STATE OF FLORIDA
SITING BOARD

FLORIDA POWER AND LIGHT COMPANY TURKEY POINT POWER PLANT UNITS 3 – 5 MODIFICATION TO CONDITIONS OF CERTIFICATION	)	**OGC CASE NO. 14-0510** **DOAH CASE NO. 15-1559EPP**

FINAL ORDER

This proceeding arose under the Florida Electrical Power Plant Siting Act (PPSA)[1] and requires the Siting Board to take action on Florida Power & Light's (FPL) application to modify Condition XII of the Conditions of Certification of the existing Site Certification for Turkey Point Power Plant Units 3, 4, and 5, located in Southeast Miami-Dade County.[2] The modification to Condition XII authorizes construction and operation of six new production wells to withdraw 14 million gallons per day (mgd) of Upper Floridan Aquifer (UFA) water for use in the Turkey Point cooling canal system (CCS) for salinity reduction and management purposes.

BACKGROUND

FPL filed a petition for modification of Condition XII with the Department of Environmental Protection (DEP or Department) on September 5, 2014. *See* Joint Ex. 2. The petition for modification sought to authorize three system improvement projects related to water use: (1) construction and operation of the new UFA production wells for

[1] Sections 403.501 *et seq.*, Florida Statutes.

[2] Condition XII contain the South Florida Water Management District conditions for water use. *See* § 403.511, Fla. Stat. (2015) (reflecting that Site Certification is the sole license of the state and any affected agency).

Filed April 1, 2016 12:52 PM Division of Administrative Hearings

use in the CCS; (2) utilization of one of the new production wells as a dual purpose well to comply with a recent order of the United States (U.S.) Nuclear Regulatory Commission related to providing emergency cooling water supplies for the nuclear-fueled Units 3 and 4; and (3) re-allocation of authorized water withdrawn from an existing production well for Unit 5 (Well No. PW-3) as a source of process water for Units 3 and 4. *See* Joint Ex. 2.

On December 23, 2014, DEP issued a notice of intent to modify Condition XII to authorize the three proposed projects. All required public notices were published by FPL and DEP. DEP received three written objections to the proposed production wells to provide water for use in the CCS. No objections were raised regarding the two other FPL projects and DEP issued a final order approving those two modifications to Condition XII. *See* Joint Ex. 1.[3] This modification proceeding involves only the proposal to construct and operate new UFA production wells to discharge water into the CCS.

Miami-Dade County, Tropical Audubon Society, Inc., and South Florida Water Management District (SFWMD) each filed notices of their intent to be parties to the modification proceeding. Miami-Dade County and Tropical Audubon Society, Inc., later voluntarily withdrew from the proceeding. Atlantic Civil, Inc. (ACI), filed a Motion to Intervene on March 24, 2015, which was denied. On April 3, 2015, ACI filed an Amended Motion to Intervene, which was granted. On October 30, 2015, ACI filed a Second Amended Motion to Intervene, which was granted over the objection of FPL.

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[3] Rule 62-17.211(1)(b)5, Florida Administrative Code, provides that if written objections only address a portion of the requested modification, the Department shall issue a final order approving the portion to which no objections were filed, unless that portion is substantially related to or necessary to implement the portion to which written objections were filed.

The final hearing was held on December 1-4, 2015, in Miami, Florida. No member of the public requested the opportunity to offer testimony on the proposed modification, and no written comments were received from the public. The parties were allowed to file proposed recommended orders and the Transcript of the final hearing was filed with the Division of Administrative Hearings (DOAH). On January 25, 2016, an administrative law judge (ALJ) with the DOAH submitted a Recommended Order (RO). The RO shows that copies were served on counsel for FPL and DEP. The RO also shows that it was served to counsel for the Intervenor ACI, and counsel for the SFWMD. A copy of the RO is attached hereto as Exhibit A. On February 9, the DEP filed its Exception to the RO, and ACI also filed Exceptions to the RO. FPL, DEP, and SFWMD, on February 19, filed their joint response to ACI's Exceptions.

This matter is now before the Governor and Cabinet, sitting as the State of Florida Siting Board, for final action under the PPSA, Sections 403.501 *et seq.*, Florida Statutes.

