, and 45, in what he has identified as Exception Nos. 2, 2a, 2b, 2c, and 2d.

Paragraphs 43, 44, and 45 read as follows:

> 43. The Department's scoring of the Project was determined by review of the UMAM scores provided by Long Bar, review of available information provided, numerous discussions with Long Bar, and field work. The Department's summary of the credit evaluation for each of the 47 assessment areas is contained in Condition 11 of the permit and is accepted as being the most persuasive on this issue. The actual scores for each assessment area are contained in Exhibit H of the draft permit.
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> 44. While Mr. Hull disagreed with the scoring of the project, the difference between his and Long Bar's numbers are a reflection in the difference in the application of reasonable scientific judgment.

45. Petitioners failed to prove by a preponderance of the evidence that the Department's determination that the project could generate 18.01 credits was incorrect.

RO ¶¶ 43-45. Exception No. 2 appears to be a heading summarizing McClash's arguments for Exception Nos. 2a through 2d. Consequently, the Department incorporates its responses to Exception Nos. 2a through 2e herein. Moreover, McClash fails to identify the legal basis for Exception No. 2 and fails to include any citations to the record in accordance with Section 120.57(1)(k), F.S. and Rule 28-106.217, F.A.C.

Based on the foregoing reasons, including the ALJ's findings of fact, McClash's Exception No. 2 is denied.

MCCLASH's Exception No. 2a. regarding Paragraphs 43, 44, and 45

McClash's exception No. 2a takes exception to the ALJ's findings of fact in paragraph 43. McClash takes exception with the ALJ's finding that "The Department's summary of the credit evaluation for each of the 47 assessment areas is contained in Condition 11 of the permit and is accepted as being the most persuasive on this issue. The actual scores for each assessment area are contained in Exhibit H of the draft permit." (RO ¶ 43). Specifically, McClash takes exception that the permit applicant did not submit any Part II UMAM forms as part of the application. However, Part II UMAM forms are not required to be submitted as part of a mitigation bank permit application, either by the UMAM rules, or other applicable mitigation bank rules. *See* Chapter 242, Fla. Admin. Code and Chapter 245, Fla. Admin. Code.

An agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial

evidence." § 120.57(1)(l), Fla. Stat. (2017); *Charlotte County 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).

Contrary to McClash's arguments, the ALJ's findings in paragraph 43 are supported by competent substantial evidence. The UMAM scores were provided by Long Bar as part of its application (Joint Exhibit 1J, p. 2). The Department reviewed these scores and additional available information, had numerous discussions with Long Bar, and conducted field inspections. (Rach, T. Vol. I, pp. 158-238). The summary of the Department's credit evaluation is contained in Condition 11 of the Permit (Joint Exhibit 1N, pp. 23-27), which the ALJ stated in paragraph 43 "is accepted as being the most persuasive on this issue." The actual UMAM scores are contained in Exhibit H of the draft permit. (Hoffner, T. Vol. I, pp. 81-106; Rach, T. Vol. I, pp. 166-67, Joint Exhibit 1N, pp. 80-81).

McClash seeks to have the Department reweigh the evidence. However, 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*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307; *Dunham*, 652 So. 2d at 896. If there is competent substantial evidence to support an ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g.*, *Arand Constr Co.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623. Since the findings of fact disputed by McClash in Exception 2a are based on competent substantial evidence, the Department may not reject the ALJ's findings of fact.

Based on the foregoing reasons, including the ALJ's findings of fact, McClash's Exception No. 2a. is denied.

MCCLASH's Exception No. 2b. regarding Paragraphs 43, 44, and 45

McClash's exception No. 2b takes exception to the ALJ's findings of fact in paragraphs 44 and 45, which provide:

> 44. While Mr. Hull disagreed with the scoring of the project, the difference between his and Long Bar's numbers are a reflection in the difference in the application of reasonable scientific judgment."
>
> 45. Petitioners failed to provide by a preponderance of the evidence that the Department's determination that the project could generate 18.01 credits was incorrect.

RO ¶¶ 44, 45.

McClash disagrees with the ALJ's findings of fact regarding the UMAM scoring of the project for the mitigation bank, and with the ALJ's finding that the petitioner failed to prove that the Department's determination that the project could generate 18.01 credits was incorrect.

An agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2017); *Charlotte County 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).

The ALJ's findings of fact in paragraph 44 are supported by competent substantial evidence. While the Petitioners' own expert, Clark Hull, disagreed with the scoring of the project, he acknowledged that determining UMAM scores is not a precise assessment and requires reasonable scientific judgment. (Pre-Hearing Stipulation ¶ 57; Joint Exhibit 1N, pp 80-81; Hoffner, T. Vol. I, pp. 76-77; Rach, T. Vol. I, pp. 165-166, 237-238; Hull, T. Vol. II, pp. 436-437).

Moreover, McClash mischaracterizes Alec Hoffner's testimony regarding how he scored the P-factor. Mr. Hoffner did not testify that he only considered one of the five preservation adjustment factor considerations when determining the P-factor. Instead, competent substantial evidence was provided at the hearing regarding how the Petitioner applied and the Department reviewed all five preservation adjustment factors. (Hoffner, T. Vol. I, pp. 62-65, 73-74, 77-78, 94; Joint Exhibit 1A, p. 1-292; Joint Exhibit 1N, p. 502).

The record also contains competent substantial evidence to support the ALJ's findings of fact in paragraph 45 regarding how many credits the project would generate. (Hoffner, T. Vol. I, pp. 81-106; Rach, T. Vol. I, pp. 166-167; Joint Exhibit 1J, p. 2; Joint Exhibit 1N, pp. 80-81).

McClash seeks to have the Department reweigh the evidence. However, 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*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307; *Dunham*, 652 So. 2d at 896. The ALJ is entitled to rely on the testimony of a single witness even if that testimony contradicts the testimony of a number of other witnesses. *Lantz v. Smith*, 106 So. 3d 518, 521 (Fla. 1st DCA 2013). If there is competent substantial evidence to support an ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g.*, *Arand Constr Co.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623. Since the findings of fact disputed by McClash in Exception 2b are based on competent substantial evidence, the Department may not reject the ALJ's findings of fact.

Based on the foregoing reasons, including the ALJ's findings of fact, McClash's Exception No. 2b. is denied.

MCCLASH's Exception No. 2c. regarding Paragraphs 43, 44, and 45

McClash takes exception to the ALJ's findings of fact in paragraphs 43, 44, and 45 regarding assessment of the project to determine the project's UMAM score, and the lift generated for the water environment score.

An agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2017); *Charlotte County 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).

Contrary to McClash's arguments, the ALJ's findings in paragraph 43 are supported by competent substantial evidence. The UMAM scores were provided by Long Bar as part of its application. (Joint Exhibit 1N, pp. 80-81; Joint Exhibit 1J, p. 2). The Department reviewed these scores and additional available information, had numerous discussions with Long Bar, and conducted field inspections. (Rach, T. Vol. I, pp. 166). The summary of the Department's credit evaluation is contained in Condition 11 of the Permit (Joint Exhibit 1N, pp. 23-27), which the ALJ stated in paragraph 43 "is accepted as being the most persuasive on this issue." The actual UMAM scores are contained in Exhibit H of the draft permit. (Hoffner, T. Vol. I, pp. 81-106; Rach, T. Vol. I, pp. 166-167; Joint Exhibit 1N, pp. 80-81).

The ALJ's findings of fact in paragraph 44 are supported by competent substantial evidence in the form of testimony from all three experts: Alec Hoffner, Tim Rach, and Clark Hull. While the Petitioners' own expert, Clark Hull, disagreed with the scoring of the project, he acknowledged that determining UMAM scores is not a precise assessment and requires reasonable scientific judgment. (Hoffner, T. Vol. I, pp. 76-77; Rach, T. Vol. I, pp. 165-166,

237-238; Hull, T. Vol. II, pp. 436-437; Pre-Hearing Stipulation ¶ 57).

The record also contains competent substantial evidence to support the ALJ's findings of fact in paragraph 45 regarding how many credits the project could generate. (Hoffner, T. Vol. I, pp. 81-106; Rach, T. Vol. I, pp. 166-167; Joint Exhibit 1J, p. 2; Joint Exhibit 1N, pp. 80-81).

McClash seeks to have the Department reweigh the evidence. However, 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*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307; *Dunham*, 652 So. 2d at 896. If there is competent substantial evidence to support an ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g.*, *Arand Constr Co.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623. Since the findings of fact disputed by McClash in Exception 2a are based on competent substantial evidence, the Department may not reject the ALJ's findings of fact.

The ALJ's findings of fact in paragraphs 43, 44, and 45 are supported by competent substantial evidence.

Based on the foregoing reasons, including the ALJ's findings of fact, McClash's Exception No. 2c. is denied.

MCCLASH's Exception No. 2d. regarding Paragraphs 43, 44, and 45

McClash's exception No. 2d again takes exception to the ALJ's findings of fact in paragraphs 44 and 45, which provide:

> 44. While Mr. Hull disagreed with the scoring of the project, the difference between his and Long Bar's numbers are a reflection in the difference in the application of reasonable scientific judgment."

45. Petitioners failed to provide by a preponderance of the evidence that the Department's determination that the project could generate 18.01 credits was incorrect.

RO ¶¶ 44, 45.

McClash disagrees with the ALJ's findings of fact regarding the UMAM scoring of the project for the mitigation bank, and with the ALJ's finding that the petitioner failed to prove that the Department's determination that the project could generate 18.01 credits was incorrect.

An agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2017); *Charlotte County 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).

The ALJ's findings of fact in paragraph 44 are supported by competent substantial evidence. While the Petitioners' own expert, Clark Hull, disagreed with the scoring of the project, he acknowledged that determining UMAM scores is not a precise assessment and requires reasonable scientific judgment. (Hoffner, T. Vol. I, pp. 76-77; Rach, T. Vol. I, pp. 165-166, 237-238; Hull, T. Vol. II, pp. 436-437; Pre-Hearing Stipulation ¶ 57; Joint Exhibit 1N, pp 80-81).

The record also contains competent substantial evidence to support the ALJ's findings of fact in paragraph 45 regarding how many credits the project would generate. (Hoffner, T. Vol. I, pp. 81-106; Rach, T. Vol. I, pp. 166-167; Joint Exhibit 1J, p. 2; Joint Exhibit 1N, pp. 80-81).

McClash seeks to have the Department reweigh the evidence. However, 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*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307; *Dunham*, 652 So. 2d at 896. Th ALJ is entitled to rely on the testimony of a single witness even if that testimony contradicts the testimony of a number of other witnesses. *Lantz v. Smith*, 106 So. 3d 518, 521 (Fla. 1st DCA 2013). If there is competent substantial evidence to support an ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g.*, *Arand Constr Co.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623. Since the findings of fact disputed by McClash in Exception 2b are based on competent substantial evidence, the Department may not reject the ALJ's findings of fact.

Based on the foregoing reasons, including the ALJ's findings of fact, McClash's Exception No. 2d. is denied.

MCCLASH's Exception Nos. 3, 3a, 3b, 3c, 3d, and 3e regarding Paragraph 47

McClash takes exception to paragraph 47, in what he has identified as Exception Nos. 3, 3a, 3b, 3c, 3d, and 3e.

Paragraph 47 reads as follows:

> 47. As to the first issue, Petitioners generally contend that in the seagrass areas, the bank is focused on preservation only, and not restoration, and therefore no additional protection or functional lift will be provided for any seagrass assessment areas. To begin with, preservation is a goal expressly included in the UMAM rule, which emphasizes preservation of undegraded areas and restoration of degraded systems over alteration of existing landscapes to create artificial wetlands. The proposed conservation easement increases protection to the wetlands and other surface waters in the site by preventing structures (such as docks or piers) within the seagrass assessment areas. If the site is not preserved, it is likely to be used to access Sarasota Bay from the uplands. As previously found, there will also be enhancement activities in adjacent assessment areas. In short, the steps being proposed by Long Bar provide additional protection to the seagrasses. The UMAM seagrass score is appropriate.

RO ¶ 47. Exception No. 3 appears to be a heading summarizing McClash's arguments for Exception Nos. 3a through 3e. Consequently, the Department incorporates its responses to Exception Nos. 3a through 3e herein.

Based on the foregoing reasons, including the ALJ's findings of fact, McClash's Exception No. 3 is denied.

MCCLASH's Exception No. 3a. regarding Paragraph 47

McClash takes exception to the ALJ's findings in paragraph 47 that the "proposed conservation easement increases protection to the wetlands and other surface waters in the site by preventing structures (such as docks or piers) within the seagrass assessment areas" and that the "UMAM seagrass score is appropriate." (RO ¶ 47). In particular, McClash contends that the existing bottomlands are not all seagrasses and vary from sparse to dense seagrass beds, oyster reefs, and sand/silt bottom areas.

An agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2017); *Charlotte County 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).

Contrary to McClash's arguments, the ALJ's findings in paragraph 47 are supported by competent substantial evidence. Specifically, the ALJ's finding that the proposed conservation easement will increase protection to the wetlands and other surface waters in the site by preventing structures within the seagrass assessment areas is supported by competent substantial evidence. (Hoffner, T. Vol. I, pp. 62-65, 90-91; Rach, T. Vol. I, pp. 161-162). There is also competent substantial evidence and testimony that enhancement activities in adjacent assessment

areas will provide additional protection to seagrasses. (Hoffner, T. Vol. I, pp 90-106; Joint Exhibit 1A, pp. 125-128, 146-150; Joint Exhibit 1F, pp. 6-13, 22-26; Joint Exhibit 1N, pp. 23-28, 74-75, 80-81).

McClash seeks to have the Department reweigh the evidence. However, 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*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307; *Dunham*, 652 So. 2d at 896. If there is competent substantial evidence to support an ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Constr Co.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623. Since the findings of fact disputed by McClash in Exception 3a are based on competent substantial evidence, the Department may not reject the ALJ's findings of fact.

Based on the foregoing reasons, including the ALJ's findings of fact, McClash's Exception No. 3a. is denied.

MCCLASH's Exception No. 3b. regarding Paragraph 47

McClash takes exception to the ALJ's finding in paragraph 47 that "[t]o begin with, preservation is a goal expressly included in the UMAM rule, which emphasizes preservation of undegraded areas and restoration of degraded systems over alteration of existing landscapes to create artificial wetlands." (RO ¶ 47).[3]

[3] After reviewing the RO, exceptions, and responses to exceptions, the Department concludes that the ALJ intended to cite to the Mitigation Banking rule in the second sentence of paragraph 47 and not to the UMAM rule, and that changing the reference from the UMAM rule to the Mitigation Banking rule in the Department's final order is merely a correction of a typographical error in the RO.

An agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2017); *Charlotte County 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).

McClash cites to subsection 62-342.100(3), Florida Administrative Code, which states that "Mitigation Banks shall be consistent with Agency endorsed watershed management objectives and emphasize restoration and enhancement of degraded ecosystems and the preservation of uplands and wetlands as intact ecosystems rather than alteration of landscapes to create wetlands." § 62-342.100(3), Fla. Admin. Code. Furthermore, McClash states that the RO's statement in paragraph 47 that the "UMAM seagrass score is appropriate" is not supported by evidence.

However, the ALJ's findings are a reasonable inference from rule language cited above from subsection 62-342.100(3) and the hearing testimony. The ALJ can "draw permissible inferences from the evidence." *Heifetz v. Dep't of Bus. Regulation*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). *See also Walker v. Bd. of Prof'l Eng'rs*, 946 So. 2d 604, 605 (Fla. 1st DCA 2006) ("It is the hearing officer's function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence.").

Specifically, the ALJ's finding that the seagrass score is appropriate is supported by competent substantial evidence. (Hoffner, T. Vol. I, pp. 62-65; Rach, T. Vol. I, pp. 161-162).

Based on the foregoing reasons, including the ALJ's findings of fact, McClash's Exception No. 3b. is denied.

MCCLASH's Exception No. 3c. regarding Paragraph 47

McClash takes exception to the ALJ's finding in paragraph 47 that "[t]he proposed conservation easement increases protection to the wetlands and other surface waters in the site by preventing structures (such as docks or piers) within the seagrass assessment areas." (RO ¶ 47).

An agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2017); *Charlotte County 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).

Contrary to McClash's arguments, the ALJ's findings in paragraph 47 are supported by competent substantial evidence. Specifically, the ALJ's finding that the proposed conservation easement will increase protection to the wetlands and other surface waters in the site by preventing structures within the seagrass assessment areas is supported by competent substantial evidence. (Hoffner, T. Vol. I, pp. 62-65, 90-91; Rach, T. Vol. I, pp. 161-162).

McClash seeks to have the Department reweigh the evidence. However, 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*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307; *Dunham*, 652 So. 2d at 896. If there is competent substantial evidence to support an ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g.*, *Arand Constr Co.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623. Since the findings of fact disputed by McClash in Exception 3c are based on competent substantial evidence, the Department may not reject the ALJ's findings of fact.

Based on the foregoing reasons, including the ALJ's findings of fact, McClash's Exception No. 3c. is denied.

MCCLASH's Exception No. 3d. regarding Paragraph 47

McClash takes exception to the ALJ's finding in paragraph 47 that the UMAM seagrasss score is appropriate. (RO ¶ 47).

An agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2017); *Charlotte County 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).

Contrary to McClash's arguments, the ALJ's findings in paragraph 47 are supported by competent substantial evidence. Specifically, the ALJ's finding that the UMAM seagrass score is appropriate is supported by competent substantial evidence. (Hoffner, T. Vol. I, pp. 62-65; Rach, T. Vol. I, pp 161-162).

McClash seeks to have the Department reweigh the evidence. However, 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*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307; *Dunham*, 652 So. 2d at 896. If there is competent substantial evidence to support an ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g.*, *Arand Constr Co.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623. Since the findings of fact disputed by McClash in Exception 3a are based on competent substantial evidence, the Department may not reject the ALJ's findings of fact.

Based on the foregoing reasons, including the ALJ's findings of fact, McClash's Exception No. 3d. is denied.

MCCLASH's Exception No. 3e. regarding Paragraph 47

McClash takes exception to the ALJ's finding in paragraph 47 that the proposed conservation easement increases protection to the wetlands and other surface waters in the site. (RO ¶ 47).

An agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2017); *Charlotte County 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).

Contrary to McClash's arguments, the ALJ's findings in paragraph 47 are supported by competent substantial evidence. Specifically, the ALJ's finding that the proposed conservation easement will increase protection to the wetlands and other surface waters in the site by preventing structures within the seagrass assessment areas is supported by competent substantial evidence. (Hoffner, T. Vol. I, pp. 62-65, 90-91; Rach, T. Vol. I, pp. 161-162).

McClash seeks to have the Department reweigh the evidence. However, 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*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307; *Dunham*, 652 So. 2d at 896. If there is competent substantial evidence to support an ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g.*, *Arand Constr Co.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623. Since the findings of fact disputed by McClash in

Exception 3c are based on competent substantial evidence, the Department may not reject the ALJ's findings of fact.

Based on the foregoing reasons, including the ALJ's findings of fact, McClash's Exception No. 3e. is denied.

MCCLASH's Exception No. 4 regarding Paragraph 26

McClash takes exception to the last three sentences in paragraph 26. Paragraph 26 reads, in pertinent part, as follows:

> Installation of the [seagrass informational] buoys will provide a significant public benefit in that it should significantly reduce or eliminate prop scars within the seagrass beds along the project site. Good channel marking is one of the best ways to protect seagrasses from prop scarring. There is no credible evidence that signage will attract inexperienced boaters who will damage the seagrasses in the area.

RO ¶ 26.

Specifically, McClash takes exception to the ALJ's finding that installation of seagrass informational buoys will "significantly reduce or eliminate prop scars within the seagrass beds along the project site," and will provide a public benefit. (RO ¶ 26). Competent substantial evidence exists in the record that installation of seagrass informational buoys will protect seagrasses and reduce prop scars within the seagrass beds in the area. (Hoffner, T. Vol. I, pp. 85-87, 171; Joint Exhibit 1N, pp. 62-63; Long Bar Exhibits 5, 6, 7, 8, 9, 10, and 11).

McClash takes exception with the finding that "[g]ood channel marking is one of the best ways to protect seagrasses from prop scarring." (RO ¶ 26). However, competent substantial evidence and testimony in the record supports this finding, including testimony from Petitioners' own witness John Stevely. (Hoffner, T. Vol. I, p. 85-87; Stevely, T. Vol. I, p. 290; Long Bar Exhibit 5, pp. 25-26; Long Bar Exhibit 7, p. 203; and Long Bar Exhibit 8, pp. 1-4).

McClash also takes exception to the finding that "[t]here is no credible evidence that signage will attract inexperienced boaters who will damage the seagrasses in the area." McClash's Exceptions, p. 13. The ALJ explicitly determined that the testimony by Petitioner's witness John Stevely on this topic was not credible. Only the ALJ is in a position to weigh the credibility of witnesses; and thus, the Department may not reject the ALJ's finding on this topic. *See, e.g., Rogers*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307.

McClash repeatedly seeks to have DEP reweigh the evidence associated with the findings of fact in paragraph 26. However, DEP is not authorized to reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See, e.g., Rogers*, 920 So. 2d at 30, *Belleau*, 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623.

Based on the foregoing reasons, including the ALJ's findings of fact, McClash's Exception No. 4 is denied.

MCCLASH's Exception No. 5 regarding Paragraph 26

McClash takes exception to the second sentence of the finding of fact in paragraph 26. The first two sentences in paragraph 26 read as follows:

> In addition to protection provided by the conservation easement, Long Bar proposes implementation of a Seagrass Information Buoy Placement Plan (Plan) in an effort to provide additional protection to the submerged seagrass beds within and in the vicinity of the Project. *The Plan contemplates the installation of non-regulatory seagrass information buoys at approximately the three-foot bathymetric contour along the Project site, and which follows the path of the traditional unmarked navigational channel where they can be readily seen.*

RO ¶ 26 (emphasis added).

McClash contends that the finding that the proposed location of the seagrass information buoys will be along the Project site and will "be readily seen" is not supported by competent substantial evidence. However, the ALJ's findings in the second sentence of paragraph 26 are supported by competent substantial evidence. (Hoffner, T. Vol. I, pp. 85-87; Joint Exhibit 1N, pp. 62-63; Long Bar Exhibit 11). Since the findings of fact disputed by McClash in Exception 5 are based on competent substantial evidence, the Department may not reject the ALJ's findings of fact.

Based on the foregoing reasons, including the ALJ's findings of fact, McClash's Exception No. 5 is denied.

MCCLASH's Exception No. 6 regarding Paragraphs 50, 51, and 52

McClash takes exception to the findings of fact in paragraphs 50, 51, and 52 which read as follows:

> 50. The preponderance of the evidence supports a finding that Long Bar has satisfied all criteria in rule 62-330.301 for the issuance of an ERP.
>
> 51. The preponderance of the evidence supports a finding that Long Bar has established that the Project is clearly in the public interest, as required by rule 62-330.302(1).
>
> 52. The preponderance of the evidence supports a finding that Long Bar has satisfied all criteria for establishing a mitigation bank, as required by rule 62-342.400.

RO ¶¶ 50-52.

McClash contends that the findings above are not supported by the evidence, culminating in his conclusion that "[t]here is not a preponderance of evidence to support the UMAM scores totaling 18.01 credits" for the mitigation bank. McClash's Exceptions, p. 32.

An agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with

particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2017); *Charlotte County 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).

Contrary to McClash's arguments, the ALJ's findings in paragraphs 50, 51, and 52 are supported by competent substantial evidence. (Hoffner, T. Vol. I, pp. 66-75; Rach, T. Vol. I, pp. 163-165; Pre-Hearing Stipulation ¶¶ 26, 29, 35-49, pp. 16-19; Joint Exhibit 1N, pp. 7-8). Since the findings of fact disputed by McClash in Exception 6 are based on competent substantial evidence, the Department may not reject the ALJ's findings of fact.

Based on the foregoing reasons, including the ALJ's findings of fact, McClash's Exception No. 6 is denied.

