On August 23, 2010, an Administrative Law Judge (ALJ) of the Division of
Administrative Hearings (DOAH) entered his Recommended Order in the above captioned
proceeding. On August 31, 2010, Joy Ann Wettstein Griffin (Petitioner) served Written
Exception to Administrative Law Judge Donald R. Alexander’s Recommended Order. Pursuant
to Rule 28-106.217(3), Florida Administrative Code, the Department of Environmental
Protection (Department) responds to those Exceptions as follows.

**Standard of Review of DOAH Recommended Orders**

Section 120.57(1)(l), Florida Statutes, prescribes that an agency reviewing a
recommended order may not reject or modify the findings of fact of an 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.” 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 (quantity) 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*, 671 So.2d 287, 289 n. 3 (Fla. 5th DCA 1996).

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. Dept. of Health*, 920 So.2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dept. of Environmental Protection*, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands Co. School Board*, 652 So. 2d 894 (Fla. 2d DCA 1995). Such evidentiary-related matters are the province of the ALJ as the fact-finder in administrative proceedings. See e.g., *Tedder v. Fla. Parole Commission*, 842 So.2d 1022, 1025 (Fla. 1st DCA 2003); *Heifetz v. Dept. of Business Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). 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 lack of competent substantial evidence in the record to support the ALJ’s decision. See e.g., *Collier Medical Center v. State, Dept. of HRS*, 462 So.2d 83, 85 (Fla. 1st DCA 1985); *Fla. Chapter of Sierra Club v. Orlando Utilities Commission*, 436 So.2d 383, 389 (Fla. 5th DCA 1983).

A reviewing agency therefore lacks the authority to evaluate the quantity and quality of the evidence presented at a DOAH formal hearing, beyond making a determination that the evidence is competent and substantial. See e.g., *Brogan v. Carter*, 671 So.2d 822, 823 (Fla. 1st DCA 1996). Therefore, if the DOAH record reveals any competent substantial evidence supporting a factual finding of the ALJ, the agency head is bound by such factual finding in the Final Order. See e.g., *Walker v. Board of Prof. Engineers*, 946 So.2d 604 (Fla. 1st DCA 2006); *Fla. Dept. of Corrections v. Bradley*, 510 So.2d 1122, 1123 (Fla. 1st DCA 1987). Additionally,
the agency head has no authority to make independent or supplemental findings of fact. See e.g.,
*North Port, Fla. v. Consolidated Minerals*, 645 So.2d 485, 487 (Fla. 2d DCA 1994).

In reviewing a recommended order and any written exceptions, the agency’s final order
“shall include an explicit ruling on each exception.” §120.57(1)(k), Fla. Stat. (2008). However,
the agency is not obligated to 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*

**Response to History of the Proceeding Exceptions**

Petitioner takes exception to Findings of Fact I, 2, and 4, in which the ALJ makes
findings of fact in regard to the Lake County Water Authority (Water Authority) and
Department’s legislative purpose and/or statutory authority in this matter, as well as the
characterization of the water body in question. Petitioner’s exceptions reflect the testimony and
evidence which Petitioner presented at the hearing. However, Petitioner fails to demonstrate that
the Findings of Fact were made absent competent and substantial evidence.

As the Petitioner is improperly requesting that the Department reweigh the evidence
presented at the hearing and accepted by the ALJ and improperly replace the ALJ’s finding of
fact, these exceptions should be rejected.