SUMMARY OF THE RECOMMENDED ORDER

In the RO, the ALJ recommended that the Siting Board enter a Final Order approving the modification as proposed by the Department on December 23, 2014, with an additional condition that was stipulated by the parties. (RO at page 24). The ALJ found that FPL provided reasonable assurance that the proposed modification would comply with all applicable water use regulatory criteria. (RO ¶¶ 55, 58-60, 67, 69, 71). The ALJ also concluded that the proposed modification met the PPSA criteria for approval in Section 403.509(3)(a) through (g). (RO ¶¶ 61, 69).

STANDARDS OF REVIEW OF DOAH RECOMMENDED ORDERS

Section 120.57(1)(l), prescribes that an agency reviewing a recommended order (here the Governor and Cabinet sitting as the Siting Board) may not reject or modify the findings of fact of an ALJ, "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2015); *Charlotte Cnty. v. IMC Phosphates Co.*, 18 So. 3d 1089 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So. 2d 61 (Fla. 1st DCA 2007). 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 Comm'n*, 671 So. 2d 287, 289 n.3 (Fla. 5th DCA 1996).

Thus the Siting Board 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 Sch. Bd.,* 652 So. 2d 894 (Fla. 2d DCA 1995). Also, the ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. *See e.g., Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co.,* 18 So. 3d 1079, 1088 (Fla. 2d DCA 2009). Therefore, if the DOAH 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. *See, e.g., Walker v. Bd. of Prof'l 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). 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 Construction Co. v. Dyer,* 592 So. 2d 276, 280 (Fla. 1st DCA 1991); *Conshor, Inc. v. Roberts,* 498 So. 2d 622 (Fla. 1st DCA 1986). In addition, an agency has no authority to make independent or supplemental findings of fact. *See, e.g., Fla. Power & Light Co. v. Siting Bd.,* 693 So. 2d 1025, 1026-1027 (Fla. 1st DCA 1997); *North Port, Fla. v. Consol. Minerals*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994).

Section 120.57(1)(l), 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). However, the agency should not 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).

Thus, the Siting Board's review of legal conclusions in a recommended order is restricted to those that concern matters within the agency's field of expertise or "substantive jurisdiction." *See, e.g., Charlotte County v. IMC Phosphates Co.*, 18 So. 3d

1089 (Fla. 2d DCA 2009); *G.E.L. Corp. v. Dep't of Envtl. Prot.*, 875 So. 2d 1257, 1264 (Fla. 5th DCA 2004). Deference should be accorded to an agency's interpretation of statutes and rules within its regulatory jurisdiction, and such agency interpretation should not be overturned unless "clearly erroneous." *See, e.g., Falk v. Beard*, 614 So. 2d 1086, 1089 (Fla. 1993); *Dep't of Envtl. Regulation v. Goldring*, 477 So. 2d 532, 534 (Fla. 1985). Furthermore, agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be the only reasonable interpretations. It is enough if such agency interpretations are "permissible" ones. *See, e.g., Suddath Van Lines, Inc. v. Dep't of Envtl. Prot.*, 668 So. 2d 209, 212 (Fla. 1st DCA 1996).

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

RULINGS ON EXCEPTIONS

The case law of Florida holds that parties to formal administrative proceedings must alert reviewing agencies to any perceived defects in DOAH hearing procedures or in the findings of fact of ALJs by filing exceptions to DOAH recommended orders. *See, e.g., Comm'n on Ethics v. Barker,* 677 So. 2d 254, 256 (Fla. 1996); *Henderson v. Dep't*

of Health, Bd. of Nursing, 954 So. 2d 77 (Fla. 5th DCA 2007); *Fla. Dep't of Corrs. v. Bradley*, 510 So. 2d 1122, 1124 (Fla. 1st DCA 1987). Having filed no exceptions to certain findings of fact the party "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).

Limited Scope of PPSA modification

The scope of this modification proceeding is not in the nature of a challenge to the existing Site Certification (Uprate).[4] The issue in the instant proceeding is not whether the 2008 Uprate was properly evaluated, but whether the proposed modification meets the applicable conditions for issuance. The Siting Board's review includes only that portion of the 2008 Uprate that is proposed to be modified or is affected by the modification. *See Conservancy of S.W. Fla. v. G.L. Homes of Naples Assoc. II, Ltd,* Case No. 06-4922 ¶109 (DOAH May 15, 2007; SFWMD July 18, 2007). It is well established that a modification does not burden the applicant with providing "reasonable assurances" anew with respect to the original permit. *See Friends of the Everglades v. Dep't of Envtl. Regulation,* 496 So. 2d 181, 183 (Fla. 1st DCA 1986) (reflecting that the agency's interpretation of the scope of a modification application was a permissible one). This modification proceeding is limited to whether the application to modify Condition XII meets the applicable water use regulatory criteria and PPSA