MCCLASH's Exception No. 7 regarding Paragraph 55

McClash takes exception to the conclusion of law in paragraph 55, in which the ALJ concluded that McClash's alleged injury is too speculative and remote, and thus does not give rise to standing under Chapter 120, Florida Statutes. Since McClash failed to demonstrate at the DOAH hearing that it will suffer injury to his substantial environmental interests as the result of the proposed permit, his standing to participate in this case should technically be denied at this stage of these proceedings under the *Agrico* rationale.[4] *See Agrico Chem. Co. v. Dep't of Envtl. Reg.*, 406 So. 2d 478, 481-82 (Fla. 2d DCA 1981).

Nevertheless, the DOAH record reflects that the ALJ afforded McClash all the rights provided by the Administrative Procedures Act (APA) to a party claiming his substantial

[4] The issue of whether a party's "substantial environmental interests" have been affected or determined by a proposed DEP permitting action so as to confer standing to participate as a party in an administrative proceeding challenging such action is a matter within DEP's "substantive jurisdiction" under section 120.57(1)(l), Florida Statutes. *See Parkinson v. Dep't of Envtl. Protection*, DOAH Case No. 06-2842 (Dep't of Envtl. Protection Final Order 2017), *affirmed by*, *Reily Enterprises, LLC v. Dep't of Envtl. Protection*, 990 So. 2d 1248 (Fla. 4th DCA 2008).

interests would be affected by the DEP action being challenged in this case. During the DOAH hearing, McClash presented arguments, testimony, and documentary evidence in support of the merits of his claims. Some of the same issues raised by McClash were also raised by the other petitioners Suncoast or FISH, which were considered by the ALJ. McClash filed a Proposed Recommended Order and Exceptions to the RO; and, these Exceptions have been addressed on their merits in this Final Order.

Consequently, since McClash's claims were litigated on their merits in the DOAH hearing and are addressed in this Final Order, the issue of his standing is essentially moot at this administrative stage of these proceedings. *See Hamilton Cty. Bd. Of Cty. Commissioners v. Dep't of Envtl. Reg.*, 587 So. 2d 1378, 1383 (Fla. 1st DCA 1991) (concluding that the issue of Hamilton County's standing to challenging a DER permitting action was moot on appellate review because the "issues were fully litigated in the proceedings below"); *Okaloosa Cty. v. Dep't of Envtl. Reg.*, ER F.A.L.R. 1992: 032, p. 6 (Fla. DER 1992) (concluding that, from a practical standpoint, the issue of Okaloosa County's standing was moot, because the County's substantive claims had been litigated on their merits at the DOAH final hearing).

Based on the foregoing reasons, including the ALJ's conclusions of law, McClash's Exception No. 7 is denied.

MCCLASH's Exception No. 8 regarding Paragraphs 59 and 60

McClash takes exception to the conclusions of law in paragraphs 59 and 60. In paragraph 59, the ALJ concluded that the "burden of ultimate persuasion is on Petitioners to prove their case in opposition to the permit by a preponderance of the competent and substantial evidence," and the Petitioners have failed to meet their burden. In paragraph 60, the ALJ concluded that the

permit applicant Long Bar had provided reasonable assurance that all relevant criteria for issuance of an ERP mitigation bank permit had been satisfied.

McClash summarily rejected the ALJ's conclusions of law in paragraphs 59 and 60 without any legal analysis or citation to the record. Specifically, he fails to identify the legal basis for Exception No. 8 and fails to include any citations to the record in accordance with Section 120.57(1)(k), F.S. and Rule 28-106.217, F.A.C.

Moreover, McClash is ultimately requesting the Department reweigh the evidence presented at the DOAH hearing and reject the ALJ's findings regarding expert opinion testimony. 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 the ALJ's decision. *See e.g.*, *Peace River/Manasota Regional Water Supply Authority v. IMC Phosphates Co.*, 18 So. 3d 1079, 1088 (Fla. 2d DCA 2009). However, the record is replete with competent substantial evidence to support the ALJ's conclusion that Long Bar has provided reasonable assurances for issuance of an environmental resource permit to establish the proposed mitigation bank. The Department incorporates its responses to McClash's Exception Nos. 1, 2, 2a, 2b, 2c, 2d, 3, 3a, 3b, 3c, 3d, 3e, 4, 5, 6, 7, 8, 9, 9a, 9b, 9c, and 9d herein.

Based on the foregoing reasons, including the ALJ's conclusions of law, McClash's Exception No. 8 is denied.

MCCLASH's Exception Nos. 9, 9a, 9b, 9c and 9d regarding Paragraphs 43, 44, 45, 50, 51, 52, 59 and 60

McClash takes exception to the findings of fact in paragraphs 43, 44, 45, 50, 51, and 52, and to the conclusions of law in paragraphs 59 and 60, arguing that the "ALJ did not have

evidence to support the UMAM score since this score did not meet the Essential Requirements of Law that requires a fact to support compliance with the UMAM rule(law)." McClash's Exceptions ¶ VII, p. 35.

McClash does not provide any citations to the record in support of Exception No. 9. *See* Section 120.57(1)(k), Fla. Stat. (2017), and Rule 28-106,217, Florida Administrative Code. Moreover, McClash refers to one case, *Chicken'N'Things v. Murray*, 329 So. 2d 302, 304 (Fla. 1976) in support of his exception, but does not provide any explanation of how that case applies to the findings of fact and conclusions of law identified in Exception No. 9.

Ultimately, McClash is requesting that the Department reweigh the evidence presented at the DOAH hearing and reject the ALJ's findings regarding expert opinion testimony. 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 the ALJ's decision. *See e.g., Peace River/Manasota Regional Water Supply Authority v. IMC Phosphates Co.*, 18 So. 3d 1079, 1088 (Fla. 2d DCA 2009).

McClash takes exception again to the conclusions of law in paragraphs 59 and 60. In paragraph 59, the ALJ concluded that the "burden of ultimate persuasion is on Petitioners to prove their case in opposition to the permit by a preponderance of the competent and substantial evidence," and the Petitioners have failed to meet their burden. In paragraph 60, the ALJ concluded that the permit applicant Long Bar had provided reasonable assurance that all relevant criteria for issuance of an ERP mitigation bank permit had been satisfied. McClash summarily rejected the ALJ's conclusions of law in paragraphs 59 and 60 without any legal basis for the exception or citation to the record. *See* § 120.57(1)(j) and (k), Fla. Stat. (2017).

The Department incorporates its responses to Exception Nos. 2, 2a, 2b, 2c, 2d, 6, and 8 herein.

Based on the foregoing reasons, including the ALJ's findings of fact and conclusions of law, McClash's Exception No. 9 is denied.

MCCLASH's Exception No. 9a.

In McClash's Exception No. 9a, he fails to identify *any* disputed findings of fact or conclusions of law in the RO with which he takes exception. He provides no legal basis for this exception, and does not include any citations to the record in support of his exception. The Department is not obligated to consider exceptions that do not clearly identify the disputed portion of the recommended order by page number or paragraph, that do not identify the legal basis for the exception, or that do not include appropriate and specific citations to the record. *See* § 120.57(1)(k), Fla. Stat.

To the extent that Exception No. 9a applies to findings of Fact Nos. 43, 44, 45, 50, 51, and 52, and conclusion of law Nos. 59 and 60, the Department incorporates its rulings to Exception Nos. 2, 2a, 2b, 2c, 2d, 6, 8, and 9 herein.

Based on the foregoing reasons, including the ALJ's findings of fact and conclusions of law, McClash's Exception Nos. 9a. is denied.

MCCLASH's Exception No. 9b.

In McClash's Exception No. 9b, he fails to identify *any* disputed findings of fact or conclusions of law in the RO with which he takes exception. He provides no legal basis for this exception, and does not include any citations to the record in support of his exception. The Department is not obligated to consider exceptions that do not clearly identify the disputed portion of the recommended order by page number or paragraph, that do not identify the legal

basis for the exception, or that do not include appropriate and specific citations to the record. *See* § 120.57(1)(k), Fla. Stat.

To the extent that Exception No. 9b applies to findings of Fact Nos. 43, 44, 45, 50, 51, and 52, and conclusion of law Nos. 59 and 60, the Department incorporates its rulings to Exception Nos. 2, 2a, 2b, 2c, 2d, 6, 8, and 9 herein.

Based on the foregoing reasons, including the ALJ's findings of fact and conclusions of law, McClash's Exception Nos. 9b. is denied

MCCLASH's Exception No. 9c.

In McClash's Exception No. 9c, he fails to identify *any* disputed findings of fact or conclusions of law in the RO with which he takes exception. He provides no legal basis for this exception, and does not include any citations to the record in support of his exception. The Department is not obligated to consider exceptions that do not clearly identify the disputed portion of the recommended order by page number or paragraph, that do not identify the legal basis for the exception, or that do not include appropriate and specific citations to the record. *See* § 120.57(1)(k), Fla. Stat.

To the extent that Exception No. 9c applies to findings of Fact Nos. 43, 44, 45, 50, 51, and 52, and conclusion of law Nos. 59 and 60, the Department incorporates its rulings to Exception Nos. 2, 2a, 2b, 2c, 2d, 6, 8, and 9 herein.

Based on the foregoing reasons, including the ALJ's findings of fact and conclusions of law, McClash's Exception Nos. 9c. is denied.

MCCLASH's Exception No. 9d.

In McClash's Exception No. 9d, he fails to identify *any* disputed findings of fact or conclusions of law in the RO with which he takes exception. He provides no legal basis for this exception, and does not include any citations to the record in support of his exception. The Department is not obligated to consider exceptions that do not clearly identify the disputed portion of the recommended order by page number or paragraph, that do not identify the legal basis for the exception, or that do not include appropriate and specific citations to the record. *See* § 120.57(1)(k), Fla. Stat.

To the extent that Exception No. 9d applies to findings of Fact Nos. 43, 44, 45, 50, 51, and 52, and conclusion of law Nos. 59 and 60, the Department incorporates its rulings to Exception Nos. 2, 2a, 2b, 2c, 2d, 6, 8, and 9 herein.

Based on the foregoing reasons, including the ALJ's findings of fact and conclusions of law, McClash's Exception Nos. 9d. is denied

RULINGS ON THE DEPARTMENT'S EXCEPTIONS

In the following two exceptions, DEP requests corrections to certain legal citations that appear from the context to constitute typographical errors.

DEP's Exception No. 1 regarding Paragraph 29

DEP takes exception to the reference to "section 373.327, Florida Statutes" contained in the first sentence of finding of fact paragraph 29, alleging that the citation is a typographical error. DEP contends that the correct reference is to "section 403.9327, Florida Statutes" (which addresses general permits for mangrove trimming). After reviewing the Recommended Order and the statutory references, the Department concludes that Paragraph 29 is a mixed Statement of Law and Fact. *See J.J. Taylor Companies v. Dep't of Business and Prof. Reg.*, 724 So. 2d 192,

193 (Fla. 1st DCA 1999), and *Battaglia Properties v. Fla. Land and Adjudicatory Commission*, 629 So. 2d 161, 168 (Fla. 5th DCA 1993). Furthermore, the Department agrees that the exception merely requests correction of a typographical error in a statutory citation.

Based on the foregoing reasons, DEP's Exception No. 1 is granted.

DEP's Exception No. 2 regarding Paragraph 53

DEP takes exception to the reference to "section 413.412(6), Florida Statutes" contained in the first sentence of conclusion of law paragraph 59, alleging that the citation is a typographical error. DEP contends that the correct reference is to "section 403.412(6), Florida Statutes" (which addresses standing criteria for non-profit corporations to bring suit under the Environmental Protection Act). After reviewing the Recommended Order and the statutory references, the Department agrees that the exception merely requests correction of a typographical error in a statutory citation.

Based on the foregoing reasons, DEP's Exception No. 2 is granted.

CONCLUSION

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

ORDERED that:

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

B. Based on the ALJ's order and the Department's review, DEP Permit No. 0338349-002, authorizing the issuance of a Mitigation Bank to Long Bar Pointe, LLLP, is APPROVED.

JUDICIAL REVIEW

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

DONE AND ORDERED this 27th day of April 2018, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

NOAH VALENSTEIN
Secretary

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

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

Deputy CLERK

4/27/18
DATE

CERTIFICATE OF SERVICE

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

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this 27th day of April, 2018.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SUNCOAST WATERKEEPER, INC.; FLORIDA INSTITUTE FOR SALTWATER HERITAGE, INC.; AND JOSEPH MCCLASH,

Petitioners,

vs. Case Nos. 17-0795
17-0796

LONG BAR POINTE, LLLP, AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.
_____/

RECOMMENDED ORDER

Administrative Law Judge D. R. Alexander conducted a hearing in these cases on December 5 and 6, 2017, in Sarasota, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue is whether Long Bar Pointe, LLLP's (Long Bar), application for a Mitigation Bank/Environmental Resource Permit (ERP) to establish a mitigation bank on a 260.80-acre coastal site located in western Manatee County should be approved.

PRELIMINARY STATEMENT

By letter dated December 16, 2017, the Department of Environmental Protection (Department) issued its Notice of Intent to Issue Mitigation Bank Permit No. 0338349-002 (Notice) authorizing Long Bar to establish the Long Bar Pointe Mitigation Bank on a 260.80-acre site in Manatee County. The Notice indicates that a total of 18.01 potential mitigation bank credits will be awarded.

Petitioners, Suncoast Waterkeeper, Inc. (Suncoast), and Florida Institute for Saltwater Heritage, Inc. (FISH), timely filed a Verified Petition challenging the agency action. After the initial pleading was dismissed by the Department, an Amended Verified Petition was filed. The matter was referred to the Division of Administrative Hearings (DOAH) and assigned Case No. 17-0795. Petitioner, Joseph McClash (McClash), also timely filed a Verified Petition challenging the same action. After

his initial pleading was dismissed by the Department, a First Amended Verified Petition for Formal Administrative Hearing was filed. This filing was referred to DOAH and assigned Case No. 17-0796. The two cases were then consolidated.

At the hearing, Petitioners jointly presented the testimony of seven witnesses, including Mr. McClash. Also, Petitioners' Exhibits 1 through 47, 55 (treated as hearsay only), 63, 67 (Land Use Map only), 78, and 81 (except the Key West photograph) were accepted in evidence. The remainder of Exhibit 67 and Exhibits 68, 69, and 75 were accepted on a proffer basis only. Long Bar presented the testimony of two witnesses. Long Bar Exhibits 1 through 12 were accepted in evidence. The Department presented no witnesses; however, Department Exhibit 1 was accepted in evidence. Finally, Joint Exhibit 1 was accepted in evidence.

A two-volume Transcript of the hearing was prepared. Proposed findings of fact and conclusions of law were filed by the parties on February 16 and 19, 2018, and they have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

The Parties

1. The Department is the state agency having concurrent jurisdiction with the water management districts for permitting mitigation banks pursuant to chapter 373, Florida Statutes.

Pursuant to an operating agreement executed by the Department and the water management districts, the Department is responsible for reviewing and taking final agency action on this activity.

2. Long Bar is a Florida limited liability limited partnership registered to do business in the state. Its address is 1651 Whitfield Avenue, Sarasota, Florida.

3. Suncoast has been registered as a nonprofit corporation in Florida since 2012. Its mission is to "protect and restore the Suncoast's waterways through enforcement, fieldwork, advocacy, and environmental education for the benefit of the communities that rely upon these precious coastal resources." Respondents have stipulated that at least 25 members reside within Manatee County.

4. Suncoast's geographical area of interest is the coastal waters of Manatee and Sarasota Counties, including the waterways and coastline in the immediate area of the project site and within the proposed Mitigation Service Area (MSA) of the bank.

5. Suncoast's representative, Mr. Merriam, testified that the organization has more than 800 members residing within Manatee County. However, he does not know the exact number of members who actually use the site or MSA and might reasonably be expected to be affected by the proposed activities. Moreover, he was unaware of what activities the proposed permit actually

authorizes that would adversely affect the interests of the members. After learning what activities are authorized by the permit, he admitted they have a beneficial purpose.

6. FISH is an active not-for-profit corporation in good standing since 1991 and has an address at 4515 124th Street West, Cortez, Florida. FISH owns and maintains real property, including coastal land within the village of Cortez. FISH also owns and maintains a wetland restoration/mitigation project known as the "FISH Preserve" property located in Cortez.

7. The mission and goal of FISH includes the protection of the nature and natural resources within Manatee County, including Anna Maria Sound and Perico Island located within the MSA. Respondents have stipulated that FISH has at least 25 members who reside in Manatee County.

8. According to a representative of FISH, Mr. Stevely, there are more than 150 members who reside or own property in Manatee County. The number who actually use and enjoy the natural resources located in the bank site and MSA is not known. Mr. Stevely could not explain how the activities authorized by the proposed permit would adversely affect its members. He also admitted that the removal of exotics, planting of native plants, and recording of a conservation easement (the only activities authorized by the permit) may actually benefit his environmental interests. Mr. Stevely asserted that the trimming of mangroves

would adversely affect his interests, but the permit, as proposed, does not authorize mangrove impacts. He speculated that the proposed placement of buoys along the shoreline might attract inexperienced boaters to the area, but admitted that good channel marking is one of the best ways to protect seagrasses. Moreover, the installation of buoys requires a separate permit from the Florida Fish and Wildlife Conservation Commission (FFWCC). Presumably, a point of entry to contest that action will be provided by the agency.

9. Mr. McClash is a resident of Bradenton who uses the waters in the vicinity of the project site for fishing, crabbing, boating, and wildlife observation. He contends the informational buoys will attract inexperienced boaters to the area, who will harm the seagrasses. He is also concerned that if the application is approved, other ERPs may be issued in the future and their impacts could potentially be offset by the purchase of credits from the Project.

The Project Site

10. The property designated to become the mitigation bank is a 260.80-acre site located in western Manatee County, west of El Conquistador Parkway and 75th Street West, and an adjacent unsurveyed portion of Sarasota Bay, an Outstanding Florida Water (OFW), Class II Waters. Around half of the site is adjacent to agricultural lands that may be developed with a mixed use

residential/commercial project. The other half is contiguous with Sarasota Bay and/or existing conservation lands. The project site has more than two miles of shoreline making it the largest continuous mangrove shoreline along Sarasota Bay. The site is near other properties with high ecological value, such as Emerson Point, Robinson Preserve, Neal Preserve, Tidy Island, Sister Keys, and Legends Bay. All of these properties are conservation lands. Long Bar has a sufficient real property interest to conduct the proposed activities.

11. Based on historical aerial photography, the area encompassing the Project site has remained essentially undeveloped since 1944, with the exception of mosquito ditching that was conducted in the northwestern portion of the property from the 1940s to the 1970s, and agricultural ditching that has occurred adjacent to and within some portions of the site.

12. The site is dissected by four, approximately 30-foot-wide strips of land owned by Manatee Fruit Company (MFC), which are excluded from the credit assessment. However, Long Bar has sufficient ownership interest in the MFC strips of land and will be required to maintain the area free of debris and nuisance and exotic vegetation.

13. The Town of Longboat Key also has a 30-foot-wide easement in the southeastern portion of the site, which will be preserved, enhanced, and maintained similar to the adjacent area

of the project site , but is excluded from the credit assessment.

14. The project site consists of privately-owned submerged Sarasota Bay bottomlands that are dominated by seagrasses; mangrove swamps; mangrove hedges; areas of salt marsh/saltern; coastal freshwater herbaceous wetlands; and areas of coastal uplands (maritime hammock).

15. The seagrass areas are dominated by shoal grass with patches of turtle grass in deeper pockets. The mangrove areas are predominately black mangroves, mixed with red mangroves closer to the shoreline and with white mangroves in the more landward mangrove areas. Red mangroves increase in dominance in the vicinity of the mosquito ditches in the northwestern portion of the site, and white mangroves increase in dominance in the formerly disturbed portions of the site. The salt marsh/saltern area is generally open and sandy, but supports some herbaceous vegetation, such as buttonwood, glasswort, and saltwort. The coastal freshwater herbaceous wetlands and much of the coastal uplands are currently dominated by a near monoculture of invasive exotic Brazilian Pepper, though areas of intact maritime hammock remain. Brazilian Pepper is present in the ecotone areas (the transition area between two communities) between the freshwater herbaceous and mangrove swamp assessment

areas. There are also spoil mounds within the mangrove swamp assessment areas.

Mitigation Bank Permits

16. Section 373.403(19), Florida Statutes, defines a mitigation bank as "a project permitted under Section 373.4136, F.S. undertaken to provide for the withdrawal of mitigation credits to offset adverse impacts authorized" by an ERP issued under Part IV, chapter 373. A mitigation bank permit is a type of ERP. See Fla. Admin. Code R. 62-330.301(3).

17. Section 373.4136(1) authorizes the Department and water management districts to require an ERP to establish, implement, and operate a mitigation bank. A bank acts as a repository for wetland mitigation credits that can be used to offset adverse impacts to wetlands that occur as the result of future ERP projects. A bank is designed to "enhance the certainty of mitigation and provide ecological value due to the improved likelihood of environmental success associated with their proper construction, maintenance, and management," often within larger, contiguous, and intact ecosystems.

18. Mitigation banks are intended to "emphasize the restoration and enhancement of degraded ecosystems and the preservation of uplands and wetlands as intact ecosystems." Id. Therefore, the Department and the water management districts are

directed to participate in and encourage the establishment of mitigation banks. Id.

19. A mitigation bank is to be awarded a number of mitigation credits by the permitting agency. § 373.4136(4), Fla. Stat. A mitigation credit is a "standard unit of measure which represents the increase in ecological value resulting from restoration, enhancement, preservation, or creation activities." Fla. Admin. Code R. 62-345.200(8). The number of credits must be "based upon the degree of improvement in ecological value expected to result from the establishment and operation of the mitigation bank as determined using a functional assessment methodology." § 373.4136(4), Fla. Stat. In this case, the Department is proposing to issue 18.01 credits.

Mitigation Service Area (MSA)

20. Rule 62-342.600 requires the establishment of a MSA for a mitigation bank. An MSA is a geographical area within which adverse impacts may be offset by the bank credits. A single MSA is proposed for the Project, covering both freshwater and saltwater credits. The MSA includes portions of Charlotte, Manatee, and Sarasota Counties within the South Coastal Drainage Basin and portions of the Manatee River Basin west of Interstate 75 and the portion of the Tampa Bay Drainage Basin located west of Interstate 75 and south and west of Interstate 275. Credits

are not allowed for use outside the MSA, except as provided for by section 373.4136(6)(d).

Criteria for a Mitigation Bank

21. Besides statutory criteria in section 373.4136(1), a maze of Department rules applies to the creation of a mitigation bank. Pertinent to this case, rule 62-342.400 sets forth criteria specifically applicable to a mitigation bank. Rule 62-330.301 sets forth criteria for the issuance of an ERP, while rule 62-330.302 establishes additional ERP criteria that form the basis for the public interest test. In the Joint Pre-hearing Stipulation, Petitioners agree that only the criteria in rule 62-330.301(1)(d) and (f), rule 62-330.302(1)(a)2., 4., and 5., and rule 62-342.400(1)(a)-(f) are at issue. Petitioners also agree that Long Bar has provided reasonable assurance in regards to all requirements of financial responsibility.

The Project

22. Long Bar submitted to the Department its application for a permit on September 12, 2016. After additional information was submitted, the application was deemed complete on December 16, 2016. See Fla. Admin. Code R. 62-342.450.

23. The majority of the site is mangrove swamp and privately owned submerged seagrass bottomlands that are proposed for preservation only. The site also contains areas of coastal freshwater marsh and coastal uplands that are currently degraded

by invasive exotic vegetation which will be enhanced through removal of invasive exotic vegetation, planting of desirable vegetation, and implementation of a perpetual management plan. No wetland creation or dredging or filling activities are proposed for the Project.

24. The Project has the potential to generate several credit types, including seagrass, mangrove swamp, mangrove hedge, salt marsh/saltern, and freshwater herbaceous credits. The credit release schedule provides for an initial credit release upon recordation of a conservation easement and establishment of financial assurance mechanisms, followed by a series of potential credit releases based on satisfactory completion of specified mitigation activities, and a final credit release once all success criteria are met.

25. Prior to the release of credits, the site will be preserved by a conservation easement in favor of the Department and Southwest Florida Water Management District. Long Bar will establish financial assurance performance bonds for construction and implementation and perpetual management. Financial assurance is required to ensure the Project reaches success, it remains in compliance, and the perpetual management activities have a dedicated funding source.