**Response to Standing Exceptions**

Petitioner takes exception to Finding of Fact 9 in which the ALJ discusses the distance
between Petitioner’s property and the project sites, as well as the remote possibility of sediment
from the dredge site or treated, discharged water from the disposal site reaching Petitioner’s
property. Petitioner argues here, as in the exception to Conclusion of Law 27, that impacts to
one part of the lake system can have a far reaching effect downstream and because Petitioner lives downstream, Petitioner’s substantial interests will be affected and therefore has standing to challenge this action. Petitioner states in the exception to Conclusion of Law 27 that the Authority’s Motion to Dismiss Petition for Lack of Standing was denied. However, as that Order directed, the Petitioner was required to demonstrate standing at the administrative hearing. The ALJ concluded that based on the evidence presented, Petitioner failed to demonstrate standing but was afforded a full hearing on the merits of the case. Petitioner’s arguments are a combination of restatements of Petitioner’s testimony at hearing as well as an attempt to improperly present new testimony to support Petitioner’s arguments. However, Petitioner fails to demonstrate that the Finding of Fact and Conclusion of Law were made absent competent and substantial evidence.

As the Petitioner is improperly requesting that the Department reweigh the evidence presented at the hearing and accepted by the ALJ and improperly replace the ALJ’s finding of fact, these exceptions should therefore be rejected.

Response to Project Exceptions

Petitioner takes exception to Findings of Fact 10 – 16 and presents restatements of Petitioner’s testimony and evidence at hearing as well as attempts to improperly present new evidence to support the arguments. However, Petitioner fails to demonstrate that the Findings of Fact were made absent competent and substantial evidence. Again, as the Petitioner is improperly requesting that the Department reweigh the evidence presented at the hearing and accepted by the ALJ and improperly replace the ALJ’s finding of fact, these exceptions should be rejected.
Petitioner also takes exception to Finding of Fact 19 in which the ALJ found that the Water Authority has given reasonable assurance that the project will not adversely affect or violate water quality standards and will not adversely impact fish and wildlife; Petitioner also takes exception to Finding of Fact 22 which states that the Water Authority has the financial, legal and administrative capabilities to ensure the project will be undertaken in accordance with conditions of the permit. In these exceptions, Petitioner again reiterates testimony and evidence presented at hearing as well as attempts to improperly present new evidence into the record. In Petitioner's exception to Finding of Fact 22, Petitioner renews their argument that the Department’s Waste Management Program failed to approve this project and cites to evidence which was presented at hearing. However, as the evidence presented by the Department at hearing provided, the Waste Management Program was asked to evaluate this project solely from the human health perspective and as such, found it to be acceptable. (T. Martin; DEP Ex. 5). Further, Petitioner fails to demonstrate that the Findings of Fact were made absent competent and substantial evidence. Again, as the Petitioner is improperly requesting that the Department reweigh the evidence presented at the hearing and accepted by the ALJ and improperly replace the ALJ’s finding of fact, these exceptions should be rejected.

Response to Reasonable Assurance Standard Exceptions

Petitioner takes exception to Conclusion of Law 28, in which the ALJ states that the Water Authority had the burden to prove by a preponderance of evidence that it had given reasonable assurances that the applicable permitting criteria would be satisfied and that it does not require absolute guarantees. Petitioner further takes exception to Conclusion of Law 29, in which the ALJ states that the overwhelming evidence supports a conclusion that the Water
Authority has provided reasonable assurances and the permit and consent to use land should be approved.

Petitioner's exception to both Conclusion of Law 28 and 29 is their belief that the reasonable assurance standard is not satisfactory and that there should be guarantees that the conditions will be satisfied. While Petitioner may disagree with the legal standard in these proceedings, Petitioner has provided no legal support for their argument. Petitioner fails to demonstrate that the Conclusions of Law, and the Findings of Fact which support them, were made absent competent and substantial evidence. Further, to the extent that the Petitioner's argument restates their testimony at hearing and requests for the Department to reweigh the evidence presented at the hearing and accepted by the ALJ and improperly replace the ALJ's finding of fact, these exceptions should be rejected.

Based on the foregoing, the Secretary is requested to enter a Final Order denying each of Petitioner's exceptions and adopting the Recommended Order.

Respectfully submitted this 17th day of September, 2010.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing was provided to the following persons by U.S. Mail or electronic mail:

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on this 17th day of September, 2010.

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