[4] *See In Re: Fla. Power & Light Co. Turkey Point Unit 3 and 4 Uprate Power Plant Siting Application No. PA74-02,* Case No. 08-0378EPP (Fla. DEP October 29, 2008).

criteria. Similarly, standing is based upon whether there is sufficient evidence to demonstrate that, if the adverse impacts of the proposed modification were proven,[5] ACI's substantial interests would be affected by the final agency action.

The ALJ found that FPL provided reasonable assurance that the proposed modification would comply with all applicable water use regulatory criteria. (RO ¶¶ 55, 58-60, 67, 69, 71). The ALJ also concluded that the proposed modification met the PPSA criteria for approval in Section 403.509(3)(a) through (g). (RO ¶¶ 61, 69). In addition, as the ALJ pointed out in paragraph 73, this modification proceeding is not an enforcement proceeding.

Therefore, based on the foregoing reasons, paragraphs 63 and 64 of the Final Order are amended as follows:

> 63. ACI has standing in this proceeding because the alleged potential harm encompasses legal uses of the water resource, like ACI's uses, that could be affected by the addition of 14 mgd of water to the CSS. ACI alleges the modification will interfere with its legal use of groundwater, and that saline intrusion from the proposed modification would degrade the water quality of the Biscayne Aquifer which they use for industrial purposes.
>
> 64. Respondents cite Agrico v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981), in support of their argument that ACI has not demonstrated standing because the proposed modification does not present an immediate threat to ACI's property. ACI contends that the proposed modification will exert a greater westward push on the hypersaline plume towards ACI's property. The injury to ACI is immediate in the sense that it is predictable based on current conditions, as affected by the proposed modification, and does not require the occurrence of other intervening events or forces.

[5] The ALJ found that while "ACI contends the FPL proposal would worsen groundwater conditions ... ACI's exhibits 38, 39, 42, 51, and 63 appear to support Respondents' contention that the FPL proposal would slow the rate of saltwater intrusion." (RO ¶ 54).

ACI's Exceptions

Exception No. 1

ACI takes exception to paragraph 28 of the RO, where the ALJ found that ACI did not refute FPL's evidence "that elimination of the thermal output from Unit 2 offset the thermal output from the uprate of Units 3 and 4, so that the total thermal output is now about four percent less." (RO ¶ 28). The competent substantial evidence that supports this finding was in the form of expert testimony from an FPL witness (Scroggs, T. Vol. I, p. 54, lines 4-10). ACI argues that the ALJ's finding "should be rejected and modified to find that operation of Units 3 and 4 in their uprated conditions have been the primary cause of increased average temperature and salinity in the CCS since 2011." *See* ACI's Exceptions at pages 6-7. However, ACI did not take exception to paragraph 29 where the ALJ found that "the recent spike in salinity and the relative influence of contributing factors shows it is a complex subject . . ." *See Envtl. Coal. Of Fla., Inc. v. Broward County*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991) (Having filed no exceptions to certain findings of fact the party "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact."). ACI argues that there's a difference between the testimony of FPL's witness and the ALJ's description of it, and that the testimony of ACI's witness should be accepted. *See* ACI's Exceptions at pages 4-7. Thus, ACI wants the Siting Board to reweigh the evidence and make additional findings of fact.

As outlined in the standard of review, the Siting Board may not reweigh the evidence, 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). Also, 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 decision. *See e.g., Peace River/Manasota Reg'l Water Supply Auth. V. IMC Phosphates Co.,* 18 So. 3d 1079, 1088 (Fla. 2d DCA 2009). In addition, the Siting Board has no authority to make independent or supplemental findings of fact. *See, e.g., Fla. Power & Light Co. v. Siting Bd.,* 693 So. 2d 1025, 1026-1027 (Fla. 1st DCA 1997).

Therefore, based on the foregoing reasons, ACI's Exception No. 1 is denied.

Exception No. 2

ACI takes exception to paragraphs 49 and 50 of the RO, on the basis that "[n]o expert for any party" testified that the hypersaline plume would freshen, shrink, and eventually disappear. *See* ACI's Exceptions at page 7. ACI also argues the phrase "eventually disappear" overlooks or misstates the collective expert opinions offered by all parties in the final hearing. *See* ACI's Exceptions at page 7.