26. In addition to protection provided by the conservation easement, Long Bar proposes implementation of a Seagrass

Informational Buoy Placement Plan (Plan) in an effort to provide additional protection to the submerged seagrass beds within and in the vicinity of the Project. The Plan contemplates the installation of non-regulatory seagrass information buoys at approximately the three-foot bathymetric contour along the Project site, and which follows the path of the traditional unmarked navigational channel where they can be readily seen. The buoys will inform boaters of the presence of seagrasses surrounding the Project site, which support significant estuarine habitats and can be harmed or destroyed from vessel groundings or prop scarring. Installation of the buoys will provide a significant public benefit in that it should significantly reduce or eliminate prop scars within the seagrass beds along the project site. Good channel marking is one of the best ways to protect seagrasses from prop scarring. There is no credible evidence that signage will attract inexperienced boaters who will damage the seagrasses in the area.

27. The permit does not authorize the installation of the buoys. In order to implement the Plan, Long Bar must apply to the FFWCC for a Uniform Waterways Markers in Florida Waters permit. The Plan must be implemented prior to credit release.

28. No mangrove trimming is authorized by the permit. Pursuant to a Conceptual Mangrove Trimming Plan, attached to the permit as Attachment A, Long Bar has reserved the right to trim

approximately 30 percent of the onsite mangrove acreage to a minimum height of 12 feet, as measured from the substrate. No trimming will be allowed within the Project's mangrove swamps that are greater than 500 feet in width from the shoreline, and no trimming can result in fragmentation of the remaining intact mangrove forest into more than four individual fragments. Prior to the initial release of credits, Long Bar must develop and submit a Final Mangrove Trimming Plan and modify the permit to substitute the final plan for the conceptual plan, adjust the assessment area configuration and acreages, and recalculate the total potential mitigation credits.

29. Any mangrove trimming must be conducted by a licensed professional mangrove trimmer and take place under a mangrove trimming permit issued pursuant to section 373.327 that may be issued at some time in the future by the Department if applicable criteria are met. Long Bar's reserved right to conduct limited mangrove trimming was accounted for in the credit scores.

30. Many of the current communities on the site are generally similar to the types of communities that would have been present historically, but have been adversely affected by invasion of nuisance and exotic vegetation, including Brazilian Pepper and Australian Pine. As such, the Project also involves a number of enhancement activities on the site. Approximately

17.35 acres of degraded coastal freshwater marsh will be enhanced by removing invasive exotic vegetation and replanting with appropriate native vegetation. Approximately 13.13 acres of degraded coastal uplands will be enhanced by removing invasive exotic vegetation and replanting with appropriate native vegetation. Approximately 6.44 acres of relatively intact coastal uplands will be enhanced by removing nuisance vines and exotic vegetation. All areas of preserved mangroves and salt marsh/saltern will be treated to remove existing low levels of nuisance and invasive exotic vegetation. Upon implementation and planting, the permit requires Long Bar to conduct "time zero" monitoring to establish a baseline for use in future monitoring events to determine whether success criteria have been achieved.

31. Although the proposed activities are expected to maintain and enhance site conditions in perpetuity, Long Bar will employ other strategies, based on continual evaluation of environmental data collected from the site, to ensure the goals of the Project continue to be met in perpetuity.

32. Long Bar will implement a Security Plan to take all measures necessary to ensure the integrity of the Project is upheld in perpetuity. Large hole 50-inch high hog fencing will be installed at the Project boundary where it interfaces with offsite areas to ensure separation and protection from any

future development on adjacent lands. Fencing will act as a barrier to deter trespassing, but will still allow wildlife to move across and into the Project site. Conservation easement signage will also be installed at a minimum of every 300 feet, and at every bank boundary turn along the fence line. The buoy plan is also part of the Security Plan. Long Bar will conduct quarterly inspections of the fencing and signage, as well as Project site lands, and will repair or replace fencing as soon as the need is discovered. Any trash and other debris will be removed during site inspections either by hand or by a method that minimizes disturbances to Project lands. If habitat impacts are discovered during an inspection, adaptive management actions will be implemented.

33. After the Project's final success criteria are met, the Perpetual Management Plan will ensure that the Project is managed by Long Bar in a manner that ensures all permit conditions are maintained. The Perpetual Management Plan includes quarterly inspections of the Project site, including security measures.

The Calculation of Credits

34. In 2004, the Department adopted chapter 62-345, the Uniform Mitigation Assessment Method (UMAM) rule, which provides a standardized procedure for assessing the functions provided by wetlands and other surface waters, the amount those functions

are decreased by a proposed project, and the amount of mitigation necessary to offset that loss. UMAM is the sole means for determining the amount of mitigation credits to be awarded to mitigation banks and applied to Long Bar.

35. When applying UMAM, reasonable scientific judgment must be used. Therefore, even though UMAM is a standardized procedure, UMAM is not a precise assessment, and in the exercise of reasonable scientific judgment, two scientists can arrive at different results.

36. In general terms, the UMAM analysis consists of two parts. Part I is a qualitative characterization of the property, which divides the property into assessment areas. Part II assigns mitigation bank credits to those areas based on scoring criteria established in UMAM.

37. The mitigation proposal was assessed by the Department using UMAM. The Department determined that the Project had the potential to generate a total of 18.01 credits. These credits are differentiated as 7.38 for seagrass-dominated submerged bottomlands, 0.23 for salt marsh/saltern, 7.07 for mangrove swamps, 0.68 for trimmed mangrove hedge, and 2.65 for coastal freshwater marsh.

38. The environmental communities present at the site are subdivided into 47 different assessment areas. The assessment areas were established by Long Bar's expert, Mr. Hoffner, who

has worked on the Project since 2014 and has spent hundreds of hours evaluating the site. The assessment areas were generally grouped into seagrass, mangrove, saltwater, salt marsh, freshwater marsh, and uplands, and then sub-assessed based on their proximity to different habitats and different activities within the bank.

39. Assessment area boundaries were based upon aerial photography interpretation, the Florida Land Use, Cover and Forms Classification System, habitat map, Natural Resources Conservation Service soil maps, site inspections, formal wetlands jurisdiction determination, surveys performed by professional land surveyors, field verification, and reasonable scientific judgment. The record shows that ecotone community boundaries in the environment do not often have distinct lines of demarcation and two adjacent communities can be identified as unique assessment areas and yet have ecotone areas that share characteristics of both communities. For example, Brazilian Pepper is present within the ecotone areas between the mangrove and freshwater marsh assessment areas.

40. The Department's expert, Mr. Rach, verified the boundaries of the bank and assessment areas both in the field and through aerial photographs and descriptions provided by the applicant. Mr. Rach reiterated that the determination of assessment areas is not an exact science and requires the use of

scientific judgment. He determined that Long Bar provided sufficient information for each assessment area to be evaluated under the second part of the UMAM analysis and that they provide an appropriate frame of reference to use in the Part II evaluation.

41. While Petitioners' expert, Mr. Hull, disagreed with the assessment area boundaries, he agreed that UMAM is not an exact science. He conceded that he was not sure whether he visited every assessment area on the site, and he was unable to provide an explanation of where he believed each specific boundary should be located.

42. Petitioners did not establish by a preponderance of the evidence that the assessment areas are in contravention of Department rules.

43. The Department's scoring of the Project was determined by review of the UMAM scores provided by Long Bar, review of available information provided, numerous discussions with Long Bar, and field work. The Department's summary of the credit evaluation for each of the 47 assessment areas is contained in Condition 11 of the permit and is accepted as being the most persuasive on this issue. The actual scores for each assessment area are contained in Exhibit H of the draft permit.

44. While Mr. Hull disagreed with the scoring of the project, the difference between his and Long Bar's numbers are a

reflection in the difference in the application of reasonable scientific judgment.

45. Petitioners failed to prove by a preponderance of the evidence that the Department's determination that the project could generate 18.01 credits was incorrect.

Petitioners' Objections

46. In their PROs, Petitioners raise three broad objections. First, they contend that no credits should be awarded to Long Bar for seagrasses, or that a much smaller number is appropriate. Second, they contend fewer credits should be awarded for areas where mature mangroves that are 40 to 50 feet in height could be trimmed to 12 feet simply to provide a view for future residents of the adjacent upland residential development conceptually proposed by Long Bar. Finally, they contend the site is bisected by a 100-foot gap that is excluded from the bank because Long Bar intends to allow future access from the planned adjacent upland residential development to the shoreline. They argue that by creating this gap, Long Bar fails to maintain an intact ecosystem. Given these considerations, Suncoast and FISH contend that no more than 4.18 mitigation credits should be awarded, while Mr. McClash argues that the application should be denied.

47. As to the first issue, Petitioners generally contend that in the seagrass areas, the bank is focused on preservation

only, and not restoration, and therefore no additional protection or functional lift will be provided for any seagrass assessment areas. To begin with, preservation is a goal expressly included in the UMAM rule, which emphasizes preservation of undegraded areas and restoration of degraded systems over alteration of existing landscapes to create artificial wetlands. The proposed conservation easement increases protection to the wetlands and other surface waters in the site by preventing structures (such as docks or piers) within the seagrass assessment areas. If the site is not preserved, it is likely to be used to access Sarasota Bay from the uplands. As previously found, there will also be enhancement activities in adjacent assessment areas. In short, the steps being proposed by Long Bar provide additional protection to the seagrasses. The UMAM seagrass score is appropriate.

48. As to the second issue, no mangrove trimming is authorized by the permit. Long Bar has, however, reserved the right to modify the permit to trim approximately 30 percent of the onsite mangrove acreage to a minimum height of 12 feet, as measured from the substrate. The potential trimming was properly accounted for in the UMAM scores. If Long Bar chooses not to implement the proposed trimming, it would likely receive more credits. Notably, no trimming can result in fragmentation

of the remaining intact mangrove forest into more than four individual fragments. And prior to the release of credits, Long Bar must develop and submit a final mangrove trimming plan and modify the permit, adjust the assessment area configuration and acreages, and recalculate the total potential mitigation credits. Petitioners did not prove by a preponderance of the evidence that mangrove trimming affects the Department's assessment of the number of credits to be awarded.

49. Finally, the exclusion of a 100-foot gap from the conservation easement does not diminish the value of the bank as an intact system as a whole. While this area will not be included in the recorded plans, this will not fragment an intact ecosystem. No construction is proposed in the gap, and current Manatee County regulations do not allow for dredging in this area. Therefore, wildlife utilizing the site will be able to continue to utilize the excluded area and traverse the gap, regardless of the lines drawn on a set of plans. The net effect of the Project is to preserve approximately two miles of intact shoreline. The more persuasive evidence supports a finding that the 100-foot wide strip does not affect the overall suitability of the site as a mitigation bank. Petitioners did not prove by a preponderance of the evidence that the so-called "gap" impacts the number of credits to be awarded.

Compliance with Applicable Criteria

50. The preponderance of the evidence supports a finding that Long Bar has satisfied all criteria in rule 62-330.301 for the issuance of an ERP.

51. The preponderance of the evidence supports a finding that Long Bar has established that the Project is clearly in the public interest, as required by rule 62-330.302(1).

52. The preponderance of the evidence supports a finding that Long Bar has satisfied all criteria for establishing a mitigation bank, as required by rule 62-342.400.

CONCLUSIONS OF LAW

53. Suncoast and FISH allege standing to initiate this proceeding under chapter 120 and section 413.412(6). Respondents have stipulated that the facts established by the two organizations provide standing under section 403.412(6).

54. For an association to establish standing under section 120.57(1) when acting solely as a representative of its members, it must demonstrate that a substantial number of its members, although not necessarily a majority, are substantially affected by the challenged action, that the subject matter of the challenged action is within the association's general scope of interest and activity, and that the relief requested is of a type appropriate for an association to receive on behalf of its members. See, e.g., St. John's Riverkeeper, Inc. v. St. Johns

River Water Mgmt. Dist., 54 So. 3d 1051, 1054 (Fla. 5th DCA 2011); Fla. League of Cities, Inc. v. Dep't of Envtl. Reg., 603 So. 2d 1363 (Fla. 1st DCA 1992). Suncoast and FISH have failed to quantify the number of members that reside in the area of the Project that might reasonably be expected to be affected by the proposed activities. Therefore, they have no standing under chapter 120.

55. Mr. McClash alleges he has standing under chapter 120 as a person whose substantial interests are affected by the proposed issuance of the permit. Here, the evidence shows that Mr. McClash is concerned with activities contemplated, but not authorized, by the permit, and future ERPs that may have impacts that could potentially be offset through the purchase of credits from the Project. These concerns will not result in a direct injury or place Mr. McClash in an immediate danger of sustaining a direct injury as a result of the agency action. His concern is with future permit impacts, which are too speculative and remote to give rise to standing under chapter 120.

56. Petitioners have challenged the issuance of a mitigation bank permit issued under chapter 373. Therefore, section 120.569(2)(p) is applicable. Under this provision, the permit applicant must present a prima facie case demonstrating entitlement to the permit. Thereafter, a third party challenging the issuance of the permit has the burden "of

ultimate persuasion" and the burden "of going forward to prove the case in opposition to the . . . permit." If the third party fails to carry its burden, the applicant prevails by virtue of its prima facie case.

57. Issuance of the permit is dependent upon there being reasonable assurance that the mitigation bank will meet applicable statutory and regulatory standards. § 373.4136(1), Fla. Stat.

58. 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 that the applicable conditions for issuance of a permit have been satisfied.

59. Long Bar made its prima facie case of entitlement to the permit. Therefore, the burden of ultimate persuasion is on Petitioners to prove their case in opposition to the permit by a preponderance of the competent and substantial evidence. Having failed to do so, Long Bar must prevail.

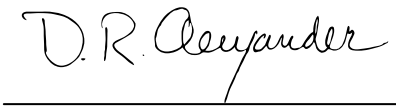
60. In summary, Long Bar has provided reasonable assurance that all relevant criteria for the issuance of an ERP and establishment of a mitigation bank have been satisfied.

RECOMMENDATION

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

RECOMMENDED that the Department of Environmental Protection enter a final order approving the issuance of Mitigation Bank Permit No. 0338349-002 to Long Bar.

DONE AND ENTERED this 6th day of March, 2018, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of March, 2018.

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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.

RECEIVED
March 12, 2018
Dept. of Environmental Protection
Office of General Counsel

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

SUNCOAST WATERKEEPER, INC.; FLORIDA INSTITUTE FOR SALTWATER HERITAGE, INC.; and JOSEPH MCCLASH,

Petitioner,

vs.

DOAH CASE NO. 17-0796
OGC CASE NO. 17-0002

LONG BAR POINTE, LLLP and STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.

_____/

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION'S EXCEPTIONS TO RECOMMENDED ORDER

Respondent, State of Florida Department of Environmental Protection, (Department), under Rule 28-106.217 of the Florida Administrative Code (F.A.C.) and section 120.57(1)(k) of the Florida Statutes (Fla. Stat.), files the following exceptions to the Administrative Law Judge's Recommended Order entered on March 6, 2018.

ABBREVIATIONS

Department, DEP — Department of Environmental Protection

STANDARD OF REVIEW

Section 120.57(1)(l), Fla. Stat., authorizes an agency to reject or modify an Administrative Law Judge's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction."

An agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction and expertise. Public Employees Relations Commission v. Dade County Police Benevolent Association, 467 So. 2d 987, 989 (Fla. 1985); Florida Public Employee Council, 79 v. Daniels, 646 So. 2d 813, 816 (Fla. 1st DCA 1994). Great 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., Dept. of Environmental 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. Suddath Van Lines, Inc. v. Dept. of Environmental Protection, 668 So. 2d 209, 212 (Fla. 1st DCA 1996).

Section 120.57(1)(l), Fla. Stat., also prescribes that an agency reviewing a recommended order may not reject or modify the findings of fact of an Administrative Law Judge, "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." However, if a finding of fact in a recommended order is improperly labeled by an Administrative Law Judge, the label should be disregarded and the item treated as though it were properly labeled as a conclusion of law. Battaglia Properties v. Fla. Land and Adjudicatory Commission, 629 So. 2d 161, 168 (Fla. 5th DCA 1994).

It is the role of the Administrative Law Judge to rule dispositively on *relevant* factual issues one way or the other. Reviewing agencies may not reject or modify such findings unless they determine on the basis of a review of the complete record, that there is no competent substantial evidence from which findings could be inferred. Goin v. Commission on Ethics, 658 So. 2d 1131,

1138 (Fla. 1st DCA 1995); Heifetz v. Dep't of Business Regulation, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). The Florida Supreme Court defined substantial evidence "to be such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. Such 'substantial evidence' must be 'competent', and it is [competent], if it is relevant and material to the issue or issues presented for determination." Gainesville Bonded Warehouse, Inc. v. Carter, 123 So. 2d 336, at 338 (Fla. 1960) (emphasis added), (*citing* De Groot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957)). The Administrative Law Judge's findings of fact must also be "based upon a preponderance of the evidence" and "exclusively on the evidence of record and on matters officially recognized." Section 120.57(1)(j), Fla. Stat. (2017). When fulfilling the role described above, the Administrative Law Judge must apply the correct legal standards applicable to the administrative proceeding.

In the instant case the Department's exceptions are not substantive in nature, and rather simply correct two typos included in the Recommended Order.

EXCEPTIONS

Exception to Finding of Fact # 29.

The Department excepts to the reference to "section 373.327," Florida Statutes" contained in the first sentence of paragraph 29. This is a typo. The correct reference is to "section 403.9327," Florida Statutes, (which addresses general permits for trimming of mangroves.)

Exception to Conclusion of Law #53.

The Department excepts to the reference to "section 413.412(6)," Florida Statutes, contained in the first sentence of paragraph 53. This is a typo. The correct reference is to "section 403.412(6)" Florida Statutes, (which addresses standing standards for non-profit corporations to bring suits under the Environmental Protection Act.)

CONCLUSION

For the foregoing reasons, the Department requests that the statutory references in paragraphs 29 and 53 be corrected.

Respectfully submitted this 12th day of March 2018.

STATE OF FLORIDA DEPARTMENT OF
ENVIRONMENTAL PROTECTION

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed with Lea Crandall, the agency clerk of the State of Florida Department of Environmental Protection by email at lea.crandall@dep.state.fl.us and agency_clerk@dep.state.fl.us and served via email emailed only to Joseph McClash, 711 89 St. NW, Bradenton, Florida at Joemcclash@gmail.com; Long Bar Pointe, LLLP c/o Peter Logan, 1651 Whitfield Avenue, Sarasota, Florida 34243 at petel@medallionhome.com; Ralf Brookes, Counsel for Suncoast Waterkeeper, 1217 E Cape Coral Parkway, Suite 107, Cape Coral, Florida 33904 at Ralfbrookes@gmail.com and Ralf@Ralfbrookesattorney.com; Douglas Manson, Amy Brennan, Chris Tanner, Manson Bolves Donaldons & Varn, 204 South Monroe St., Tallahassee, Florida 32301 at dmanson@mansonbolves.com; drodriguez@mansonbolves.com; ctanner@mansonbolves.com; abrennan@mansonbolves.com; Edward Vogler, Vogler, Ashton, PLLC, 2411 Manatee Ave. W, Suite A, Bradenton, Florida 34205 at edvogler@voglerashton.com, on this 12th day of March 2018.

/s/ Marianna Sarkisyan
MARIANNA SARKISYAN
Senior Assistant General Counsel

RECEIVED
March 19, 2018
Dept. of Environmental Protection
Office of General Counsel

STATE OF FLORIDA

DIVISION OF ADMINISTRATIVE HEARINGS

SUNCOAST WATERKEEPER, INC.;

FLORIDA INSTITUTE FOR SALTWATER

HERITAGE, INC.; and JOSEPH MCCLASH,

Petitioners,

vs. CASE NOS.: 17-0795 & 17-0796

LONG BAR POINTE, LLLP, and

DEPARTMENT OF ENVIRONMENTAL

PROTECTION,

Respondents.

_____/

PETITIONER JOSEPH MCCLASH EXCEPTIONS TO PROPOSED RECOMMENDED ORDER

INTRODUCTION

Pursuant to Section 120.57(1)(b), Florida Statutes, and Rule 28-106.217, F.A.C., Petitioner, Joseph McClash hereby submits his Exceptions to the Recommended Order entered in this matter on the 6th day of March, 2018.

The final hearing in these consolidated cases was held December 5 and 6, 2017, in Sarasota, Florida. Administrative Law Judge (ALJ) D. R. Alexander conducted the hearing of the Division of Administrative Hearings ("DOAH").

Citations to the hearing transcript are denoted as (T. page(s) __); citations to Petitioners Exhibits admitted into evidence at the final hearing are denoted as (P EXHIBIT __, -p.__) ; Long Bar Exhibits (LB Exhibit __)citations to LBP and FDEP Joint Exhibits admitted into evidence at the final hearing in this matter are denoted as (JT EXH __, -p.__); citations to the findings of fact in the Recommended Order are denoted as (FOF __); and citations to the conclusions of law in the Recommended Order are denoted as (COL___).

Standard for Exceptions to Findings of Fact -Section 120.57(1)(l), Florida Statutes, provides, in pertinent part: The agency may not reject or modify the findings of fact 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 upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

Evidence as used herein defined as- *Competent Substantial Evidence* - DeGroot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957). See also City of Hialeah Gardens v. Miami-Dade Charter Foundation, 857 So. 2d 202, 204 (Fla. 3d DCA 2003 *"competent evidence is evidence sufficiently relevant and material to the ultimate determination 'that a reasonable mind would accept it as adequate to support the conclusion reached.*

Summary of Petitioner McClash exceptions

The proposed recommended order issued by Administrative Law Judge Alexander contains **Findings of Facts** cited that are not supported by the record or any competent substantial evidence. The Findings of Fact misstate facts causing an error in stating the **Conclusions of Law**. The **Conclusion of Laws** based on the **Finding of Facts** are erroneous and not supported by the Evidence; departing form the essential requirements of law.

Long Bar made its prima facie case of entitlement to the permit. Therefore, the burden of ultimate persuasion is on Petitioners to prove their case in opposition to the permit by a preponderance of the competent and substantial evidence.

The burden is on Petitioners to present contrary evidence, equivalent in quality to that presented by the applicant. *Dr. Octavio Blanco v. NNP-Bexley, Ltd. and Southwest Florida Water Management District, 2008 WL 4974178* holds that upon presentation of a prima facie case of credible evidence of reasonable assurances and entitlement to the permit, the burden of presenting evidence can be shifted to Petitioner, as permit challenger, to present evidence of equivalent quality to refute the applicant's evidence of reasonable assurances and entitlement to the permit. Unless the Petitioner, as permit challenger, presents 'contrary evidence of equivalent quality,' the hearing officer would not be authorized to deny the ERP. *Diventura v. The Gables at Stuart. 2006 WL 716869 (Fla. Div.Admin. Hrgs. 2006) [citing to Fla. DOT v. J.W.C. Co., Inc.396 So.2d 778 (Fla. 1st DCA 1981)]").* In order to overcome that finding, Petitioners must present a preponderance of the evidence for a contrary position to be sustained. *Davis Family Day Care Home v. Department of Children and Family,117 So.3d 464 (Fla. 2d DCA 2013)*.

Petitioner provided a preponderance of evidence that the permit failed to comply with rules and statutes, that the UMAM score used assumptions that were not proven by evidence and the permit should have been recommended to be denied.

- Evidence contained no Part II forms as typically required to provide reasonable assurance which is less quality of evidence than the Part II forms submitted by the Petitioner into evidence,
- The "lift" used to calculate the UMAM was not supported by evidence or testimony since the calculations do not comply with UMAM rules specific procedures.
- The evidence provided by Long Bar to support the permit for sea grass credits was not relevant to the informational buoys proposed; the evidence by petitioner was specific to the area and was relevant.
- No credible or expert witness produced facts supporting a finding seagrasses would not be impacted by the placement of informational buoys. Applicant's expert was not proffered as an expert in this field.
- The impact of seagrasses in Sarasota Bay from increased boaters and prop scarring was proven and causes the permit to be clearly not in the Public Interest.
- The erroneous fact stated that the buoys are along the site is not supported by evidence. These buoys are on Sovereign State lands and any reliance on credits for a mitigation bank credit cannot support facts, evidence clearly indicates these buoys are not within the mitigation bank site and other entities can permit these buoys.
- Mitigation credits for seagrasses assumed water quality improvements as a basis to calculate a UMAM credit is not supported by any evidence. Petitioners' substantial

competent evidence proved seagrasses are healthy and increasing due to water quality in Sarasota Bay and are meeting regulatory criteria.

EXCEPTIONS

I. Exception No. 1: FOF 21 does not include all statutory and rule criteria disputed.

> Criteria for a Mitigation Bank
>
> 21. Besides statutory criteria in section 373.4136(1), a maze of Department rules applies to the creation of a mitigation bank. Pertinent to this case, rule 62-342.400 sets forth criteria specifically applicable to a mitigation bank. Rule 62-330.301 sets forth criteria for the issuance of an ERP, while rule 62-330.302 establishes additional ERP criteria that form the basis for the public interest test. In the Joint Pre-hearing Stipulation, Petitioners agree that only the criteria in rule 62-330.301(1)(d) and (f), rule 62-330.302(1)(a)2., 4., and 5., and rule 62-342.400(1)(a)-(f) are at issue. Petitioners also agree that Long Bar has provided reasonable assurance in regards to all requirements of financial responsibility.

Mitigation Bank statutory criteria and rules that are also applicable:

FOF 21 does not include the complete criteria for a mitigation bank or all the disputed issues. The Petitioner has provided evidence that the UMAM rule and the application of the rule is disputed and that the criteria under Florida statute 373.4136(1) is disputed. Uniform

Mitigation Assessment Method (UMAM) rule (Chapter 62-345,F.A.C.) provides for specific guidelines in performing a credit for a mitigation bank.

Chapter 62-345,F.A.C. was a disputed issue and should be included in FOF21.

II. Exception No. 2: FOF 43,44,45 – The evidence does not support the UMAM analysis was correct and performed in conformance with the criteria for Part II- Quantification of Assessment Area, and applicant did not provide the more persuasive quality evidence and or competent substantial evidence. The reasonable scientific judgement by the applicant expert failed to include a factual basis to support Hoffner's reasonable scientific judgement and or failed to satisfy the requirements under the rules and statutes.

<u>Exception No. 2a.</u> No Part II- Quantification of Assessment Area forms were part of evidence, therefore only the testimony by the applicant's expert could form the basis for any competent substantial evidence to support the finding of fact to support the mitigation bank credits were done consistent with statute and rules. The lack of evidence by the applicant fails to provide for a finding the UMAM score is correct and can be the most persuasive (FOF 43 page 19). The petitioners' evidence is higher in quality and is consistent with

statute and rules.

> 43. The Department's scoring of the Project was determined by review of the UMAM scores provided by Long Bar, review of available information provided, numerous discussions with Long Bar, and field work. The Department's summary of the credit evaluation for each of the 47 assessment areas is contained in Condition 11 of the permit and is accepted as being the most persuasive on this issue. The actual scores for each assessment area are contained in Exhibit H of the draft permit.

The applicant did not submit any Part II UMAM forms as part of the application and none were entered as evidence, Mr. Rach from FDEP testified that he did not recall receiving or reviewing any Part II UMAM submitted by the applicant.(T.at 220) Discussions with FDEP are not relevant to the evidence required to be more persuasive. The applicant provided only a UMAM Credit Assessment Summary (JT EXH 1 – 348 aka Exhibit H credit assessment) of all assessment areas, and provided testimony that conflicted with the information required under the Part II evaluation. The evidence did not establish the improvement of ecological value referred to as the delta or the lift.(Fla. Admin. Code R. 62-345.500)

Clark Hull on behalf of the Petitioners prepared Exhibits P1-47, which were entered as evidence that contains an individual Part II UMAM form for each assessment area in dispute, and did provide testimony to supplement each assessment area with the information required under the Part II evaluation, each mitigation assessment area was evaluated (1) under its current condition --or for areas subject to preservation mitigation,

without mitigation and (2)its with mitigation condition. The difference in those conditions represented the improvement of ecological value referred to as the delta or the lift included on each Part II (Exhibits 2-47).‖ Fla. Admin. Code R. 62-345.500.(T. Page 372-Page 428).

Applicant's conflicting evidence and failure to comply with requirements contained in Fla. Admin. Code 62-345, their UMAM score lacked any evidence to be the most persuasive.

<u>Exception No. 2b</u>. Applicant failed to calculate the Preservation Adjustment Factor in accordance with criteria contained in Fla. Admin. Code 62-345.500(3) resulting in a UMAM not consistent with these requirements.

The applicant only prepared a summary sheet that contained a P factor short for Preservation Adjustment Factor (JT EXH 1 – 348 aka Exhibit H credit assessment), Testimony by Alec Hoffner for the applicant only indicated he used only 1 issue out of the 5 for determining the P factor – stating "It really has a lot to do with the significance of the habitat to be preserved… regional significance of that habitat … It also has to do with the adjacent habitats." (T. Page 77-78) The Applicant did not provide a rational basis for their P factor, they just put a number in. (T. Page434)

44. While Mr. Hull disagreed with the scoring of the project, the difference between his and Long Bar's numbers are a

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reflection in the difference in the application of reasonable scientific judgment.

The Petitioners expert Clark Hull submitted a P factor analysis (P.Exhibit P-1 page 9) containing the required 5 factors required by Fla. Admin. Code R. 62-345.500(3) requiring each factor be assigned a score based on the applicability and relative significance. Each assessment area by Petitioners' evidence for Presservation had a unique determination of the P factor with the information justifying the score. Hull also supplemented the exhibit by testifing on each of the 5 factors and further described and justified why his score was lower than that in the application and proposed permit.(T.Page 335 -336, 419-421,434)

The record does not provide evidence by an exhibit or by testimony the preservation adjustment factor (P factor) performed by the applicant complied with the requirements of Fla. Admin. Code R. 62-345.500(3) by assigning a score based on the applicability and relative significance for each of the 5 considerations. 62-345.500 Assessment and Scoring - Part II states:

The preservation adjustment factor shall be scored on a scale from 0 (no preservation value) to 1 (optimal preservation value), on one-tenth increments. ***The score shall be assigned based on the applicability and relative significance of the following considerations:***

1. The extent to which proposed management activities within the preserve area promote natural ecological conditions such as fire patterns or the exclusion of invasive exotic species.

2. The ecological and hydrological relationship between wetlands, other surface waters, and uplands to be preserved.

3. The scarcity of the habitat provided by the proposed preservation area and the degree to which listed species use the area.

4. The proximity of the area to be preserved to areas of national, state, or regional ecological significance, such as national or state parks, Outstanding Florida Waters, and other regionally significant ecological resources or habitats, such as lands acquired or to be acquired through governmental or non-profit land acquisition programs for environmental conservation, and whether the areas to be preserved include corridors between these habitats.

5. The extent and likelihood of potential adverse impacts if the assessment area were not preserved.

(b) The preservation adjustment factor is multiplied by the mitigation delta assigned to the preservation proposal to yield an adjusted mitigation delta for preservation.Fla. Admin. Code R. 62-345.500(3)

Petitioners provided a preponderance of evidence; superior in quality that met the requirements of Fla. Admin. Code R. 62-345.500(3) and the applicant did not.

> 45. Petitioners failed to prove by a preponderance of the evidence that the Department's determination that the project could generate 18.01 credits was incorrect.

Any finding of fact that the applicant's UMAM score is correct would not be supported by the evidence for failing to comply with the requirements of Fla. Admin. Code R. 62-345.500(3) which requires the applicant to consider the applicability and relative significance of the required considerations for the preservation adjustment factor by stating "*The score shall be assigned based on the applicability and relative significance of the following considerations*:…" No evidence any score was assigned to each consideration required.

<u>Exception No. 2c.</u> No evidence or testimony was provided to support FOF 43,44,45 for a UMAM score that indicates lift generated for the water environment score increases from 8 to 9 for assessment areas 3a,3b,4,4b in Attachment H (JT EXH 1 – 567) is correct, and the resulting UMAM scores are supported by evidence required to comply with Fla. Admin. Code 62-345.

Attachment H shown below does not contain evidence to support the increase in the water environment scores. Since the applicant did not provide as evidence any Part II forms for each assessment area the testimony is the only evidence to support this score. Hoffner testified that there was no lift for each of the assessment areas yet the summary table includes lift not supported by evidence.

This lack of evidence and testimony that contradicts the evidence to support the applicant's UMAM, fails to support the FOF that the UMAM score is more persuasive, correct, or just a difference in the experts reasonable scientific judgement. The four corners of the record cannot support a finding of fact that the permit should include lift in assessment areas 3a,3b,4,4b for water environment a formula used to determine a UMAM score.

ATTACHMENT H - Credit Assessment

Long Bar Pointe Mitigation Bank - UMAM Assessment

ASSESSMENT AREA NUMBER	MITIGATION CATEGORY	AREA (acres)	SCORE						UMAM W/OUT MIT.	UMAM WITH MIT.	DELTA	TIME LAG	P FACTOR	RISK	RFG	CREDIT
			LOCATION AND LANDSCAPE		WATER ENVIRONMENT		COMMUNITY STRUCTURE									
			W/OUT or CUR.*	WITH MIT.	W/OUT or CUR.*	WITH MIT.	W/OUT or CUR.*	WITH MIT.								
3A	Seagrass, Adjacent Mangroves Trimmable via GP, Preserved Intact Preservation	9.85	7.00	9.00	8.00	9.00	8.00	9.00	0.77	0.90	0.13	1.00	0.90	1.00	0.12	**1.18**
3B	Seagrass, Adjacent Mangroves Not Trimmable via GP, Left Intact Preservation	1.75	8.00	9.00	8.00	9.00	8.00	9.00	0.80	0.90	0.10	1.00	0.90	1.00	0.09	**0.16**
4	Seagrass, Adjacent Mangroves Reserved to be Trimmed	47.20	7.00	8.00	8.00	9.00	8.00	9.00	0.77	0.87	0.10	1.00	0.70	1.00	0.07	**3.30**
4A	Seagrass, Adjacent Mangroves Reserved to be Trimmed	6.38	7.00	8.00	8.00	8.00	8.00	9.00	0.77	0.83	0.07	1.00	0.70	1.00	0.05	**0.30**
4B	Seagrass, Adjacent Mangroves Not Trimmable via GP Preservation	3.75	7.00	8.00	8.00	9.00	8.00	9.00	0.77	0.87	0.10	1.00	0.90	1.00	0.09	**0.34**

Alec Hoffner provided the only testimony for the applicant's water environment score assessment areas 3a,3b,4,4b stating that no lift was given to the water environment – "water environment score the current condition, we scored it an eight, proposed condition eight. So there was no lift generated" (T.Page 90). Without evidence to support this increase in the applicant's UMAM summary table, the UMAM score finding did not contain sufficient information to support a finding of fact that provided a preponderance of evidence; superior in quality that allows for the 4.95 mitigation bank seagrass credits is

correct. The conflict in testimony and the summary table fails to provide competent substantial evidence to support FOF 43,44,45(pages 19,20).

The Petitioners did provide evidence by testimony and exhibits to support a UMAM score complying with Fla. Admin. Code 62-345 and calculated a score of zero indicating no credits for these assessment areas which is correct.

<u>Exception No. 2d</u>. Water quality improvements used to calculate the UMAM score for seagrasses by the applicant lacks any evidence and provides no reasonable assurance that water quality improvements would benefit the seagrasses and cause a gain in ecological function.

The seagrass UMAM score was based on water quality improvements for removing exotics. There is no competent and substantial evidence to support the assumption used by Alec Hoffner or the review by FDEP Tim Rach. No water quality expert testified, no modeling was done to support such an assumption, Alec Hoffner's testimony did not provide any evidence to support water quality will improve by removing exotics a basis for all his UMAM scores. Mr. Hoffner was proffered as an expert in wetland ecology, restoration ecology, and mitigation, not water quality analysis. The Reasonable Scientific Judgement for a UMAM score that is based on unsupported assumptions that water quality will improve is not accurate and can't support facts that the ecological conditions will increase.

The applicant and FDEP did not model any nutrient loading currently or for post mitigation.(T.pages 126,223) No competent evidence was provided that nutrients would

be reduced by removing Brazilian pepper/exotics. (T. Page 126). A reasonable person would not assume fewer nutrients would be in the waters impacting seagrasses fish and wildlife, by substituting one plant for another. One would have to see evidence of a study that compared the larger Brazilian pepper exotics (JT EXH 1 – 622) to the smaller replacement plants, (JT EXH 1 – 172) and then have some model that demonstrated the flow of water would cross the plants changing the nutrient uptake in a manner that would impact fish and wildlife. Clark Hull testimony and his UMAM Part II (P.Exhibits 2-13) indicates a de minimis amount of impact to seagrasses (.Brazilian pepper controlled in freshwater marsh farther upslope has de minimis effect on this AA.) which would be supported by a reasonable person without evidence to the contrary.

No reasonable person would think these small 4 inch plugs planted 5 feet on center and 3 gallon plants 10 feet on center could remove more nutrients than exotics of Brazilian Pepper. The evidence just does not support finding.

Long Bar Pointe Mitigation Bank
Hardwood-Conifer Mixed Upland and Freshwater Shrub/Marsh
Enhancement Planting Plan
Attachment #9

Freshwater Shrub/Marsh Enhancement Area (±17.5 acres)				
Species	**Common Name**	**Size**	**Spacing**	**Quantity**
Muhlenbergia capillaris	Gulf Muhly Grass	4" plug	5' on center	6273
Blechnum serrulatum	Swamp Fern	4" plug	5' on center	6273
Spartina alterniflora	Smooth Cordgrass	4" plug	5' on center	6273
Juncus roemerianus	Needlegrass Rush	4" plug	5' on center	6273
Acrostichum danaeifolium	Leather Fern	4" plug	5' on center	6273
Muyrica cerifera	Wax Myrtle	3 gal.	10' on center	1960
Baccharis halimifolia	Saltbush	3 gal.	10' on center	1960
Conocarpus erectus	Buttonwood	3 gal.	10' on center	1960
Cephalanthus occidentalis	Buttonbush	3 gal.	10' on center	1960

FDEP did not define the difference between with and without mitigation percentage for exotics, which used the words low and minimal, so there is no evidence there would be a difference after mitigation to support an increase in environmental values impacting fish and wildlife, and indicated there may be a 5 percent degradation (T page 188).. FDEP proved they did not know the amount of exotics and that it really didn't matter since this was about preservation stating "What I'm trying to say, it doesn't matter, because we're preserving this habitat. We're giving credits for the preservation." (T. Page 391, Pages 186-189). This contradicts the credit calculations for removing exotics and improvements to water quality calculated by Hoffner. If the exotic removal does not matter as Mr. Rach indicates then the evidence does not support the UMAM score.

Manatee County requires as a condition of development approval removal of Brazilian peppers in this area known as a Coastal High Hazard Area(Exhibit 67 Land Use Map). This was not taken into consideration in calculation of the UMAM score.(P Exhibit 63 Manatee County Land Development Code 403.8)

Petitioners did submit evidence that Seagrasses are healthy and increasing in the area of the project site. Water quality improvements have been the reason sea grasses are increasing (T. Page 276).

Seagrasses are an indicative of the health of the bay waters and used as a water quality indicator. (T.Page 472) Seagrasses in Sarasota Bay, which includes this region, increased almost 2400 acres in the period between 2006 and 2012. (T.Page 470). In 2014 the state and federal government established numeric nutrient criteria for Sarasota Bay waters, which have not been exceeded. Seagrasses along the shorelines of Long Bar Pointe have

increased since 1988 (T.Page 478) Manatee County reduced pollution to Sarasota Bay around the Long Bar Pointe site (T. Page 499,500).

Any finding of fact that the applicant's UMAM score is correct would not be supported by the evidence for failing to provide any competent evidence to support these finding.

44. While Mr. Hull disagreed with the scoring of the project, the difference between his and Long Bar's numbers are a

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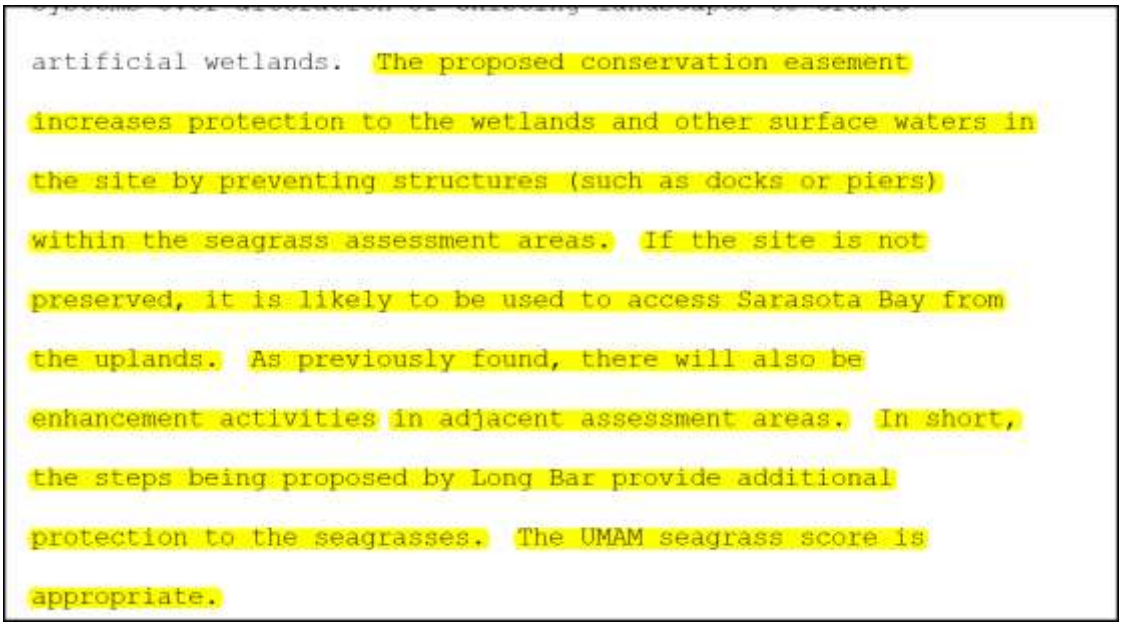
reflection in the difference in the application of reasonable scientific judgment.

45. Petitioners failed to prove by a preponderance of the evidence that the Department's determination that the project could generate 18.01 credits was incorrect.

The ALJ incorrectly states the UMAM score included in FOF 44 and 45 is just a difference in reasonable scientific judgement and that the preponderance of evidence did not prove the 18.01 credits was not accurate. The petitioners proved by competent and substantial evidence the applicant and review by FDEP failed to perform the UMAM consistent with the UMAM rules contained in Chapter 62-345,F.A.C, and did not have any evidence to support a score based on removing exotics will have any difference since the FDEP's testimony stated it only used preservation as its justification conflicting with

Hoffner testifying he used preservation and enhancement. This failure to comply with the rule and lack of supporting evidence causes the UMAM score/ Mitigation Bank Credit to be inaccurate.

III. Exception No. 3 – FOF47 The conservation easement will not prevent unmitigated adverse impacts to seagrasses. The UMAM is not supported by evidence that if the site is not preserved, it is likely to be used to access Sarasota Bay from the uplands to support a seagrass mitigation bank credit.



artificial wetlands. The proposed conservation easement increases protection to the wetlands and other surface waters in the site by preventing structures (such as docks or piers) within the seagrass assessment areas. If the site is not preserved, it is likely to be used to access Sarasota Bay from the uplands. As previously found, there will also be enhancement activities in adjacent assessment areas. In short, the steps being proposed by Long Bar provide additional protection to the seagrasses. The UMAM seagrass score is appropriate.

<u>Exception No. 3 a</u>. First of all in the seagrass assessment areas there is not continuous seagrasses along the shoreline in the areas depicted by the applicant for structures (LB Exhibit 4).

The applicant's existing site conditions cited in the application exhibits (JT EH 1 –335)

Summary

Seagrass

Existing Condition:

- Predominantly *Halodule wrightii* within the bottomlands owned by Long Bar Pointe
- Patches of *Thalassia testudinum* also within bottomlands owned by Long Bar Pointe
- Rock and oyster reefs located near the shoreline
- Silt and sand shoreline
- Scoured bottomlands

Mitigation Activities:

are in conflict with the applicant's expert, Alec Hoffner's testimony for **community structure score a part of his Part II** Quantification of Assessment stated "the conservation easement that would restrict any future boardwalk, pier, observation platform construction. So you would be eliminating those direct impacts to seagrasses as well as any potential shading impacts." (T.Page 91) **Hoffner testified he went through a similar process for each of the seagrass assessment areas and stated all scored based on the same criteria and the calculations were exactly the same**.

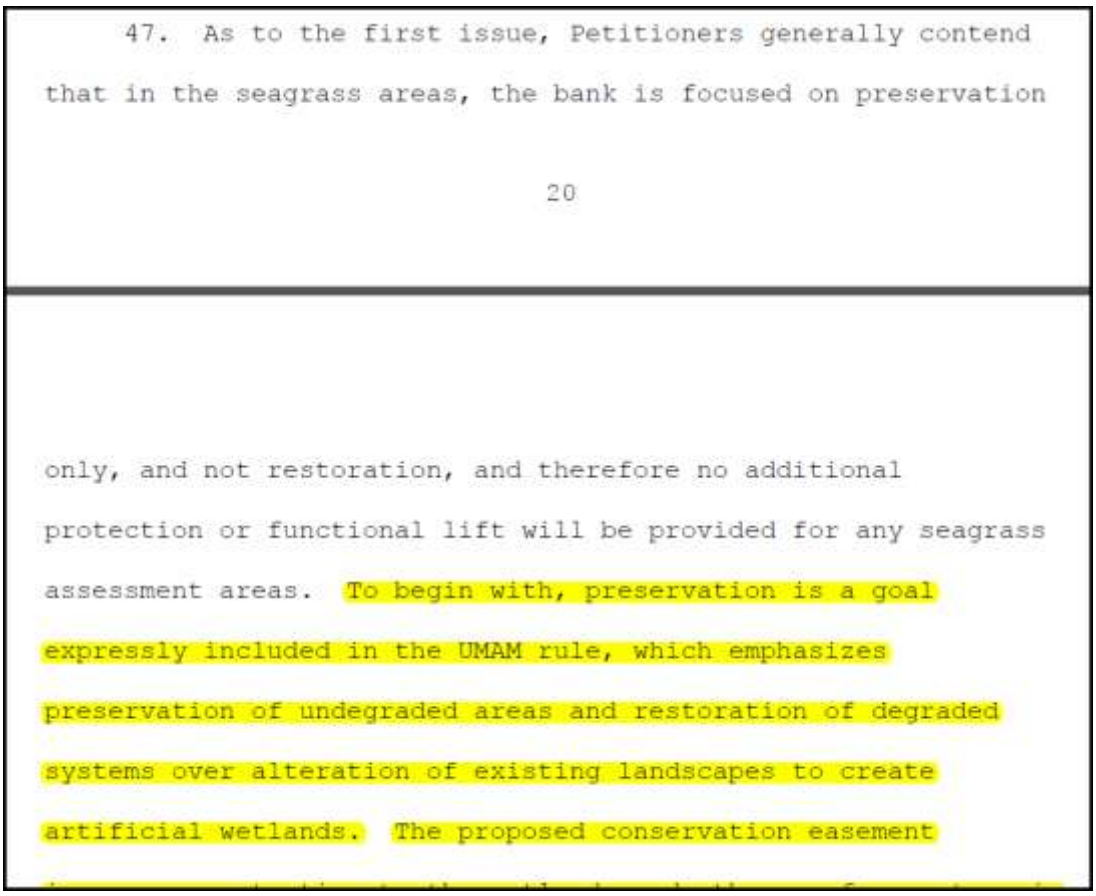
Contrary to the testimony at the hearing by Hoffner, applicant's exhibits state the shoreline bottomlands as silt and sand (JT EXH 1 – 467), and further defined by stating - Existing bottomlands are not all seagrasses and vary from sparse to dense seagrass beds, oyster reefs and sand/silt bottom areas. (JT EXH 1 – 468) … A series of oyster reefs also occur along the entire shoreline of Long Bar Pointe. (JT EXH 1 – 469)

There is no evidence to support seagrasses would be impacted by docks since most of the shoreline is silt, sand, and oyster reefs and not seagrasses as Hoffner states. For the UMAM score for seagrasses to be appropriate evidence needs to insure there is an increase to ecological value for the functions for fish and wildlife, not just that structures/docks could be built and a conservation easement prevents these

structures/docks. Even if there was to be structures (such as docks or piers) without a conservation easement as FOF 47 states, these would require a permit and any adverse impacts would be mitigated. (T.Page 384, and 62-341.427(f) General Permit for Certain Piers and Associated Structures states) The finding provides no fact that structures would have adverse impacts to the environment. The ALJ finding does not support that the UMAM seagrass score is accurate based on his findings within FOF 47.