Contrary to ACI's argument, paragraph 49 (reflecting that FPL presented evidence to show "that the hypersaline plume would begin to shrink and eventually disappear") and paragraph 50 (reflecting that "the [FPL] model's prediction that groundwater in the area would steadily freshen and the hypersaline plume would shrink and eventually disappear"), are fully supported by the testimony of FPL's expert groundwater modeling witness, Peter Andersen (Andersen, T. Vol. II, p. 136, lines 4-5; FPL Ex. 22). 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 Construction Co. v. Dyer,* 592 So. 2d 276, 280 (Fla. 1st DCA 1991); *Conshor, Inc. v. Roberts,* 498 So. 2d 622 (Fla. 1st DCA 1986).

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

Exception No. 3

ACI takes exception to paragraph 68 of the RO by arguing that it "must be rejected." *See* ACI's Exceptions at page 9. In paragraph 68, the ALJ concluded that:

> 68. ACI claims in its Proposed Recommended Order that FPL failed to demonstrate a need for the amount of water it requested and did not consider mitigative measures, but these issues were not raised in ACI's amended petition to intervene.

ACI concedes that "the ALJ is correct that no specific allegation regarding FPL's failure to demonstrate an open-ended need for five billion gallons per year, and the District's failure to consider mitigative measures were not raised in those specific words in ACI's Petition." *Id.* at page 10. However, ACI asserts "that the issues were identified and raised in the proceeding" by virtue of generic references to various regulatory and statutory provisions in ACI's original and amended petitions to intervene, its [amended] statement of issues, and the prehearing stipulation. However, none of those references contain any specific allegations regarding FPL's "need" for UFA water or consideration of "mitigative measures." Thus, the ALJ's statement in paragraph 68 is accurate.

In addition, paragraph 68 is the type of evidentiary ruling of the ALJ that is not within the substantive jurisdiction of the Siting Board. Evidentiary rulings of the ALJ that deal with "factual issues susceptible to ordinary methods of proof that are not infused with [agency] policy considerations," are not matters over which the agency has "substantive jurisdiction." *See Martuccio v. Dep't of Prof'l Regulation*, 622 So. 2d 607,

609 (Fla. 1st DCA 1993); *Fla. Power & Light Co. v. Siting Bd.*, 693 So .2d 1025, 1028 (Fla. 1st DCA 1997). Also, an agency has no authority to reweigh the evidence and make independent or supplemental findings of fact. *Id.*

ACI asserts that these determinations are important in evaluating whether or not the proposed use of water is a reasonable beneficial use, which is one of the water use regulatory criteria. However, ACI did not take exception to the ALJ's findings in paragraphs 60 and 61 that FPL's proposal meets all applicable water use regulatory criteria and applicable PPSA criteria. *See Envtl. Coal. Of Fla., Inc. v. Broward County*, 586 So. 2d 1212 (Fla. 1st DCA 1991).

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

Exception No. 4

ACI takes exception to paragraph 69 of the RO, where the ALJ concluded:

> 69. ACI claims the proposed use of the 14 mgd of water, in contrast to the withdrawal of the water, was not properly reviewed by SFWMD under the reasonable-beneficial use criteria. However, SFWMD reviewed the proposed use of the water under the public interest test, which is consistent with its rules and practices. The FPL proposal is consistent with the public interest because it would likely improve current groundwater conditions. It would also reduce water temperature in the CCS to avoid the shutdown of the nuclear generating units pursuant to Nuclear Regulatory Commission requirements.

ACI contends that this conclusion constitutes an unreasonable and incorrect application of the applicable statutes and rules because under the water use permitting three-prong test in Section 373.223(1), "[a] proposed water use must be both a reasonable and beneficial use and in the public interest." *See* ACI's Exceptions at page 12. ACI cites to the definition of "reasonable beneficial use" in Section 373.019(16), and acknowledges

that the definition also includes that the water use must be consistent with the public interest. However, without citation to any authority, ACI argues that these are two separate and distinct public interest requirements such that the SFWMD's interpretation is unreasonable. *See* ACI's Exceptions at pages 12-13.