<u>Exception No. 3 b</u>. FOF 47 incorrectly references the UMAM rule as to emphasize preservation of undegraded areas and restoration of degraded systems over alteration of existing landscapes to create artificial wetlands .

FOF 47 states "*To begin with, preservation is a goal expressly included in the UMAM rule, which emphasizes preservation of undegraded areas and restoration of degraded systems over alteration of existing landscapes to create artificial wetlands*."



47. As to the first issue, Petitioners generally contend that in the seagrass areas, the bank is focused on preservation

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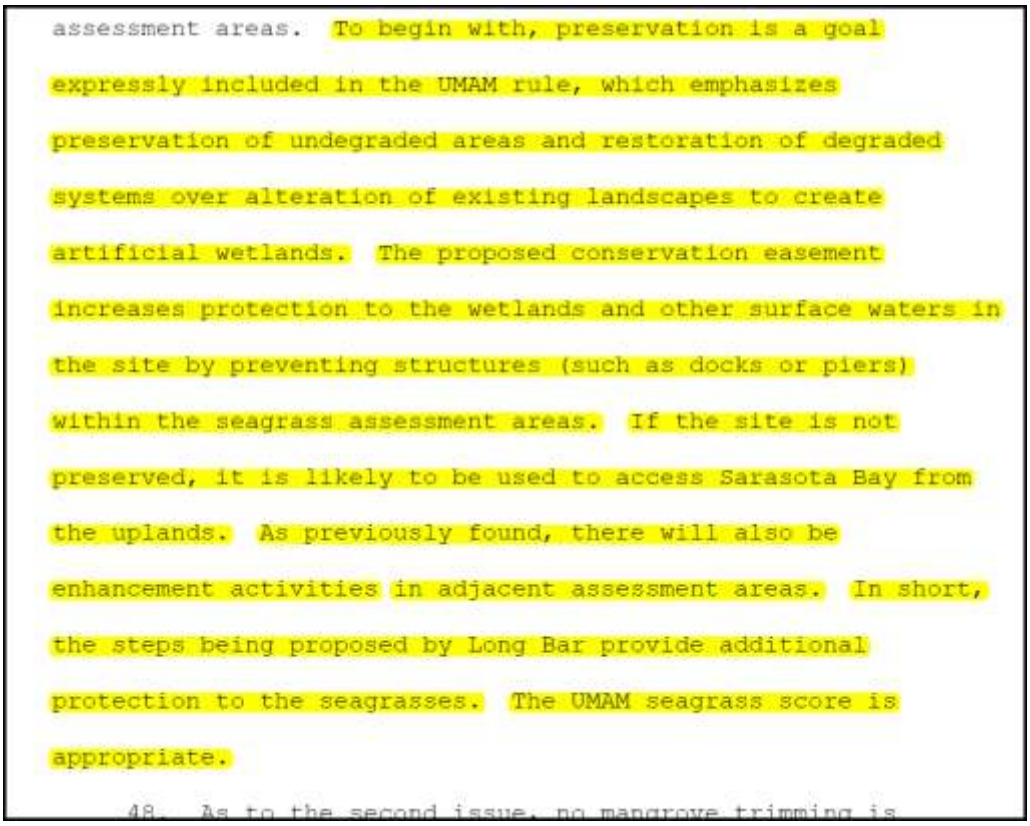
only, and not restoration, and therefore no additional protection or functional lift will be provided for any seagrass assessment areas. To begin with, preservation is a goal expressly included in the UMAM rule, which emphasizes preservation of undegraded areas and restoration of degraded systems over alteration of existing landscapes to create artificial wetlands. The proposed conservation easement

The fact is there is no rule citation or intent within the UMAM rule that could support this finding. UMAM is a procedure to calculate a score for a mitigation bank credit. The reference contained in CHAPTER 62-342 MITIGATION BANKS *states "Mitigation Banks shall be consistent with Agency endorsed watershed management objectives and emphasize restoration and enhancement of degraded ecosystems* ***and the preservation of uplands and wetlands as intact ecosystems rather than alteration of landscapes to create wetlands.****"* It does not state preservation of undegraded areas even in this rule.

Any reference to this incorrect citation must be stricken and the finding "The UMAM seagrass score is appropriate." is without evidence.

<u>Exception No. 3 c.</u> Conservation Easement preventing structures such as docks does not provide evidence that the UMAM score is appropriate.



assessment areas. To begin with, preservation is a goal expressly included in the UMAM rule, which emphasizes preservation of undegraded areas and restoration of degraded systems over alteration of existing landscapes to create artificial wetlands. The proposed conservation easement increases protection to the wetlands and other surface waters in the site by preventing structures (such as docks or piers) within the seagrass assessment areas. If the site is not preserved, it is likely to be used to access Sarasota Bay from the uplands. As previously found, there will also be enhancement activities in adjacent assessment areas. In short, the steps being proposed by Long Bar provide additional protection to the seagrasses. The UMAM seagrass score is appropriate.

48. As to the second issue, no mangrove trimming is

There was evidence that docks could only be built with an Environmental Resource Permit which would mitigate for any adverse impacts. 62-341.427(f) General Permit for Certain Piers and Associated Structures states - "This general permit shall not authorize the construction of more than one pier per parcel of land or individual lot. For the purposes of this general permit, multi-family living complexes shall be treated as one parcel of property regardless of the legal division of ownership or control of the associated property." (T. Page 112) It is more reasonable that only one pier or dock could meet the requirements of a general permit. (T.Page 384)

Even if there was to be structures (such as docks or piers) without a conservation easement these would require a permit and any adverse impacts would be mitigated. The finding provides no fact that structures would have adverse impacts to the environment.

A conservation easement is a piece of paper that would be recorded and by itself has no impact on seagrasses ecological value to justify a credit without merit." Fla. Admin. Code R. 62-345.200(3). The without preservation scenario must be based on likelihood scenarios ***if but for the conservation easement these things won't happen.*** The pier/dock structures identified as scenarios in the future by the applicant are not a likelihood scenario without a conservation easement.

Even if structures (such as docks or piers) could be built as submitted by the applicant exhibit, there is no proof that seagrasses are in these specific areas that would have increased ecological value from recording a conservation easement.

FOF47 does not find structures would have an impact to fish and wildlife and a resulting increase to ecological values.

<u>Exception No. 3 d.</u> UMAM score did not accurately account for existing protection of seagrasses required in the scoring requirements contained in 62-345.500 Assessment and Scoring - Part II. (3)(a).

62-345.500 Assessment and Scoring - Part II. *(3)(a) States " When assessing preservation, the "with mitigation" assessment shall consider the potential of the assessment area to perform current functions in the long term, considering the protection mechanism proposed, and* ***the "without preservation" assessment shall evaluate the assessment area's functions considering the extent and likelihood of what activities would occur if it were not preserved, the temporary or permanent effects of those***

activities, and the protection provided by existing easements, restrictive covenants, or state, federal, and local rules, ordinances and regulations."

Seagrasses are already protected under existing regulations (T.Page 117), FDEP did not review the specific regulations for local government's existing protection, or Manatee County land development codes or comprehensive plan requirements, or boating regulations that restricted boat speed or protected seagrasses. (Page 221) Tim Rach did not perform a site visit from the bay by boat. The petitioners' experts John Stevely and Clark Hull did perform a site visit from the bay by a boat and then using a kayak.
Part II requires considering of the existing protection provided by existing rules. This was not done.

The UMAM score did not comply with requirements of F.A.C **62-345.500 Assessment and Scoring - Part II.** (3)(a) and is not correct or appropiate.

Exception No. 3 e. FOF 47 Preservation contemplated by the conservation easement must prove increase in ecological value

In order to obtain a mitigation bank credit it is required to have reasonable assurances based on reasonable scientific judgement, based on facts and likelihood scenarios that would create an "increase in ecological value resulting from restoration, enhancement, preservation, or creation activities." Fla. Admin. Code R. 62-345.200(8).

The seagrass credits requested by the applicant and testified by FDEP are for preservation. The credits proposed are mainly for the placement of a conservation easement, and installation of informational buoys. (T. Page 84-95,553)

To justify an increase in ecological value at this site it is required to evaluate the potential of the assessment area to perform current functions in the long term for the placement of a conservation easement, and installation of informational buoys(with mitigation) compared to the extent and likelihood of what activities would occur if it were not preserved, the temporary or permanent effects of those activities, and the protection provided by existing easements, restrictive covenants, or state, federal, and local rules, ordinances and regulations(without mitigation).

Stevely the only expert for boating impacts to seagrasses testified and relied upon past studies that marking seagrass beds were not effective in protecting sea grasses but could increase boat traffic and prop scarring. (Exhibit 55, T.Page 300) causing adverse impacts to petitioners' substantial interest.

No reasonable assurance of success was included as evidence. The applicant did not provide the percent of existing prop scarring for seagrasses within each the assessment area, or for the bank as a whole. Transect lines (JT EXH 1 - 559 , T.Page 135) are the success criteria to determine mitigation success or meeting criteria that would demonstrate an increase in ecological value. The current conditions within the transect areas do not have evidence to define the amount or percentage of sea grasses. The success criterion does not have evidence the seagrasses can meet success criteria (preserved and maintained at existing conditions).(T.Page 426)

Currently, there are a few vessel propeller prop scars within the mitigation bank bottomlands that have either damaged or destroyed seagrasses. Excluding the prop scars and sediment deltas from agricultural outfall runoff, the seagrass beds within the Long Bar Pointe bottomlands are high quality and provide full function including nutrient cycling and essential fish habitat. (JT EXH 1 – 469)

There is little scarring within the site due to shallow waters (T.Page 278). Very few boaters use the waters due to its shallow depth and most of the site at low water is only a few inches. There is also oyster habitat on the site which further limits boaters. Information buoys could have an adverse impact on seagrasses not only within the site but outside the mitigation bank, impacting state submerged sovereign lands. (T.Page 279)

The area over the seagrasses will not be fenced or have any enforcement to restrict access; the recording of a conservation easement will have no beneficial impact to fish and wildlife. The prop scarring that is taking place appears to be self-healing (resilient) (T. Page 265). No reasonable person would conclude a conservation easement over state waters/Applicant's bottomland, without restricting access would have any change to increase ecological value.

<u>Exception No. 4</u> FOF 26 - Installation of buoys was not proven by competent substantial evidence to significantly reduce or eliminate prop scars within the seagrass beds within the project site and produce a public benefit.

in the vicinity of the Project. The Plan contemplates the installation of non-regulatory seagrass information buoys at approximately the three-foot bathymetric contour along the Project site, and which follows the path of the traditional unmarked navigational channel where they can be readily seen. The buoys will inform boaters of the presence of seagrasses surrounding the Project site, which support significant estuarine habitats and can be harmed or destroyed from vessel groundings or prop scarring. Installation of the buoys will provide a significant public benefit in that it should significantly reduce or eliminate prop scars within the seagrass beds along the project site. Good channel marking is one of the best ways to protect seagrasses from prop scarring. There is no credible evidence that signage will attract inexperienced boaters who will damage the seagrasses in the area.

27. The permit does not authorize the installation of the

The evidence the applicant provided to support the proposed informational buoys was a study from another County outside the MSA and basin. The study results were for regulatory marking not based on the non-regulatory informational buoys proposed by the applicant (T.Page 115,119). Mr. Hoffner the applicant's expert was proffered as an expert in wetland ecology, restoration ecology, and mitigation, not on boating impacts on seagrasses. Petitioners submitted evidence (P. Exhibit 55 Hearsay) and provided testimony by several experts that the buoys would impact seagrasses within the site and outside the project site. John Stevely who was personally involved in the study (P.Exhibit 55), serving on the Technical Advisory Committee of Sarasota Bay National Estuary,

testified that the result of placing similar buoys by Sister Keys (in the adjacent area to the mitigation bank site proposed) attracted more boaters and should be removed.(T. Page 304) The buoys that did some benefit were those that marked existing channels. The ALJ confuses the testimony in his finding that marking a channel benefits the seagrasses from preventing prop scarring. This finding has no evidence to support this and the applicant did not provide testimony or evidence by an expert in this area of expertise. There is no channel that is marked so the finding "Good channel marking is one of the best ways to protect seagrasses from prop scarring." is not supported by the evidence.

The Petitioners' expert John Stevely was the only expert proffered for boating impacts on seagrasses.(T. Page 276) As a Florida sea grant agent for over 30 years, he testified that the signage on the buoys would attract inexperienced. The applicant had no expert testifying on impacts to seagrasses so Stevely's testimony would be the only credible evidence. The finding "no credible evidence that signage will attract inexperienced boaters who will damage the seagrasses in the area" is contrary to the evidence and the expert's testimony. Experienced boaters may also be attracted to this area and impact seagrasses. Stevely's testimony stated these buoys, these informational buoys, would have adverse impacts on the environment.(T. Page 288)

Placement of information buoys could cause adverse impacts to seagrasses (T.Page 279) not only within the mitigation bank but outside the bank impacting state sovereign land in violation of the intent of 253.04 F.S.

There was no evidence to support the finding stating “buoys will provide a significant public benefit in that it should significantly reduce or eliminate prop scars within the seagrass beds along the project site.” Applicant’s expert only testified that “seagrass informational signs could potentially reduce the amount of future prop scarring”.(T.page 91) not significantly reducing or eliminating prop scarring.

The reasonable person test must be used. First of all, the informational buoys proposed are not channel markers or marking a channel, they would mark just deep water that is not on the applicant’s site. Second, the buoys would be placed in waters where no other markers exist and have letters that can only be read if someone was real close to the marker (T. Page 115), testimony stated 50 yards. Even Hoffner the applicant’s expert stated the buoys would be an attractive nuisance if placed on the mitigation bank site and further stated “We didn't want people to come on the seagrass areas to see what the signs say” (T. Page 85). So the evidence if Hoffner’s testimony is relied upon buoys attract boaters as Stevely testified. This testimony is consistent with the facts McClash who was a Manatee County Commissioner for 22 years testified when he was a commissioner he recommended no markers along the area of the mitigation site known as Long Bar Pointe (T. Page 527) to avoid attracting boaters to this part of the bay(T. Page 526)

Seagrass informational buoys are not channel markers and a finding of fact cannot be made they are marking a channel – this departs from the essential requirements of law for

what is considered a channel marker, and no evidence can be found the informational buoy proposed is a channel marker.

Evidence by Stevely stated “When you start just putting out seagrass signs out in the middle of the bay, so they're not channel markers, they can actually serve as magnets and attract boaters to the area.(T. Page 266). Again his comments were not limited to inexperienced boaters as what the finding states so as to not impact seagrasses and be a significant public benefit.

Evidence also indicated only a few boats were typically on the mitigation bank site maybe 1 or 2 (T.Page 286) and only a few minor prop scars were observed.(T. Page 278) Stevely also participated in boat studies in Sarasota Bay(T. Page 284). Not a significant amount.

No reasonable person would consider the testimony by John Stevely as not credible. Stevely and was the most familiar with the area water; serving on the Sarasota Bay National Estuary in a role as chairman of a technical advisory committee and has done extensive research in Sarasota Bay, worked not only reviewing reports but in producing reports. While the ALJ reserves the right of deciding on credible witnesses, no reasonable person would agree that Stevely’s testimony as to seagrass impacts was not credible as FOF 26 found that signage would not attract inexperienced boaters to this area.

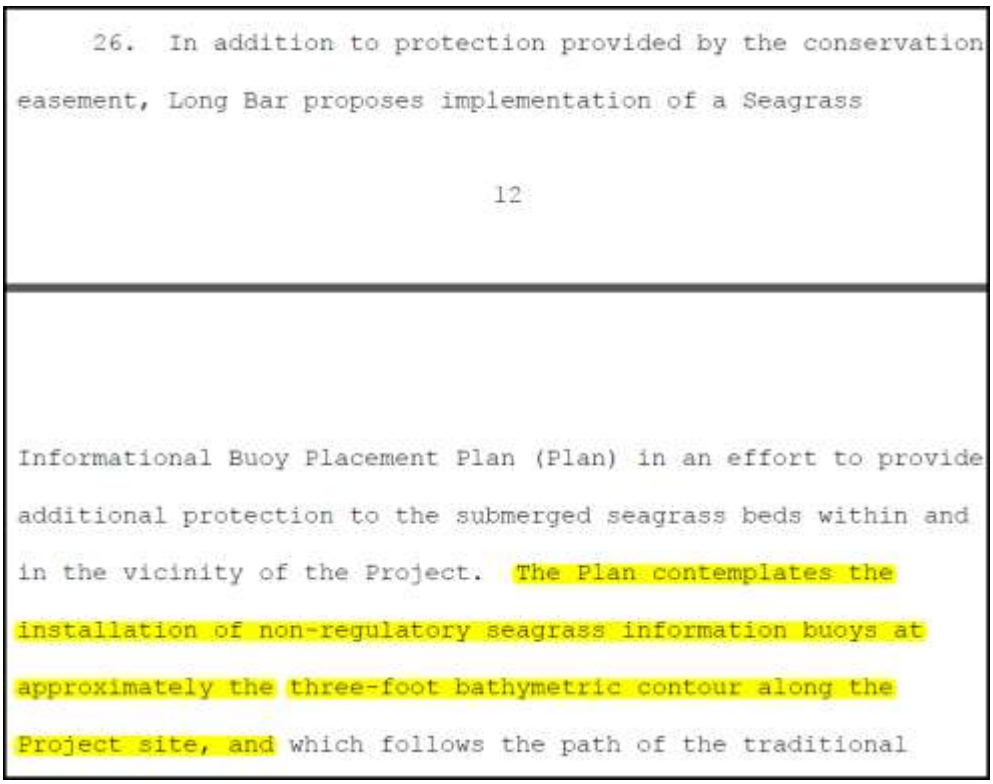
The ALJ FOF 26 is without evidence to support this finding about the significant public benefits of installing the buoys.

<u>Exception No. 5.</u> FOF 26 Placement of the buoys are not along the site owned by the applicant (T. page 118), cannot be readily seen containing finding not supported by evidence

The buoys are not on the mitigation bank site, ""Mitigation site" means wetlands and other surface waters as delineated pursuant to Chapter 62-340, F.A.C., or uplands, that are proposed to be created, restored, enhanced, or preserved by the mitigation project."(**62-345.200 Definitions)**

Mitigation bank credits are proposed for the placement of buoys on state sovereign submerged lands, not on the site owned by the applicant, (T.Page 118, 35) Providing mitigation bank credits for use of state sovereign land is not justified since these are public lands and the use is reserved for the public. Other entities could permit informational buoys. (T. Page 118)

The buoys are not along the site as stated in the finding by the *ALJ "The Plan contemplates the installation of non-regulatory seagrass information buoys at approximately the three-foot bathymetric contour along the Project site"* (T.Page 85).



26. In addition to protection provided by the conservation easement, Long Bar proposes implementation of a Seagrass

12

Informational Buoy Placement Plan (Plan) in an effort to provide additional protection to the submerged seagrass beds within and in the vicinity of the Project. The Plan contemplates the installation of non-regulatory seagrass information buoys at approximately the three-foot bathymetric contour along the Project site, and which follows the path of the traditional

The applicant even stated placing the buoys along the site would cause an attractive nuisance, so they moved them off their site.(T. Page 85) The Exhibit clearly shows the buoys used for a mitigation bank site are not in an assessment area.(JT EXH 1 – 026).

FOF 26 finding that the buoys "can be readily seen" and also the finding that the buoys are along the site is without any evidence to support this finding.

IV. Exception No. 6: FOF 50,51,52 finding that the mitigation bank complied with applicable criteria is not supported by evidence.

For a permit to be issued for a mitigation bank a UMAM score must be calculated in accordance with CHAPTER 62-345 UNIFORM MITIGATION ASSESSMENT

METHOD. The evidence does not support that the UMAM score produced by the applicant and reviewed by FDEP met the methods prescribed and required. (See exceptions II and III above)

The buoys proposed would harm seagrasses and adversely affect fish and wildlife.

The gain in ecological value by the conservation easement, and assumptions used to base reasonable scientific judgement for a UMAM score, and lack of evidence to support the UMAM scores, would fail to increase ecological value for mitigation credits totaling 18.01, and therefore the future permits that would withdraw credits from this mitigation bank would not compensate for adverse impacts to the extent required by 62-330.301 and 62-330.302 for the issuance of an ERP.

The failure to meet the requirements of the UMAM score impacts petitioners' substantial interest, and cannot be used to permit a mitigation bank credit as required by rule 62-342.400.

There is not a preponderance of evidence to support the UMAM scores totaling 18.01 credits complied with the applicable criteria and fails to meet the essential requirements of law.

V: Exception No. 7: COL 55. McClash injury is not too speculative and has standing.

55. Mr. McClash alleges he has standing under chapter 120 as a person whose substantial interests are affected by the proposed issuance of the permit. Here, the evidence shows that Mr. McClash is concerned with activities contemplated, but not authorized, by the permit, and future ERPs that may have impacts that could potentially be offset through the purchase of credits from the Project. These concerns will not result in a direct injury or place Mr. McClash in an immediate danger of sustaining a direct injury as a result of the agency action. His concern is with future permit impacts, which are too speculative and remote to give rise to standing under chapter 120.

McClash testified that the mitigation bank permit as presented would reduce recreational fishing values, meaning less crabs, shrimp, because of the future adverse impacts adjacent to the site, and within the Mitigation Service Area (MSA). He stated the project is not clearly in the public interest because of several issues. McClash testified how the mitigation bank by having "fake lift", Mitigation bank credits will not compensate for future ERP causing adverse impacts affecting his substantial interest for permits issued within the MSA; an area he uses from St Pete to Charlotte Harbor. (T -Page 539)McClash produces several exhibits to support his standing (P EXHIBIT 78,81)

These concerns of Petitioner McClash will result in direct injury or place Mr. McClash in an immediate danger of sustaining a direct injury as a result of the agency action. His concern is with future permit impacts, which are not speculative and remote to give rise to standing under chapter 120. Since reliance on mitigation bank credits are well

established for permits to offset adverse impacts in areas McClash uses, and the award of 18.01 credits is not supported by the evidence it is not too speculative that he would be injured, and that injury could be immediate.

The placement of the buoys is part of the permit since it assumes the action required for mitigation bank credits, demonstrating reasonable assurance by the assumption such authorization will be granted. Hoffner used the buoys as part of his calculating his UMAM score. The ALJ indicates a score of 18.01 is correct. It could only be thought of correct if buoys are installed. A mitigation bank permit and UMAM score are based upon 62-345.500 Assessment and Scoring - Part II. (1)(b) states "With mitigation" or "with impact" – The "with mitigation" and "with impact" assessments are based on the reasonably expected outcome, which may represent an increase, decrease, or no change in value relative to current conditions. For the "with impact" and "with mitigation" assessments, the evaluator will assume that all other necessary regulatory authorizations required for the proposed project have been obtained and that construction will be consistent with such authorizations. The "with mitigation" assessment will be scored only when reasonable assurance has been provided that the proposed plan can be conducted.

The ALJ departs from the requirements of the UMAM rule by stating buoys are speculative. They are not speculative if the UMAM score used them to calculate the credit for a mitigation bank.

These buoys will attract boaters and increase prop scarring in the immediate area and increase harm to Manatees. The buoys would be under a general permit and would not allow a challenge and must be reviewed as part of the mitigation bank permit since the

credits require the buoys along with the security plan including these as part of the requirements of the mitigation bank permit.

These cause an injury to McClash. He has standing

VI: Exception No. 8: COL 59 and 60 - Long Bar made its prima facie case of entitlement to the permit but the petitioners proved with ultimate persuasion against issuing the permit.

Long Bar made its prima facie case of entitlement to the permit. The burden of ultimate persuasion was made by the Petitioners proving their case in opposition to the permit by a preponderance of the competent and substantial evidence. Petitioners' should prevail; the facts and evidence do not support the 18.01 mitigation bank credits. Long Bar has not provided reasonable assurance that all relevant criteria for the issuance of an ERP and establishment of a mitigation bank have been satisfied.

VII: **Exception No. 9: FOF 43,44,45, 50,51,52 and COL 59 and 60 Essential Requirements of Law have not been met.(** Chicken 'N' Things v. Murray, 329 So.2d 302, 304 (Fla.1976).)

The UMAM rule **CHAPTER 62-345** uses the words shall and must. The deference rule does not apply to allow the Department to determine the requirements have been made in absent of facts to support UMAM score compliance. The ALJ did not have evidence to support the UMAM score since this score did not meet the Essential Requirements of Law that requires a fact to support compliance with theUMAM rule(law).

<u>Exception No. 9a.</u> 62-345.500 Assessment and Scoring - Part II.states "(1) Utilizing the frame of reference established in Part I, the information obtained under this part **must**

be used to determine the degree to which the assessment area provides the functions identified in Part I and the amount of function lost or gained by the project. Each impact assessment area and each mitigation assessment area **must** be assessed under two conditions."

The informational buoys used to calculate the UMAM score was outside the assessment area and could not be used in the calculation and does not meet the Essential Requirements of Law.

Exception No. 9b. **62-345.500 Assessment and Scoring - Part II (3)(a**) states " When assessing preservation, the "with mitigation" assessment shall consider the potential of the assessment area to perform current functions in the long term, considering the protection mechanism proposed, and the "without preservation" assessment shall evaluate the assessment area's functions considering the extent and likelihood of what activities would occur if it were not preserved, the temporary or permanent effects of those activities, and the protection provided by existing easements, restrictive covenants, or state, federal, and local rules, ordinances and regulations.

The evidence does not include the protection provided by existing easements, restrictive covenants, or state, federal, and local rules, ordinances and regulations were evaluated. This does not meet the Essential Requirements of Law.

Exception No. 9c. **62-345.500 Assessment and Scoring - Part II (3)(a) states …***The* ***preservation adjustment factor shall be scored*** *on a scale from 0 (no preservation value) to*

1 (optimal preservation value), on one-tenth increments. ***The score shall be assigned based on the applicability and relative significance of the following considerations:***

1. The extent to which proposed management activities within the preserve area promote natural ecological conditions such as fire patterns or the exclusion of invasive exotic species.

2. The ecological and hydrological relationship between wetlands, other surface waters, and uplands to be preserved.

3. The scarcity of the habitat provided by the proposed preservation area and the degree to which listed species use the area.

4. The proximity of the area to be preserved to areas of national, state, or regional ecological significance, such as national or state parks, Outstanding Florida Waters, and other regionally significant ecological resources or habitats, such as lands acquired or to be acquired through governmental or non-profit land acquisition programs for environmental conservation, and whether the areas to be preserved include corridors between these habitats.

5. The extent and likelihood of potential adverse impacts if the assessment area were not preserved

The evidence does not include the Preservation Adjustment Factor by the applicant evaluated the 5 required considerations and does not meet the Essential Requirements of Law.

<u>Exception No. 9d.</u> 62-345.900 Forms states "The forms used for the Uniform Mitigation Assessment Method are adopted and incorporated by reference in this section." UMAM PART II forms were never submitted by the applicant, or reviewed by

FDEP. These forms are incorporated into the rule and provide the information required to calculate a UMAM score.

No evidence from the applicant provides Part II forms and no evidence was provided FDEP reviewed the Part II forms, or the total information required by these forms and tha Part II requirements, this does not meet the Essential Requirements of Law.

WHEREFORE, Petitioner respectfully requests that the District grant the exceptions regarding FOF Nos. 21,26,43,44,45,47,50,51,52 and COL Nos. 55,59,60 and modify the Recommended Order accordingly and not issue the ERP that is the subject of this case.

RESPECTFULLY SUBMITTED this 19th March day of 2018

/s/ Joseph McClash, Petitioner
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Bradenton FL 34209
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CERTIFICATE OF SERVICE

I certify that the file **PETITIONER JOSEPH MCCLASH EXCEPTIONS TO PROPOSED RECOMMENDED ORDER HAS** been sent by email on 03/19/2018

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RECEIVED
March 29, 2018
Dept. of Environmental Protection
Office of General Counsel

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

SUNCOAST WATERKEEPER, INC.;
FLORIDA INSTITUTE FOR SALTWATER
HERITAGE, INC.; and JOSEPH MCCLASH,

Petitioners,

vs.

Case Nos.: 17-0795
17-0796
ERP No.: 0338349-002

LONG BAR POINTE, LLLP, and
FLORIDA DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Respondents.
_____/

RESPONDENT LONG BAR POINTE, LLLP'S RESPONSES TO MCCLASH'S EXCEPTIONS TO RECOMMENDED ORDER

By and through its undersigned counsel and pursuant to Section 120.57(1)(k), Florida Statutes ("F.S.") and Rule 28-106.217, Florida Administrative Code ("F.A.C."), Respondent, LONG BAR POINTE, LLLP ("Long Bar"), hereby submits the following responses to the exceptions to the Recommended Order filed in this proceeding by Petitioner JOSEPH MCCLASH ("McClash") on March 19, 2018, and in support states as follows:

STANDARD OF REVIEW

Section 120.57(1)(l), F.S., provides in pertinent part:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of

> conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law.

Fla. Stat. § 120.57(1)(k) (2017).

The agency may not reweigh evidence and may reject the Administrative Law Judge's ("ALJ") findings of fact in the recommended order only if the findings are not supported by competent, substantial evidence in the record. *Charlotte County v. IMC Phosphates Co.*, 18 So. 3d 1089, 1092 (Fla. 2d DCA 2009) (citing *Brogan v. Carter*, 671 So. 2d 822, 823 (Fla. 1st DCA 1996)); *see also Walker v. Bd. of Prof'l Eng'rs,* 946 So. 2d 604 (Fla. 1st DCA 2006) (an agency cannot modify or substitute new findings of fact if competent substantial evidence exists to support the ALJ's findings of fact). If the findings are supported by competent, substantial evidence in the record, the agency is bound by those findings. *Id.; see also Dep't of Corrections v. Bradley,* 510 So. 2d 1122, 1123 (Fla. 1st DCA 1987).

Competent substantial evidence is defined as "evidence that will establish a substantial basis of fact from which the fact at issue can be reasonably inferred." *DeGroot v. Sheffield,* 95 So. 2d 912, 916 (Fla. 1957) (citing *Becker v. Merrill,* 20 So. 2d 912, 914 (Fla. 1943)). The evidence must be sufficiently relevant and must be such that "a reasonable mind would accept as a conclusion" and "[t]o the extent the 'substantial' evidence should be competent." *Id*. Competent substantial evidence

> does not relate to the quality, character, convincing power, probative value or weight of the evidence but refers to the existence of some evidence (quantity) as to each essential element and as to the legality and admissibility of that evidence. 'Competency of evidence' refers to its admissibility under legal rules of evidence. 'Substantial' requires that there be some (more than a mere iota or scintilla), real, material, pertinent, and relevant evidence (as distinguished from ethereal, metaphysical,

> speculative, or merely theoretical evidence or hypothetical possibilities) having definite probative value (that is, "tending to prove") as to each essential element ….

Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm'n, 671 So. 2d 287, 289 n. 3 (Fla. 1st DCA 1996) (citing *Dunn v. State*, 454 So. 2d 641, 649 n. 11 (Fla. 5th DCA 1984)). An ALJ may rely on the testimony of one witness, even if that testimony contradicts testimony of other witnesses. *Lantz v. Smith*, 106 So. 3d 518, 521 (Fla. 1st DCA 2013).

If findings of fact are supported by record evidence, the agency is bound by the ALJ's findings of fact. *Charlotte County*, 18 So. 3d at 1092 (citing *Fla. Dep't of Corrs. v. Bradley*, 10 So. 2d 1122, 1123 (Fla. 1st DCA 1987)). The agency has no authority to reweigh the evidence, build a new case, or make new factual findings. *N.W. v. Dep't of Children & Family Svcs.*, 981 So. 2d 599, 602 (Fla. 3d DCA 2008); *see also Lawnwood Med. Ctr., Inc. v. Agency for Health Care Admin.*, 678 So. 2d 421, 425 (Fla. 1st DCA 1996). Furthermore, a reviewing agency may not reweigh the evidence presented at a division of administrative hearings ("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 Envt'l Prot.*, 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands Cty. Sch. Bd.*, 652 So. 2d 894 (Fla. 2d DCA 1995). "Credibility of the witnesses is a matter that is within the province of the administrative law judge, as is the weight to be given the evidence. The judge is entitled to rely on the testimony of a single witness even if that testimony contradicts the testimony of a number of other witnesses." *Lantz*, 106 So. 3d at 521 (citing *Stinson v. Winn*, 938 So. 2d 554, 555 (Fla. 1st DCA 2006)). Furthermore,

> Factual issues susceptible of ordinary methods of proof that are not infused with policy considerations are the prerogative of the hearing officer as the finder of fact. It is the hearing officer's function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses,

> draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence. If, as is often the case, the evidence presented supports two inconsistent findings, it is the hearing officer's role to decide the issue one way or the other. The agency may not reject the hearing officer's finding unless there is no competent, substantial evidence from which the finding could reasonably be inferred. The agency is not authorized to weigh the evidence presented, judge credibility of witnesses, or otherwise interpret the evidence to fit its desired ultimate conclusion.

Walker v. Bd. of Prof'l Eng'rs, 946 So. 2d 604, 605 (Fla. 1st DCA 2006) (*quoting Heifetz v. Dep't of Bus. Reg.*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985)).

Where there is conflicting or differing evidence, and reasonable people can differ about the facts, an agency is bound by the ALJ's finding unless there is no competent, substantial evidence from which the finding reasonably be inferred. *Greseth v. Dep't of Health & Rehab. Servs.*, 573 So. 2d 1004, 1006 (Fla. 4th DCA 1991). Furthermore, if there is competent substantial evidence to support an ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Const. Co. v. Dyer*, 592 So. 2d 276, 280 (Fla. 1st DCA 1991). In addition, an agency has no authority to make independent or supplemental findings of fact. *See, e.g., City of North Port v. Consol. Minerals, Inc.*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994). Therefore, if the record discloses any competent substantial evidence supporting a factual finding of the ALJ, the agency is bound by such factual finding in preparing the Final Order. *See, e.g., Walker v. Bd. of Prof. Eng'rs*, 946 So. 2d 604 (Fla. 1st DCA 2006); *Fla. Dep't of Corr. v. Bradley*, 510 So. 2d 1122, 1123 (Fla. 1st DCA 1987).

With respect to conclusions of law, an agency may reject or modify an ALJ's conclusions of law and application of agency policy; however, when doing so, the agency must make a finding that its substituted conclusion of law is as or more reasonable than that which was

rejected or modified. *Charlotte County*, 18 So. 3d at 1092; *see also Goin v. Comm'n on Ethics*, 658 So. 2d 1131, 1138 (Fla. 1st DCA 1995).

Finally, an agency is not bound by labels affixed by the ALJ to findings of fact and conclusions of law; if the item is improperly labeled, "the label is disregarded and the item is treated as though it were properly labeled." *Battaglia Properties, Ltd. v. Fla. Land & Water Adjudicatory Comm'n,* 629 So. 2d 161, 168 (Fla. 1st DCA 1993) (citing *Kinney v. Dep't of State,* 501 So. 2d 129, 132 (Fla. 5th DCA 1987).

For purposes of this response, the Department of Environmental Protection will be referred to as the "Department." Citations to the Recommended Order will appear as (RO P/pg. _____). Findings of Fact will be abbreviated "FOF" and Conclusions of Law will be abbreviated as "COL." Citations to the Record will appear as (___ Exh. ____:____) and citations to the Final Hearing Transcript will appear as (T:____). Citations to the Pre-Hearing Stipulation will appear as (PHS P.____).

RESPONSES TO EXCEPTIONS

Response to Exception No. 1

McClash's Exception No. 1 relates to FOF No. 21, which provides:

> 21. Besides statutory criteria in section 373.4136(1), a maze of Department rules applies to the creation of a mitigation bank. Pertinent to this case, rule 62-342.400 sets forth criteria specifically applicable to a mitigation bank. Rule 62-330.301 sets forth criteria for the issuance of an ERP, while rule 62-330.302 establishes additional ERP criteria that form the basis for the public interest test. In the Joint Pre-hearing Stipulation, Petitioners agree that only the criteria in rule 62-330.301(1)(d) and (f), rule 62-330.302(1)(a)2., 4., and 5., and rule 62-342.400(1)(a)-(f) are at issue. Petitioners also agree that Long Bar has provided reasonable assurance in regards to all requirements of financial responsibility.

McClash argues that FOF No. 21 does not include all statutory and rule criteria in dispute, and should also include citations to Section 373.4136(1), F.S., and Chapter 62-345, F.A.C. McClash

does not identify the legal basis for the exception, nor does he provide any specific citations to the record in support of this exception, as is required by Section 120.57(1)(k), F.S. and Rule 28-106.217, F.A.C.

Furthermore, competent substantial evidence exists in the record to support FOF No. 21. FOF No. 21 is the first paragraph under the heading "Criteria for a Mitigation Bank" (RO p. 11), and explicitly acknowledges additional statutory criteria applicable to mitigation banks. FOF No. 21 identifies the rules applicable to the proceeding, and further identifies the portions of the rules that remain in dispute, in accordance with the Pre-Hearing Stipulation filed by the parties in advance of the final hearing. (PHS at P. 35-49, 54-55, 57, 60-96.) FOF No. 21 does not have to contain an exhaustive list of the statutes and rules McClash believes are in dispute.[1]

The Department may only reject the ALJ's findings of fact if they are not supported by competent substantial evidence in the record. *Charlotte County*, 18 So. 3d at 1092. Competent substantial evidence exists in the record to support FOF No. 21. Therefore, the Department must reject McClash's Exception No. 1.

Response to Exception No. 2

Exception No. 2 relates to FOF Nos. 43, 44, and 45, and appears to be a heading in which he summarizes his argument in Exception Nos. 2a through 2d. However, because it is unclear what is intended, Long Bar hereby responds out of an abundance of caution.

Long Bar incorporates its responses to Exception Nos. 2a through 2d, herein. Additionally, McClash fails to identify the legal basis for Exception No. 2 and fails to include any citations to the record in accordance with Section 120.57(1)(k), F.S. and Rule 28-106.217, F.A.C. For those reasons, the Department must reject Exception No. 2.

[1] Indeed, FOF Nos. 34 through 45 of the Recommended Order specifically address UMAM, and the parties' positions relative to the application of UMAM. (RO at P. 34-45).

Response to Exception No. 2a

McClash's Exception No. 2a relates to FOF No. 43, which provides:

> 43. The Department's scoring of the project was determined by a review of the UMAM scores provided by Long Bar, review of available information provided, numerous discussions with Long Bar, and field work. The Department's summary of the credit evaluation for each of the 47 assessment areas is contained in Condition 11 of the permit and is accepted as being the most persuasive on this issue. The actual scores for each assessment area are contained in Exhibit H of the draft permit.

First, it is worth emphasizing that Part II UMAM forms are not required, either by UMAM or other applicable mitigation bank rules, to be submitted as part of an application for a mitigation bank. In fact, Petitioners' own expert, Clark Hull, acknowledged this at the final hearing. (T:395). Furthermore, and as McClash acknowledges in this exception, competent substantial evidence exists in the record to support FOF No. 43. The UMAM scores were provided by Long Bar as part of its application. (Joint Exh. 1; LBP Exh. 1J:2). The Department reviewed those scores and additional available information, had numerous discussions with Long Bar, and conducted field work. (T:158-238). The summary of the Department's credit evaluation is contained in Condition 11 of the Permit (Jt. Exh. 1N:23-27), which the ALJ specifically states in FOF No. 43 "is accepted as being the most persuasive on this issue." The actual UMAM scores are contained in Exhibit H of the draft permit. (T:81-106, 166-167; Jt. Exh. 1N:23-27, 80-81). McClash is improperly asking the Department to reweigh the evidence presented during the final hearing.

Competent substantial evidence will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. *DeGroot v. Sheffield*, 95 So. 2d at 916. When competent substantial evidence exists in the record, an agency is bound by the ALJ's finding. *Charlotte Cty.*, 18 So. 3d at 1092. The ALJ has the exclusive province as finder of fact, and the

Department has no authority to reweigh the evidence, build a new case, or make new factual findings. *N.W.,* 981 So. 2d at 602; *see also Lawnwood Med. Ctr., Inc.,* 678 So. 2d at 425. "If the record discloses any competent substantial evidence supporting a challenged factual finding of the ALJ, the agency is bound by such factual finding in preparing the Final Order." *Walker,* 946 So. 2d at 605. Furthermore, a reviewing agency may not judge the credibility of witnesses. *See, e.g., Rogers* 920 So. 2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep't of Envt'l Prot.*, 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands Cty. Sch. Bd.*, 652 So. 2d 894 (Fla. 2d DCA 1995). "Credibility of the witnesses is a matter that is within the province of the administrative law judge, as is the weight to be given the evidence. The judge is entitled to rely on the testimony of a single witness even if that testimony contradicts the testimony of a number of other witnesses." *Lantz,* 106 So. 3d at 521. For the foregoing reasons, the Department must reject Exception No. 2a.

Response to Exception No. 2b

McClash's Exception No. 2b relates to FOF Nos. No. 44 and 45, which provide:

> 44. While Mr. Hull disagreed with the scoring of the project, the difference between his and Long Bar's numbers are a reflection in the difference in the application of reasonable scientific judgment.
>
> 45. Petitioners failed to prove by a preponderance of the evidence that the Department's determination that the project could generate 18.01 credits was incorrect.

First, competent substantial evidence exists in the record to support FOF No. 44. Petitioners' own expert, Clark Hull, disagreed with the scoring of the project, and also acknowledged during cross-examination that determining UMAM scores is not a precise assessment and requires reasonable scientific judgment. (PHS P. 57; T:76-77, 90-95, 165-166, 237-238, 436-437; Jt. Exh. 1N:80-81; P Exh. 1). Furthermore, McClash mischaracterizes Alec

Hoffner's testimony regarding how he scored the P-factor. Mr. Hoffner did not testify that he only considered one of the five preservation adjustment factor considerations when determining the P-factor, but rather competent substantial evidence was provided in regards to the applicability and relative significance of the preservation adjustment factor considerations. (T:53-54, 62-65,73, 77-78, 94, 161-162; Jt. Exh. 1:1, 140, 502; LB Exh. 4; PHS P. 22-23). McClash only cites to Mr. Hoffner's testimony for one Assessment Area, and fails to acknowledge the totality of competent substantial evidence presented at the final hearing in regards to the UMAM scores. *Id*.

Competent substantial evidence will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. *DeGroot v. Sheffield*, 95 So. 2d at 916. When competent substantial evidence exists in the record, an agency is bound by the ALJ's finding. *Charlotte Cty.*, 18 So. 3d at 1092. The ALJ has the exclusive province as finder of fact, and the Department has no authority to reweigh the evidence, build a new case, or make new factual findings. *N.W.*, 981 So. 2d at 602; *see also Lawnwood Med. Ctr., Inc.*, 678 So. 2d at 425. "If the record discloses any competent substantial evidence supporting a challenged factual finding of the ALJ, the agency is bound by such factual finding in preparing the Final Order." *Walker*, 946 So. 2d at 605. Furthermore, a reviewing agency may not judge the credibility of witnesses. *See, e.g., Rogers* 920 So. 2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep't of Envt'l Prot*., 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands Cty. Sch. Bd*., 652 So. 2d 894 (Fla. 2d DCA 1995). "Credibility of the witnesses is a matter that is within the province of the administrative law judge, as is the weight to be given the evidence. The judge is entitled to rely on the testimony of a single witness even if that testimony contradicts the testimony of a number of other witnesses." *Lantz*, 106 So. 3d at 521.

Second, competent substantial evidence also exists in the record to support FOF No. 45, which is a reflection of the ALJ's weighing of the testimony and evidence regarding the UMAM scoring. (T:44-152; 154-238; 314-440; Jt. Exh. 1N:80-81; P Exh. 1). McClash is improperly asking the Department to reweigh the evidence, based upon his personal belief about what evidence is more persuasive. It is the ALJ's function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent substantial evidence. *Walker*, 946 So. 2d at 605 (Fla. 1st DCA 2006). The ALJ is entitled to rely on the testimony of a single witness even if that testimony contradicts the testimony of a number of other witnesses. *Lantz*, 106 So. 3d at 521. Regardless of McClash's opinion about the testimony and evidence presented during the final hearing, the ALJ has the exclusive province as finder of fact and the Department has no authority to reweigh the evidence, build a new case, or make new factual findings. *N.W.*, 981 So. 2d at 602. If the record discloses any competent substantial evidence supporting a challenged finding of fact, the agency is bound by such factual finding in preparing the Final Order. *Walker*, 946 So. 2d at 605; *see also Charlotte Cty.*, 18 So. 3d at 1092.

For the foregoing reasons, the Department must reject Exception No. 2b.

Response to Exception No. 2c

Exception No. 2c relates to FOF Nos. 43, 44, and 45, which provide:

> 43. The Department's scoring of the Project was determined by review of the UMAM scores provided by Long Bar, review of the available information provided, numerous discussions with Long Bar, and field work. The Department's summary of the credit evaluation for each of the 47 assessment areas is contained in Condition 11 of the permit and is accepted as being the most persuasive on this issue. The actual scores for each assessment area are contained in Exhibit H of the draft permit.
>
> 44. While Mr. Hull disagreed with the scoring of the project, the difference between his and Long Bar's numbers are a reflection in the difference in the application of reasonable scientific judgment.

> 45. Petitioners failed to prove by a preponderance of the evidence that the Department's determination that the project could generate 18.01 credits was incorrect.

Long Bar incorporates its responses to Exceptions 2, 2a, and 2b herein. It is also worth noting that McClash fails to identify with specificity the portions of those FOFs he disputes, or to provide any legal basis for his argument as required by Section 120.57(1)(k), F.S. and Rule 28-106.217, F.A.C.

McClash again improperly requests that the Department reweigh the evidence supporting the UMAM scoring. Mr. Hoffner's testimony cited by McClash at T:90 concerns Assessment Area 2 and there is evidence in the record and Mr. Hoffner also provided specific testimony about his scoring of Assessment Areas 3A, 3B, 4, 4A, and 4B and his use of a process similar to that used in scoring Assessment Area 2. (T: 90-95; Jt. Exh. 1A:37, 54-56, 124-128, 146-150, 153; Jt. Exh. 1F:6-13, 22-25; Jt. Exh. 1N:23-28, 74, 80-81). For the foregoing reasons, the Department must reject Exception No. 2c.

Response to Exception No. 2d

Exception No. 2d also relates to FOF Nos. 44 and 45, and McClash again argues about the UMAM scoring. Long Bar incorporates its responses to Exception Nos. 2, 2a, 2b, and 2c, herein. Competent substantial evidence exists in the record to support FOF Nos. 44 and 45. (T: 90-106; Jt. Exh. 1A:37, 54-56, 124-128, 146-150, 153; Jt. Exh. 1F:6-13, 22-25; Jt. Exh. 1N:23-28, 74, 80-81). For the foregoing reasons, the Department must reject Exception No. 2d.

Response to Exception No. 3

McClash's Exception No. 3, relating to FOF No. 47, appears to be a heading in which he summarizes his argument in Exception Nos. 3a through 3e. However, because it is unclear what is intended, Long Bar hereby responds out of an abundance of caution.

Long Bar incorporates its responses to Exception Nos. 3a through 3e herein. Additionally, McClash fails to identify the legal basis for his argument and fails to include any citations to the record as required by Section 120.57(1)(k), F.S. and Rule 28-106.217, F.A.C. For these reasons, the Department must reject Exception No. 3.