Contrary to ACI's argument the case law shows that the same evidence and analysis is frequently used to satisfy both the "consistent with the public interest" requirement that is part of the definition of "reasonable beneficial use," and the seemingly separate "consistent with the public interest" third prong of the three-prong statutory test. *See, e.g., Sierra Club, Inc., et al v. Sleepy Creek Lands, LLC,* Case No. 14-2608 ¶¶ 314-323, 346 (DOAH April 29, 2015; SJRWMD July 14, 2015). In this case, the ALJ found in paragraph 60 that the proposed modification met all applicable water use regulatory criteria, to which ACI did not take exception. In addition, the competent substantial record evidence also demonstrates that the SFWMD reviewed the proposed modification for compliance with the applicable reasonable-beneficial use criteria (Sunderland, T. Vol. IV, pp. 410, 430, 431-432, 440, 441, 445).

Deference should be accorded to an agency's interpretation of statutes and rules within its regulatory jurisdiction, and such agency interpretation should not be overturned unless "clearly erroneous." *See, e.g., Falk v. Beard*, 614 So. 2d 1086, 1089 (Fla. 1993); *Dep't of Envtl. Regulation v. Goldring*, 477 So. 2d 532, 534 (Fla. 1985). Furthermore, agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be the only reasonable interpretations. It is enough if such agency interpretations are "permissible" ones. *See, e.g., Suddath Van Lines, Inc. v. Dep't of Envtl. Prot.*, 668 So. 2d 209, 212 (Fla. 1st DCA 1996).

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

Exception No. 5

In this exception ACI argues that paragraph 70 must be rejected because it is "directly contradicted by . . . [paragraphs] 43 and 44." *See* ACI's Exceptions at page 14. In making this argument ACI confuses existing conditions with the expected effects from the proposed modification. As stated above, ACI did not take exception to the ALJ's findings in paragraphs 60 and 61 that FPL's proposal meets all applicable water use regulatory criteria and applicable PPSA criteria. Likewise, paragraph 49 (reflecting that FPL presented evidence to show "that the hypersaline plume would begin to shrink and eventually disappear") and paragraph 50 (reflecting that "the [FPL] model's prediction that groundwater in the area would steadily freshen and the hypersaline plume would shrink and eventually disappear"), are fully supported by the testimony of FPL's expert groundwater modeling witness. Based upon these facts and the ALJ's conclusion that the FPL proposal will "likely improve current groundwater conditions" there is no basis to suggest that the modification is inconsistent with the industrial wastewater/NPDES permit.

For these reasons, ACI's Exception No. 5 is denied.

Exception No. 6

ACI takes exception to paragraph 71 of the RO, where the ALJ concluded that "FPL provided reasonable assurance that the proposed modification would comply with all applicable water use regulatory criteria." For the reasons outlined in the rulings on Exception Nos. 3, 4, and 5, this exception is denied.

Exception No. 7

ACI takes exception to paragraph 72 of the RO, where the ALJ states:

> 72. However, ACI urges the Siting Board to deny the proposed modification because ACI believes it perpetuates a problem created by the CCS and fails to prevent the eventual contamination of the groundwater resources that ACI relies on for its agricultural and mining operations. ACI does not propose a condition or conditions under which FPL's proposal could be approved.

ACI argues that paragraph 72 "somehow [improperly] places the burden on ACI to formulate conditions for the modification." *See* ACI's Exceptions at pages 15-17.

It is well established that once FPL provided a *prima facie* showing of "reasonable assurances," it was incumbent on ACI to present "contrary evidence of equivalent quality" to show why the proposed modification should be rejected or additional conditions imposed. *See Fla. Dep't of Transp. v. J.W.C. Co., Inc.*, 396 So. 2d 778, 789 (Fla. 1st DCA 1981); *see also* § 120.569(2)(p), Fla. Stat. (2015). The ALJ had previously concluded in paragraph 71 that "FPL provided reasonable assurances that the proposed modification would comply with all applicable water use regulatory criteria." The ALJ also found in paragraphs 60 and 61 that "FPL provided reasonable assurance that the FPL proposal meets all applicable water use regulatory criteria" and "that the record evidence supports an affirmative determination by the Siting Board regarding the certification criteria in section 403.509(3)(a) through (g)." Thus, ACI did not show why the proposed modification should be denied or additional conditions imposed.

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

DEP'S Exception

DEP takes exception to paragraph 33 of the RO, where the ALJ refers to "chloride concentration" when describing how DEP classifies G-II and G-III groundwater. DEP explains that the competent substantial record evidence (Coram, T. Vol. III, p. 348, lines 4-13 and p. 359), and the classifications in Rule 62-520.410(1), Florida Administrative Code, show that the correct reference is to "total dissolved solids." This exception is granted.