Response to Exception No. 3a

In Exception No. 3a, McClash takes exception with the portion of FOF No. 47 which provides:

> 47. …. The proposed conservation easement increases protection to the wetlands and other surface waters in the site by preventing structures (such as docks or piers) within the seagrass assessment areas. If the site is not preserved, it is likely to be used to access Sarasota Bay from the uplands. As previously found, there will also be enhancement activities in adjacent assessment areas. In short, the steps being proposed by Long Bar provide additional protection to the seagrasses. The UMAM seagrass score is appropriate.

Competent substantial evidence exists in the record to support FOF No. 47. There is record evidence and testimony regarding the increased protection provided by the proposed conservation easement to the wetlands and other surface waters at the site by preventing structures within the seagrass areas. (LBP Exh. 4; T:62-65, 90-91; 161-162; 388-389). There is also record evidence and testimony supporting the finding that enhancement activities will occur in adjacent assessment areas, and that these activities together will provide additional protection to seagrasses. (T: 90-106; Jt. Exh. 1A:125-128, 146-150, 153; Jt. Exh. 1F:6-13, 22-25; Jt. Exh. 1N:23-28; 74, 80-81).

McClash is yet again improperly asking the Department to reweigh the evidence based upon his personal belief about what evidence is most persuasive. Regardless of McClash's belief that the evidence he placed in the record is more persuasive, the ALJ has the exclusive province as finder of fact and is entitled to rely on the testimony of a single witness even if that

testimony contradicts the testimony of a number of other witnesses. *Lantz*, 106 So. 3d at 521. The Department has no authority to reweigh the evidence, build a new case, or make new factual findings. *N.W.*, 981 So. 2d at 602. "If the record discloses any competent substantial evidence supporting a challenged factual finding of the ALJ, the agency is bound by such factual finding in preparing the Final Order." *Walker*, 946 So. 2d at 605. When competent substantial evidence exists in the record, an agency is bound by the ALJ's finding. *Charlotte Cty.*, 18 So. 3d at 1092.

For the foregoing reasons, the Department must reject Exception No. 3a.

Response to Exception No. 3b

In Exception No. 3b, McClash takes exception with the portion of FOF No. 47 which provides:

> 47. … To begin with, preservation is a goal expressly included in the UMAM rule, which emphasizes preservation of undegraded areas and restoration of degraded systems over alteration of existing landscapes to create artificial wetlands. …

McClash then argues that "there is no rule citation or intent within the UMAM rule that could support this finding" and that "[a]ny reference to this incorrect citation must be stricken and the finding 'The UMAM seagrass score is appropriate.' is without evidence." However, McClash provides no legal basis for this exception, and fails to include any citations to the record in support of his exception as required by Section 120.57(1)(k), F.S. and Rule 28-106.217, F.A.C.

Competent substantial evidence exists in the record to support FOF No. 47. In this portion of FOF No. 47, the ALJ is acknowledging that preservation is preferred to other forms of mitigation. First, preservation is a goal expressly provided for in 62-342.100(3), F.A.C., which states in pertinent part, "Mitigation banks shall … emphasize restoration and enhancement of degraded ecosystems and the preservation of uplands and wetlands as intact ecosystems rather than alteration of landscapes to create wetlands." In addition, it can be inferred from a reading of the UMAM rule that there is a preference for preservation over other restoration,

enhancement, or creation activities. The definition of "credit" in Rule 62-345.200(8), F.A.C., provides that a credit "means a standard unit of measure which represents the increase in ecological value resulting from restoration, enhancement, preservation, or creation activities." Furthermore, a preference for preservation activities can be inferred given the lower risk and time lag scores assigned to preservation activities. *See* Rule 62-345.600, F.A.C.; (T:67, 78-79, 94, 103, 418). While it is entirely appropriate for the ALJ to summarize the rules in this manner, the reference to the "UMAM rule" may also be nothing more than a scrivener's error by the ALJ.[2]

For these reasons, the Department must reject McClash's Exception No. 3b. In the alternative, the Department could correct what is likely no more than a scrivener's error by the ALJ, and correct the reference to "UMAM rule" with "mitigation bank rule."

Response to Exception No. 3c

Exception No. 3c relates to the portion of FOF No. 47 that states:

> 47. … To begin with, preservation is a goal expressly included in the UMAM rule, which emphasizes preservation of undegraded areas and restoration of degraded systems over alteration of existing landscapes to create artificial wetlands. The proposed conservation easement increases protection to the wetlands and other surface waters in the site by preventing structures (such as docks or piers) within the seagrass assessment areas. If the site is not preserved, it is likely to be used to access Sarasota Bay from the uplands. As previously found, there will also be enhancement activities in adjacent assessment areas. In short, the steps being proposed by Long Bar provide additional protection to the seagrasses. The UMAM score is appropriate.

Long Bar incorporates its responses to Exception Nos. 3a and 3b, herein. For those reasons, the Department should reject Exception No. 3c.

[2] Indeed, the ALJ himself acknowledged the "maze" of rules applicable to the creation of mitigation banks in FOF No. 21.

Response to Exception No. 3d

In his Exception No. 3d, McClash fails to identify any FOF or COL with which he takes exception. He instead argues about how UMAM was scored. With regard to the UMAM scoring, Long Bar incorporates its responses to Exception Nos. 2, 2a, 2b, 2c, 2d, 3, 3a, 3b, and 3c herein. Furthermore, McClash failed to comply with the requirements of Section 120.57(1)(k), F.S., and Rule 28-106.217, F.A.C., by failing to identify the disputed portion of the Recommended Order by page number or paragraph, and by failing to identify the legal basis for the exception. For these reasons, the Department should reject Exception No. 3d.

Response to Exception No. 3e

In Exception No. 3e, McClash references FOF No. 47 but does not identify the portion of FOF No. 47 with which he takes exception. It appears that McClash, again, is requesting the Department to reweigh the weight of the evidence on UMAM scoring specific to the seagrass assessment areas. Therefore, Long Bar incorporates its responses to Exceptions 2, 2a, 2b, 2c, 2d, 3, 3a, 3b, 3c, and 3d herein. For these reasons, the Department must reject Exception No. 3e.

Response to Exception No. 4

Exception No. 4 relates the portions of FOF No. 26 that state:

> 26. … the three-foot bathymetric contour along the Project site,
>
> …
>
> Installation of the buoys will provide a significant public benefit in that it should significantly reduce or eliminate prop scars within the seagrass beds along the project site. Good channel marking is one of the best ways to protect seagrasses from prop scarring. There is no credible evidence that signage will attract inexperienced boaters who will damage the seagrasses in this area.

Competent substantial evidence exists in the record regarding the proposed installation of the buoys at the three-foot bathymetric contour along the site, as well as the protection that will be provided to the seagrasses in the area by the installation of the buoys. (Jt. Exh. 1:549-550; LB

Exh. 5, 6, 7, 8, 9, 10, 11; T:85-87, 151, 171). There is also competent substantial evidence and testimony in the record in support of the finding that "[g]ood channel marking is one of the best ways to protect seagrasses from prop scarring," including from Petitioners' own witness, John Stevely. (LB Exh. 5:25-26, LB Exh. 7:203; LB Exh. 8:1-4, T:87, 290). When competent substantial evidence exists in the record, an agency is bound by the ALJ's finding. *Charlotte Cty.,* 18 So. 3d at 1092.

Yet again, McClash asks the Department to reweigh the evidence and believes that Petitioners' testimony regarding the buoys is somehow more persuasive. However, the ALJ specifically rejected that notion in FOF No. 26 by stating "[t]here is no credible evidence that signage will attract inexperienced boaters who will damage the seagrasses in this area." The ALJ has explicitly determined that Stevely's testimony was not credible, and he relied upon other testimony and evidence on this issue – an exercise that is entirely within the province of the ALJ. *See Lantz,* 106 So. 3d at 521.

For the foregoing reasons, the Department must reject Exception No. 4.

Response to Exception No. 5

Exception No. 5 relates to the portion of FOF No. 26 that states:

> 26. … the Plan contemplates the installation of non-regulatory seagrass information buoys at approximately the three-foot bathymetric contour along the Project site, and …

Long Bar incorporates its response to Exception No. 4, herein. Competent substantial evidence in the record supports this portion of FOF No. 26. (Jt. Exh. 1:549-550; LB Exh. 9:007; LB Exh. 11; T:85-87, 151). When competent substantial evidence exists in the record, an agency is bound by the ALJ's finding. *Charlotte Cty.,* 18 So. 3d at 1092. For these reasons, the Department must reject Exception No. 5.

Response to Exception No. 6

In Exception No. 6, McClash generally refers to FOF Nos. 50, 51, and 52, which provide:

> 50. The preponderance of the evidence supports a finding that Long Bar has satisfied all criteria in rule 62-330.301 for the issuance of an ERP.
>
> 51. The preponderance of the evidence supports a finding that Long Bar has established that the Project is clearly in the public interest, as required by rule 62-330.302(1).
>
> 52. The preponderance of the evidence supports a finding that Long Bar has satisfied all criteria for establishing a mitigation bank, as required by rule 62-342.400.

First, McClash did not comply with the requirements of Section 120.57(1)(k), F.S., and Rule 28-106.217, F.A.C., by failing to identify the legal basis for the exception and by failing to include appropriate and specific citations to the record. Furthermore, competent substantial evidence exists in the record supporting FOF Nos. 50, 51, and 52. (Jt. Exh. 1:494-495; T:66-75, 163-165; PHS P. 26, 29, 35-49). When competent substantial evidence exists in the record, an agency is bound by the ALJ's finding. *Charlotte Cty.*, 18 So. 3d at 1092. McClash's Exception No. 6 is nothing more than an attempt to re-litigate the case. For these reasons, the Department must reject Exception No. 6.

Response to Exception No. 7

In Exception No. 7, McClash takes exception with the portion of COL No. 55 that states:

> 55. … Here, the evidence shows that Mr. McClash is concerned with activities contemplated, but not authorized, by the permit, and future ERPs that may have impacts that could potentially be offset through the purchase of credits from the Project. These concerns will not result in a direct injury or place Mr. McClash in an immediate danger of sustaining a direct injury as a result of the agency action. His concern is with future permit impacts, which are too speculative and remote to give rise to standing under chapter 120.

McClash's own testimony at the final hearing supports the conclusion in COL No. 55 that he lacks standing under Chapter 120. First, in support of his standing under Chapter 120, F.S.,

McClash presented testimony expressing his concern with (1) activities contemplated, but not authorized, by the Permit; and (2) future ERPs that may propose impacts that could potentially be offset through the purchase of credits from the Project. (T:522-524, 526). McClash also admits several times during his own argument regarding Exception No. 7 that "the mitigation bank permit as presented would reduce recreational fishing values, meaning less crabs, shrimp, because of the *future adverse impacts adjacent to the site*" and that "[h]is concern is with *future permit impacts*…" (*emphasis added*).

To have an interest that is substantially affected under Chapter 120, F.S., a petitioner must clearly show that (a) it will suffer an injury in fact which is of sufficient immediacy to entitle it to a hearing; and (b) the substantial interest is of a type or nature which the proceeding is designed to protect. *Agrico Chemical Co. v. Dep't of Envt'l Reg.*, 406 So. 2d 478, 482 (Fla. 4th DCA 1981). In order to have an injury in fact of sufficient immediacy, generalized allegations of concern the agency action may have on the general public is not sufficient. *Boca Raton Mausoleum v. Dep't of Banking & Fin.*, 511 So. 2d 1060, 1064 (Fla. 1st DCA 1987). Bare allegations regarding unspecified adverse effects on the environment are likewise insufficient. *Friends of Matanzas, Inc. v. Dep't of Envt'l Prot.*, 729 So. 2d 437, 439 (Fla. 5th DCA 1999). The injury must also not be so speculative, remote, or irrelevant that it fails to be of sufficient immediacy. *Village Park Mobile Home Ass'n v. Dep't of Bus. & Prof'l Reg.*, 506 So. 2d 426, 429 (1st DCA 1987); *Int'l Jai-Alai Players Ass'n v. Fla. Pari-Mutuel Ass'n*, 561 So. 2d 1224, 1226 (Fla. 3d DCA 1990). Furthermore, the alleged injury must not be based on "pure speculation or conjecture." *Ward v. BOT*, 651 So. 2d 1236, 1237 (4th DCA 1995). Petitioner must either have (a) sustained an actual injury in fact at the time of filing the petition; or (b) be in

immediate danger of sustaining some direct injury as a result of the agency action. *Village Park*, 506 So. 2d at 429.

Respondents did not stipulate to McClash's alleged injury and McClash failed to prove an injury in fact of sufficient immediacy to his interests. Although he made many general bare allegations of harm to his interests and the environment, McClash failed to place any evidence or testimony in the record to demonstrate that the activities authorized by the Permit itself would substantially affect his interests. McClash's testimony indicated a concern with (1) activities contemplated, but not authorized, by the Permit; and (2) future ERPs that may propose impacts that could be offset through the purchase of credits from the Project. None of McClash's concerns would result in a direct injury, or place McClash in immediate danger of sustaining a direct injury, as a result of the agency action. McClash's concern is placed on future impact permits, and any injury is too speculative or remote to give rise to standing under Chapter 120. Based upon the above, it would be unreasonable to conclude anything except that Petitioner McClash does not have standing.

The Department may reject or modify an ALJ's conclusions of law only if it makes a finding that its substituted conclusion of law is as or more reasonable than that which was rejected or modified. *Charlotte County*, 18 So. 3d at 1092; *see also Goin v. Comm'n on Ethics*, 658 So. 2d 1131, 1138 (Fla. 1st DCA 1995). As explained above, it is not as or more reasonable to conclude that McClash has standing under Chapter 120. For these reasons, the Department must reject Exception No. 7.

Response to Exception No. 8

In Exception No. 8, McClash generally refers to COL Nos. 59 and 60, which provide:

> 59. Long Bar made its prima facie case of entitlement to the permit. Therefore, the burden of ultimate persuasion is on Petitioners to prove their case

> in opposition to the permit by a preponderance of the competent and substantial evidence.
>
> 60. In summary, Long Bar has provided reasonable assurance that all relevant criteria for the issuance of an ERP and establishment of a mitigation bank have been satisfied.

McClash fails to identify any legal basis for this exception and includes absolutely no citations to the record as required by Section 120.57(1)(k), F.S., and Rule 28-106.217, F.A.C.

First, COL No. 59 invokes Section 120.569(2)(p), F.S., which provides in pertinent part:

> 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 license, permit, 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.

The Department may reject or modify an ALJ's conclusions of law only if it makes a finding that its substituted conclusion of law is as or more reasonable than that which was rejected or modified. *Charlotte County*, 18 So. 3d at 1092; *see also Goin v. Comm'n on Ethics*, 658 So. 2d 1131, 1138 (Fla. 1st DCA 1995). Long Bar's application for the Project, relevant material submitted to the Department in support of the application, and the notice of intent to issue the permit as well as the draft permit were admitted into evidence without objection at the start of the final hearing. (T:12-13; Jt. Exh. 1). Long Bar Exhibits 1 through 12 were also admitted into evidence without objection. (T:13). Furthermore, Long Bar provided testimony from its consultant, Alec Hoffner (T:44-151) and the Department's Program Administrator for the

Submerged Lands and Environmental Resources Coordination Program, Tim Rach (T:154-238). Indeed, McClash concedes in his argument that "Long Bar made its prima facie case of entitlement to the permit." Therefore, it is not as or more reasonable to come to a different conclusion than what is provided in COL No. 59, which concludes that Long Bar demonstrated its prima facie case and recites Section 120.569(2)(p), F.S., to articulate the Petitioners' subsequent burden of ultimate persuasion.

Second, with regard to COL No. 60, based upon the totality of the Findings of Fact contained in the Recommended Order – not the least of which are FOF Nos. 50, 51, and 52 which find that Long Bar satisfied all criteria applicable to mitigation banks – it is not as or more reasonable to conclude anything other than that Long Bar has provided reasonable assurance that all relevant criteria for the issuance of an ERP and establishment of a mitigation bank have been satisfied.

For the foregoing reasons, the Department must reject Exception No. 8.

Response to Exception No. 9

In his Exception No. 9, McClash generally refers to FOF Nos. 43, 44, 45, 50, 51, and 52 and COL Nos. 59 and 60. McClash does not provide any citations to the record in support of Exception No. 9. *See* Section 120.57(1)(k), F.S., and Rule 28-106.217, F.A.C. Furthermore, he refers to one case, *Chicken'N'Things v. Murray*, 329 So. 2d 302, 304 (Fla. 1976) in "support" of the exception, but does not provide any explanation of how that case applies to the FOFs and COLs referred to in Exception No. 9.

Long Bar incorporates its responses to Exception Nos. 2, 2a, 2b, 2c, 2d, 6, and 8 herein. For these reasons, the Department must reject Exception No. 9.

Response to Exception No. 9a

In his Exception No. 9a, McClash fails to identify *any* disputed FOF or COL in the recommended order with which he takes exception. It is not enough that McClash lists six FOFs and 2 COLs in Exception No. 9. He also provides no legal basis for this exception, and does not include any citations to the record in support of this exception. *See* Section 120.57(1)(k), F.S., and Rule 28-106.217, F.A.C. To the extent that Exception No. 9a applies to FOF Nos. 43, 44, 45, 50, 51, and 52 and COL Nos. 59 and 60, Long Bar incorporates its response to Exception Nos. 2, 2a, 2b, 2c, 2d, 6, 8, and 9 herein. For these reasons, the Department must reject Exception No. 9a.

Exception No. 9b

In his Exception No. 9b, McClash fails to identify *any* disputed FOF or COL in the recommended order with which he takes exception. It is not enough that McClash lists six FOFs and 2 COLs in Exception No. 9. He also provides no legal basis for this exception, and does not include any citations to the record in support of this exception as required by Section 120.57(1)(k), F.S., and Rule 28-106.217, F.A.C. To the extent that Exception No. 9b applies to FOF Nos. 43, 44, 45, 50, 51, and 52 and COL Nos. 59 and 60, Long Bar incorporates its response to Exception Nos. 2, 2a, 2b, 2c, 2d, 6, 8, 9, and 9a herein. For these reasons, the Department must reject Exception No. 9b.

Exception No. 9c

In his Exception No. 9c, McClash fails to identify *any* disputed FOF or COL in the recommended order with which he takes exception. It is not enough that McClash lists six FOFs and 2 COLs in Exception No. 9. He also provides no legal basis for this exception, and does not include any citations to the record in support of this exception as required by Section

120.57(1)(k), F.S., and Rule 28-106.217, F.A.C. To the extent that Exception No. 9c applies to FOF Nos. 43, 44, 45, 50, 51, and 52 and COL Nos. 59 and 60, Long Bar incorporates its response to Exception Nos. 2, 2a, 2b, 2c, 2d, 6, 8, 9, 9a, and 9b herein. For these reasons, the Department must reject Exception No. 9c.

Exception No. 9d

In his Exception No. 9d, McClash fails to identify *any* disputed FOF or COL in the recommended order with which he takes exception. It is not enough that McClash lists six FOFs and 2 COLs in Exception No. 9. He also provides no legal basis for this exception, and does not include any citations to the record in support of this exception as required by 120.57(1)(k), F.S., and Rule 28-106.217, F.A.C. To the extent that Exception No. 9d applies to FOF Nos. 43, 44, 45, 50, 51, and 52 and COL Nos. 59 and 60, Long Bar incorporates its response to Exception Nos. 2, 2a, 2b, 2c, 2d, 6, 8, 9, 9a, 9b, and 9c, herein. For these reasons, the Department must reject Exception No. 9d.

CONCLUSION

WHEREFORE, for the reasons set forth herein, Respondent Long Bar Pointe, LLLP respectfully requests that the Department of Environmental Protection reject each and all of McClash's exceptions to the Recommended Order, and adopt the Findings of Fact, Conclusions of Law, and Recommendation set forth in the ALJ's Recommended Order as its own, and issue a Final Order consistent therewith.

Respectfully submitted this 29th day of March, 2018.

/s/ Amy Wells Brennan
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CERTIFICATE OF SERVICE

I hereby certify this 29th day of March, 2018, that a true and correct copy of the foregoing Respondent Long Bar Pointe, LLLP's Proposed Recommended Order has been served by electronic mail upon the following:

Joseph McClash 711 89th Street Northwest Bradenton, Florida 34209 joemcclash@gmail.com	Ralf Brookes 1217 East Cape Coral Parkway, Suite 107 Cape Coral, Florida 33904 ralfbrookes@gmail.com
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/s/ Amy Wells Brennan
Attorney

RECEIVED
April 4, 2018
Dept. of Environmental Protection
Office of General Counsel

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

SUNCOAST WATERKEEPER, INC., FLORIDA INSTITUTE FOR SALTWATER HERITAGE, INC., and JOSEPH MCCLASH,

Petitioners,

vs.

DOAH CASE NO. 17-0796
OGC CASE NO. 17-0002

LONG BAR POINTE, LLLP and STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.

_____/

DEPARTMENT OF ENVIRONMENTAL PROTECTION'S RESPONSES TO PETITIONER MCCLASH'S EXCEPTIONS TO RECOMMENDED ORDER

Respondent, State of Florida Department of Environmental Protection, (Department), pursuant to rule 28-106.217 of the Florida Administrative Code (F.A.C.) and section 120.57(1)(k) of the Florida Statutes (Fla. Stat.), hereby submits the following responses to the Exceptions to the Recommended Order filed in this proceeding by Petitioner Joseph McClash on March 19, 2018, and in support thereof states as follows:

ABBREVIATIONS

Department, DEP	Department of Environmental Protection
TR:	Transcript
ALJ	Administrative Law Judge

STANDARD OF REVIEW

Under sections 120.569 and 120.57, Fla. Stat., the ALJ is the finder of fact in a formal administrative proceeding. The ALJ has the exclusive authority "to consider all the evidence presented, resolve conflicts, judge the credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence." Goin v. Comm'n on Ethics, 658 So. 2d 1131, 1138 (Fla. 1st DCA 1995) (quoting Heifetz v. Dep't of Bus. Reg., 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985)); see also, Belleau v. DEP, 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997).

Section 120.57(1)(l), Fla. Stat., provides that an agency "may not reject or modify the findings of fact" unless the agency first determines that (1) "the findings of fact were not based upon competent substantial evidence" or (2) "the proceedings on which the findings were based did not comply with essential requirements of law." Therefore, ALJ findings of fact "become binding upon an agency unless it finds they are not supported by competent substantial evidence[.]" Fla. Dep't of Corr. v. Bradley, 510 So. 2d 1122, 1123 (Fla. 1st DCA 1987); see also, Charlotte Cty v. IMC Phosphates Co., 18 So. 3d 1089, 1092 (Fla. 2d DCA 2009). "Competent substantial evidence is 'such evidence as will establish a substantial basis of fact from which the fact at issue can reasonably be inferred (or) . . . such relevant evidence as a reasonable mind would accept as adequate to support a conclusion.'" Duval Util. Co. v. Fla. Pub. Serv. Comm'n, 380 So. 2d 1028, 1031 (Fla. 1980) (quoting De Groot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957)); see also, Heifetz, 475 So. 2d at 1281. "The term 'competent substantial evidence' does not relate to the quality, character, convincing power, probative value or weight of the evidence." Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm'n, 671 So. 2d 287, 289 n.3 (Fla.

5th DCA 1996). Rather, "competent substantial evidence" refers to having some supporting admissible evidence for a finding. Id.

"[F]actual issues susceptible of ordinary methods of proof that are not infused with [agency] policy considerations are the prerogative of the [ALJ] as the finder of fact." See Martuccio v. Dep't of Prof'l Regulation, Bd. of Optometry, 622 So. 2d 607, 609 (Fla. 1st DCA 1993); Heifetz, 475 So. 2d at 1281. "[I]f there is competent substantial evidence supporting an administrative law judge's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting the contrary finding." Lane v. Int'l Paper Co., DOAH Case No. 01-1490 (DOAH Aug. 2001); OGC Case No. 01-0582, 2001 WL 1917274, at *4 (FDEP Final Order, Oct. 8, 2001) (citing Arand Constr. Co. v. Dyer, 592 So. 2d 276, 280 (Fla. 1st DCA1991); Conshor, Inc. v. Roberts, 498 So. 2d 622 (Fla. 1st DCA 1986)). Accordingly, "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 competent substantial evidence of record supporting the decision." Parham v. DEP, DOAH Case No. 08-2636 (DOAH Dec. 2008); OGC Case No. 080521, 2009 WL 736938, at *3 (DEP Final Order, Mar. 2009) (citing Collier Med. Ctr. v. Dep't of Health & Rehab. Servs., 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)).

A state agency reviewing an ALJ's recommended order likewise has no authority to make independent and supplementary findings of fact to support conclusions of law in the agency final order. See Florida Power & Light Co. v. State of Florida, Siting Bd., 693 So. 2d 1025, 1026-27 (Fla. 1st DCA 1997); Boulton v. Morgan, 643 So. 2d 1103 (Fla. 4th DCA 1994); Manasota 88, Inc. v. Tremor, 545 So. 2d 439, 441 (Fla. 2d DCA 1989) (citing Friends of Children v. Dep't of Health and Rehab. Servs., 504 So. 2d 1345 (Fla. 1st DCA 1987)). "The agency's scope of review

of the facts is limited to ascertaining whether the [ALJ's] factual findings are supported by competent substantial evidence." City of N. Port v. Consol. Minerals, Inc., 645 So. 2d 485, 487 (Fla. 2d DCA 1994).

"The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction." § 120.57(1)(l), Fla. Stat. An agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction and expertise. See, e.g., Pub. Emps. Rels. Comm'n v. Dade Cnty. Police Benevolent Ass'n, 467 So. 2d 987, 989 (Fla. 1985); Fla. Pub. Emp. Council 79 v. Daniels, 646 So. 2d 813, 816 (Fla. 1st DCA 1994). As to those matters agencies are afforded substantial deference, and 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, 668 So. 2d 209, 212 (Fla. 1st DCA 1996).

An agency's review of legal conclusions is, however, restricted to matters within the agency's field of expertise. See, e.g., G.E.L. Corp. v. DEP, 875 So. 2d 1257, 1264 (Fla. 5th DCA 2004). Agencies do not have substantive jurisdiction to reject discovery, procedural or evidentiary rulings. Barfield v. Dep't of Health, 805 So. 2d 1008, 1011-12 (Fla. 1st DCA 2001). Agencies also lack authority to modify or reject conclusions of law that apply general legal concepts typically resolved by judicial or quasi-judicial officers. See, e.g., Deep Lagoon Boat Club, Ltd. v. Sheridan, 784 So. 2d 1140, 1142 (Fla. 2d DCA 2001).

Specific Responses to Petitioner's Exceptions.

Petitioner's Exception 1.

In Exception 1, Mr. McClash takes exception to finding of fact No. 21, however, does not identify the legal basis for the exception, and does not provide any specific citations to the record in support of this argument, as is required by section 120.57(1)(k), Fla. Stat. For this reason, Exception 1 is fundamentally deficient, and should not even be considered.

Furthermore, there exists competent substantial evidence on record to support finding of fact No. 21, which provides a general overview relative to criteria for approval of mitigation bank permits. The finding is not intended to be an exhaustive list of all of the statutes and rules in dispute in this case as Mr. McClash attempts to argue. Furthermore, contrary to Mr. McClash's assertions, the application of the UMAM Rule (Chapter 62-345, F.A.C.) is in fact addressed by the Recommended Order, on p. 16-20, under a subheading "Calculation of Credits."

Pursuant to section 120.57(1)(l), Fla. Stat., an agency "may not reject or modify the findings of fact" unless the agency first determines that (1) "the findings of fact were not based upon competent substantial evidence" or (2) "the proceedings on which the findings were based did not comply with essential requirements of law." Exception 1 does not meet these criteria and should be rejected.

Petitioner's Exception 2.

Exception 2 appears to be a summary of Mr. McClash's arguments on persuasiveness of the evidence related to three separate findings of fact: Nos. 43, 44, and 45. Mr. McClash does not provide the legal basis for the exception, and does not provide references to specific citations in the record. His approach of grouping multiple findings of fact together into one exception renders the exception incomprehensible.

The Department is not obligated to consider exceptions that do not clearly identify the disputed portion of the recommended order by page number or paragraph, that do not identify the legal basis for the exception, or that do not include appropriate and specific citations to the record. See, §120.57(1)(k), Fla. Stat.

Therefore, Exception 2 is fundamentally deficient and should not even be considered.

Petitioner's Exception 2a.

In his Exception 2a Mr. McClash seeks that the agency reweigh the evidence related to finding of fact No. 43, in which the ALJ determined that the Department's evaluation of the 47 assessment areas, as summarized in Condition 11 of the Permit, was the most persuasive on the issue of scoring of the project.

Here, as the language of the exception itself makes clear, there exists competent substantial evidence in the record to support the finding. The Department's scoring of the project was determined by review of the UMAM scores provided by the Applicant, review of available information provided, numerous discussions with the Applicant, and field work. (TR2, Rach, p. 166). The Department's summary of the credit evaluation for each of the 47 assessment areas is contained within Condition 11 of the proposed mitigation bank permit. (Joint Exhibit 1, p. 510-514.) The actual scores for each assessment area are contained in Exhibit H of the draft permit. (Joint Exhibit 1, p. 567-568).

Furthermore, it should be noted that contrary to Mr. McClash's assertions, Part II UMAM forms are not required to be submitted as part of the application under any of the applicable rules. (This was in fact acknowledged by Petitioner's own expert, Mr. Hull. (TR1, Hull, p. 395)).

Mr. McClash seeks to have the Department reweigh the evidence. However, it is well established that an agency reviewing a DOAH recommended order may not reweigh the

evidence or substitute its judgment as to the credibility of witnesses. Belleau 695 So. 2d 1305, 1307; Maynard v. Fla. Unemployment Appeals Commission, 609 So. 2d 143, 145 (Fla. 4th DCA 1992); Rogers v. Dept. of Health, 920 So. 2d 27, 30 (Fla. 1st DCA 2006); Dunham 652 So. 2d 894 (Fla. 2d DCA 1995). An agency may not reject an ALJ's finding of fact "unless there is no competent, substantial evidence from which the finding could reasonably be inferred." Heifetz, 475 So. 2d at 1281; see also, §120.57(1)(l), Fla. Stat.

Because finding of fact No. 43 is supported by competent substantial evidence, it is binding on the Department, and Exception 2a must be denied. See Fla. Dep't of Corr., 510 So. 2d at 1123; Charlotte Cnty., 18 So. 3d at 1092.

Petitioner's Exception 2b.

Exception 2b appears to challenge finding of fact No. 44, in which the ALJ found that the differences between Mr. Hull's versus the Respondents' scoring of the project is a reflection in differences in the application of reasonable scientific judgment, and finding of fact No. 45, in which the ALJ found that the Petitioners failed to prove by a preponderance of evidence that the Department's determination that the project could generate 18.01 credits was incorrect.

As a preliminary matter, the Petitioner's approach of grouping multiple findings of fact together into a single exception, renders the entire exception incomprehensible. As repeatedly discussed, the Department is not obligated to consider exceptions that do not clearly identify the disputed portion of the recommended order by page number or paragraph, that do not identify the legal basis for the exception, or that do not include appropriate and specific citations to the record. See, §120.57(1)(k), Fla. Stat. Therefore, Exception No. 2b is fundamentally deficient and should not even be considered.

Furthermore, Exception 2b asks that the Department reweigh the entirely of the evidence in this case (as findings of fact 44 and 45 are essentially the ALJ's conclusions as to the ultimate facts of the case, based on the entirety of the evidence presented.) However, to do so would be improper as both findings are supported by competent substantial evidence.

Finding of fact 44 is supported by competent substantial evidence because the experts in this case all agreed that UMAM scoring is not an exact science, and comes down to a difference in the application of reasonable scientific judgment. (TR2, Hull, p. 365, TR2, p. 438; TR1, Rach, p. 237-238).

Finding of fact 45 reflects the ALJ's weighing all of the evidence related to UMAM scoring. At this point in time, it would be unduly burdensome, and ultimately, futile to go through the entire record to determine which side's evidence was more persuasive and why. Instead of relitigating the case, it suffices to say that an agency reviewing a DOAH recommended order may not reweigh the evidence or substitute its judgment as to the credibility of witnesses. Belleau, 695 So. 2d 1305, 1307; Maynard, 609 So. 2d 143, 145; Rogers, 920 So. 2d 27, 30; Dunham 652 So. 2d 894. An agency may not reject an ALJ's finding of fact "unless there is no competent, substantial evidence from which the finding could reasonably be inferred." Heifetz, 475 So. 2d at 1281; see also, §120.57(1)(l), Fla. Stat. "[I]f there is competent substantial evidence supporting an administrative law judge's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting the contrary finding." Lane, DOAH Case No. 01-1490; Arand, 592 So. 2d 276, 280; Conshor, Inc. 498 So. 2d 622.

Because findings of fact Nos. 44 and 45 are both supported by competent substantial evidence, they are binding on the Department, and the exception should be rejected. See Fla. Dep't of Corr., 510 So. 2d at 1123; Charlotte Cnty., 18 So. 3d at 1092.

Petitioner's Exceptions 2c and 2d.

Exceptions 2c and 2d again focus on findings of fact 43-45. Mr. McClash again asks that the Department reweigh the entirety of the evidence in this case, again fails to identify with specificity which portions of these three findings he is disputing, and again fails to provide the legal basis for his argument per section 120.57(1)(k). Therefore, the Department incorporates its responses to Exceptions 2, 2a, and 2b herein, and requests that Exceptions 2c and 2d be denied.

Petitioner's Exceptions 3.

Exception 3 appears to be a summary of the arguments made in Exceptions 3a-3e. Mr. McClash does not provide a legal basis for the exception and does not provide references to specific citation in the record. The Department is not obligated to consider exceptions that do not clearly identify the disputed portion of the recommended order by page number or paragraph, that do not identify the legal basis for the exception, or that do not include appropriate and specific citations to the record. See, §120.57(1)(k), Fla. Stat. Therefore, Exception 3 is fundamentally deficient and should not even be considered.

Petitioner's Exceptions 3a.

Here, Mr. McClash takes exception to finding of fact No. 47, where the ALJ determined that conservation easement would increase protection to wetlands and other surface waters on site by preventing structures within seagrass areas.

However, finding of fact 47 is supported by competent substantial evidence. (See TR1, 62-65; 90-91, 161-162; TR2, 388-389.)

Mr. McClash seeks that the Department reweigh the evidence. However, an agency reviewing a DOAH recommended order may not reweigh the evidence or substitute its judgment as to the credibility of witnesses. Belleau, 695 So. 2d 1305, 1307; Maynard, 609 So.

2d 143, 145; Rogers, 920 So. 2d 27, 30; Dunham, 652 So. 2d 894. An agency may not reject an ALJ's finding of fact "unless there is no competent, substantial evidence from which the finding could reasonably be inferred." Heifetz, 475 So. 2d at 1281; see also, §120.57(1)(l), Fla. Stat. "[I]f there is competent substantial evidence supporting an administrative law judge's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting the contrary finding." Lane, DOAH Case No. 01-1490; Arand, 592 So. 2d 276, 280; Conshor, Inc. 498 So. 2d 622.

Because findings of fact 47 is supported by competent substantial evidence, it is binding on the Department. See Fla. Dep't of Corr., 510 So. 2d at 1123; Charlotte Cnty., 18 So. 3d at 1092. Exception 3a must be denied.

Petitioner's Exception 3b.

In Exception 3b, McClash takes exception with the portion of finding of fact No. 47 which states,

> To begin with, preservation is a goal expressly included in the UMAM rule, which emphasizes preservation of undegraded areas and restoration of degraded systems over alteration of existing landscapes to create artificial wetlands.

As a preliminary matter, Mr. McClash provides no legal basis for his exception, nor does he provide any specific citations to the record in support thereof. The Department is not obligated to consider exceptions that do not clearly identify the disputed portion of the recommended order by page number or paragraph, that do not identify the legal basis for the exception, or that do not include appropriate and specific citations to the record. See, §120.57(1)(k), Fla. Stat. Therefore, Exception 3b is fundamentally deficient and should not even be considered.

Substantively, preservation is in fact a goal that is enumerated in the Mitigation Bank Rule: Chapter 62-342, F.A.C. Specifically, 62-342.100(3), F.A.C. states in pertinent part:

"Mitigation banks shall … emphasize restoration and enhancement of degraded ecosystems and the preservation of uplands and wetlands as intact ecosystems rather than alteration of landscapes to create wetlands."

Therefore, if the Department does determine that a change to Finding of Fact 47 is warranted, the sole change should be changing the ALJ's reference to "UMAM rule" to "Mitigation Bank Rule."

Petitioner's Exceptions 3c.

In Exception 3c, Mr. McClash excepts to the portions of finding of fact 47 that were already addressed in Exceptions 3a and 3b, with Mr. McClash again improperly requesting that the Department reweigh the evidence in this case. The Department therefore incorporates its responses to Exceptions 3a and 3b herein, and asks that Exception 3c be denied.

Petitioner's Exception 3d.

In Exception 3d Mr. McClash does not identify the specific finding of fact or conclusions of law with which he takes an exception, and instead, argues about the UMAM scoring requirements contained in rule 62-345.500, F.A.C. However, the Department is not obligated to consider exceptions that do not clearly identify the disputed portion of the recommended order by page number or paragraph, that do not identify the legal basis for the exception, or that do not include appropriate and specific citations to the record. See, §120.57(1)(k), Fla. Stat. Therefore, Exception 3d is fundamentally deficient and should not even be considered.

Furthermore, in the abundance of caution, and as it relates to UMAM scoring, the Department incorporates its responses to Exceptions 3, 3a, 3b, and 3c herein, and asks that Exception 3d be denied on those bases as well.

Petitioner's Exception 3e.

In Exception 3e, Mr. McClash references finding of fact No. 47, but fails to identify the specific portion of finding of fact 47 with which he takes exception. Two pages of argument then follow, reflecting Mr. McClash's stream of consciousness with little to no appropriate and specific citation to the record, and no legal basis for his assertions. It appears that Mr. McClash is again asking that the Department reweigh the evidence on UMAM scoring as it relates to seagrass assessment areas. Therefore, the Department incorporates its responses to Exception 3, 3a, 3b, 3c, and 3d herein, and requests that Exception 3e likewise be denied.

Petitioner's Exception 4.

In Exception 4, Mr. McClash excepts to the portion of finding of fact No. 26 that discusses informational buoys providing a public benefit by reducing prop scaring, and channel marking being one of the best ways to protect seagrass.

However, competent substantial evidence exists in the record regarding the proposed installation of the buoys at the three-foot bathymetric contour along the site, as well as the protection that will be provided to the seagrasses in the area by the installation of the buoys. (Joint Exhibit 1, p. 549-550; TR1, p. 85-87; p. 151, p. 171). There is also competent substantial evidence and testimony in the record in support of the finding that "[g]ood channel marking is one of the best ways to protect seagrasses from prop scarring," including testimony from Petitioners' own witness, John Stevely. (TR1, p.87; p. 290).

Exception 4 seeks to have the Department reweigh the evidence. However, an agency reviewing a DOAH recommended order may not reweigh the evidence or substitute its judgment as to the credibility of witnesses. Belleau, 695 So. 2d 1305, 1307; Maynard, 609 So. 2d 143, 145; Rogers, 920 So. 2d 27, 30; Dunham 652 So. 2d 894. An agency may not reject an

ALJ's finding of fact "unless there is no competent, substantial evidence from which the finding could reasonably be inferred." Heifetz, 475 So. 2d at 1281; see also, §120.57(1)(l), Fla. Stat. "[I]f there is competent substantial evidence supporting an administrative law judge's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting the contrary finding." Lane, DOAH Case No. 01-1490; Arand, 592 So. 2d 276, 280; Conshor, Inc., 498 So. 2d 622.

Because findings of fact 47 is supported by competent substantial evidence, the finding is binding on the Department. See Fla. Dep't of Corr., 510 So. 2d at 1123; Charlotte Cnty., 18 So. 3d at 1092. Exception 4 should be rejected.

Petitioner's Exception 5.

Exception 5 is yet another challenge to finding of fact No. 26, this time relating to the portion of the finding where the ALJ determined that the Seagrass Informational Buoy Placement Plan contemplates the installation of informational buoys along the three-foot contour along the project site.

This portion of finding of fact No. 26 is certainly supported by the record. (See, e.g., Joint Exhibit 1. P. 549-550; TR1, p. 85-87; p. 151.)

An agency may not reject an ALJ's finding of fact "unless there is no competent, substantial evidence from which the finding could reasonably be inferred." Heifetz, 475 So. 2d at 1281; see also, §120.57(1)(l), Fla. Stat. "[I]f there is competent substantial evidence supporting an administrative law judge's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting the contrary finding." Lane, DOAH Case No. 01-1490; Arand, 592 So. 2d 276, 280; Conshor, Inc. 498 So. 2d 622.

Because findings of fact 26 is supported by competent substantial evidence, it is binding on the Department. See Fla. Dep't of Corr., 510 So. 2d at 1123; Charlotte Cnty., 18 So. 3d at 1092. Exception 5 should be rejected.

Petitioner's Exception 6.

In Exception 6, Mr. McClash asserts that findings of fact 50, 51, and 52 are not supported by competent substantial evidence. Notwithstanding taking an exception to three separate findings of fact, Mr. McClash fails to cite to a single place within the record to substantiate his claims. Nor does he provide the legal basis for the exception. Instead, Mr. McClash provides a stream of consciousness argument without any explanation as to which specific finding of fact he is attempting to refute.

As such, Exception 6 is fundamentally deficient and should not even be considered. Mr. McClash's grouping multiple findings of fact together into one exception, with no explanation as to which finding a particular argument is meant to discredit, and if so, how, renders the exception incomprehensible. The Department is not obligated to consider exceptions that do not clearly identify the disputed portion of the recommended order by page number or paragraph, that do not identify the legal basis for the exception, or that do not include appropriate and specific citations to the record. See, §120.57(1)(k), Fla. Stat.

Petitioner's Exception 7.

Here, Mr. McClash takes exception to conclusion of law No. 55, in which the ALJ concluded that Mr. McClash's injuries are too remote and speculative to give rise to standing under Chapter 120.

The exception must be rejected because the Department does not have substantive jurisdiction to review the ALJ's conclusions as to standing. While an agency has jurisdiction to

reject or modify the conclusions of law pursuant to section 120.57(1)(l), Fla. Stat., an agency's review of legal conclusions is, however, restricted to matters within the agency's field of expertise. See, e.g., G.E.L. Corp. 875 So. 2d 1257, 1264. Agencies do not have substantive jurisdiction to reject discovery, procedural or evidentiary rulings. Barfield, 805 So. 2d 1008, 1011-12. Agencies also lack authority to modify or reject conclusions of law that apply general legal concepts typically resolved by judicial or quasi-judicial officers. See, e.g., Deep Lagoon Boat 784 So. 2d 1140, 1142. A determination relative to standing is not within the Department's substantive jurisdiction. Consequently, Exception 7 must be rejected.

Furthermore, it should be noted that even if interpretation of Chapter 120 was within the Department's field of expertise, substantively, Exception 7 still does not establish how the ALJ's conclusion is clearly erroneous.

Standing under Chapter 120, Fla. Stat. is governed by the two-pronged test established in the case of Agrico Chem. Co. v. Dep 't of Envtl. Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981). There, the Court held that: "before one can be considered to have a substantial interest in the outcome of the proceeding, he must show (1) "will suffer injury in fact which is of sufficient immediacy to entitle him to a hearing," and, (2) that the "substantial injury is of a type or nature which the proceeding is designed to protect." Agrico Chem. Co. v. Dep 't of Envtl. Regulation, 406 So. 2d 478,482 (Fla. 2d DCA 1981). The injury or threat of injury must be real and immediate, not conjectural or hypothetical. See Village Park Mobile Homes Ass'n v. Dep't of Bus. Regulation, 506 So. 2d 426,433 (Fla. 1st DCA 1987), *rev. den.*, 513 So. 2d 1063 (Fla. 1987); Village of Key Biscayne v. Dep't of Envtl. Prot., 206 So. 2d 788 (Fla. 3d DCA 2016).

The ALJ's determination that Mr. McClash lacked standing under Chapter 120 is based on Mr. McClash's own testimony at the final hearing that made clear that his concerns are in fact

with future permit impacts. (TR2, p. 522-526). The ALJ's application of the Agrico test to the facts of the case was proper, and it was certainly reasonable for the ALJ to conclude that Mr. McClash's concerns with future permits were too speculative to remote to give rise to standing under Chapter 120.

Based on all of the foregoing reasons, Exception 7 must be rejected.

Petitioner's Exception 8.

In Exception 8, Mr. McClash excepts to two conclusions of law: Nos. 59 and 60, without any citations to the record, without an explanation as to which specific conclusion of law he is trying to refute, and without providing a legal basis for the exception. The exception is incomprehensible. As such, Exception 8 is fundamentally deficient and should not even be considered. The Department is not obligated to consider exceptions that do not clearly identify the disputed portion of the recommended order by page number or paragraph, that do not identify the legal basis for the exception, or that do not include appropriate and specific citations to the record. See, §120.57(1)(k), Fla. Stat.

Petitioner's Exception 9.

In Exception 9, Mr. McClash excepts to 6 separate findings of fact (Nos. 43, 44, 45, 50, 51, and 52), and two conclusions of law (No. 59 and 60), without any citations to the record, without identifying the legal basis for the exception, and without any explanation of what specific fact or conclusion of law his reference to case Chicken N' Things v. Murray, is meant to refute. The exception is incomprehensible, fundamentally deficient, and should not even be considered. The Department is not obligated to consider exceptions that do not clearly identify the disputed portion of the recommended order by page number or paragraph, that do not identify the legal

basis for the exception, or that do not include appropriate and specific citations to the record. See, §120.57(1)(k), Fla. Stat.

Petitioner's Exceptions 9a - 9d.

Each of these Exceptions follows the same format. Each is deficient and must be rejected for the same reasons. With each subpart of Exception 9, Mr. McClash fails to identify which disputed finding of fact or conclusion of law he is trying to except. One is left wondering whether a particular argument is aimed at discrediting a factual finding, and if so, which one, or how, or whether the argument is made to attack a legal conduction. Instead, Mr. McClash makes a reference to a rule in the Florida Administrative Code, copying the language from the rule into the body of the Exception. He follows this with a conclusion that the evidence in the case does not meet the essential requirements of law, without providing any specific citations as to which "evidence in the case" he is referring to.

The Department is not obligated to consider exceptions that do not clearly identify the disputed portion of the recommended order by page number or paragraph, that do not identify the legal basis for the exception, or that do not include appropriate and specific citations to the record. See, §120.57(1)(k), Fla. Stat. Exceptions 9a-9d must therefore be denied.

Respectfully submitted on this 4th day of April 2018.

STATE OF FLORIDA DEPARTMENT OF
ENVIRONMENTAL PROTECTION

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed with Lea Crandall, the agency clerk of the State of Florida Department of Environmental Protection by email at lea.crandall@dep.state.fl.us and agency_clerk@dep.state.fl.us and served via email to Joseph McClash, 711 89 St. NW, Bradenton, Florida at Joemcclash@gmail.com; Long Bar Pointe, LLLP c/o Peter Logan, 1651 Whitfield Avenue, Sarasota, Florida 34243 at petel@medallionhome.com; Ralf Brookes, Counsel for Suncoast Waterkeeper, 1217 E Cape Coral Parkway, Suite 107, Cape Coral, Florida 33904 at Ralfbrookes@gmail.com and Ralf@Ralfbrookesattorney.com; Douglas Manson, Amy Brennan, Chris Tanner, Manson Bolves Donaldons & Varn, 204 South Monroe St., Tallahassee, Florida 32301 at dmanson@mansonbolves.com; drodriguez@mansonbolves.com; ctanner@mansonbolves.com; abrennan@mansonbolves.com; Edward Vogler, Vogler, Ashton, PLLC, 2411 Manatee Ave. W, Suite A, Bradenton, Florida 34205 at edvogler@voglerashton.com, on this 4th day of April 2018.

/s/ Marianna Sarkisyan
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