CONCLUSION

The ALJ concluded that FPL provided reasonable assurance that the proposed modification would comply with all applicable water use regulatory criteria, and the PPSA criteria for approval in Section 403.509(3)(a) through (g). Thus, the ALJ recommended that the Siting Board enter a Final Order approving the modification as proposed by the Department on December 23, 2014, with the additional condition that was stipulated by the parties.

Having reviewed the matters of record and being otherwise duly advised, the Siting Board adopts the ALJ's recommendation.

It is therefore ORDERED that:

A. The Recommended Order (Exhibit A) is adopted, except as modified by paragraphs 63 and 64, and is incorporated by reference herein.

B. FPL's modification of Condition XII, as proposed by the Department on December 23, 2014, is APPROVED.

C. The additional condition stipulated by the parties set forth on pages 24-25 of the Recommended Order (Exhibit A), is APPROVED.

JUDICIAL REVIEW

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

DONE AND ORDERED this 1st day of April, 2016, in Tallahassee, Florida, pursuant to a vote of the Governor and Cabinet, sitting as the Siting Board, at a duly noticed and constituted Cabinet meeting held on March 29, 2016.

THE GOVERNOR AND CABINET
SITTING AS THE SITING BOARD

THE HONORABLE RICK SCOTT
GOVERNOR

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

Lea Crandall — CLERK

4-1-16 — DATE

CERTIFICATE OF SERVICE

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

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this 1st day of April, 2016.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA POWER AND LIGHT COMPANY
TURKEY POINT POWER PLANT UNITS
3-5 MODIFICATION TO CONDITIONS
OF CERTIFICATION
_____/

Case No. 15-1559EPP

RECOMMENDED ORDER

The final hearing in this matter was held on December 1-4, 2015, in Miami, Florida, before Bram D. E. Canter, an Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Florida Power and Light Company ("FPL"):

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STATEMENT OF THE ISSUE

The issue to be determined in this case is whether the Governor and Cabinet, in their capacity as the Siting Board and pursuant to the Florida Electrical Power Plant Siting Act ("PPSA"), should approve FPL's request to modify the Conditions of Certification for Units 3, 4, and 5 of the Turkey Point Power Plant in southeast Miami-Dade County.

PRELIMINARY STATEMENT

On September 5, 2014, FPL filed a petition with DEP pursuant to the PPSA, chapter 403, Part II, Florida Statutes, to modify the Conditions of Certification for Turkey Point Units 3, 4, and 5 to authorize three "system improvement projects," including the construction and operation of up to six new production wells to withdraw 14 million gallons per day ("mgd") of Upper Floridan Aquifer ("UFA") water for use in the Turkey Point cooling canal

system ("CCS") for salinity and temperature management purposes. On December 23, 2014, DEP issued notice of its intent to modify the Conditions of Certification to authorize the three projects proposed by FPL. All required public notices were published by FPL and DEP.

On March 19, 2015, DEP issued a final order authorizing the requested modifications for which no objections had been raised.

Miami-Dade County, Tropical Audubon Society, Inc., and SFWMD each filed notices of their intent to be parties to the modification proceeding. Miami-Dade County and Tropical Audubon Society, Inc., later voluntarily withdrew from the proceeding.

On March 24, 2015, ACI filed a Motion to Intervene, which was opposed by FPL. The motion to intervene was denied for failing to include an adequate explanation of ACI's alleged injury, but ACI was granted leave to file another motion to intervene. On April 3, 2015, ACI filed an Amended Motion to Intervene, which was granted. On October 30, 2015, ACI filed a Second Amended Motion to Intervene, which was granted over the objection of FPL.

At the final hearing, Joint Exhibits 1-6 were admitted into evidence. FPL presented the testimony of: Steven Scroggs, Senior Director of Project Development for FPL, who was accepted as an expert in power plant engineering, design, and siting; Peter Andersen, P.E., who was accepted as an expert in

groundwater hydrology and groundwater flow and transport modeling; and Gregory Powell, Ph.D. FPL also submitted pre-filed expert testimony of: Dr. Powell, James Andersen, Karl Bullock, Kerri Kitchen, Kennard Kosky, and James Lindsay. FPL Exhibits 1-6, 12-13, 19-22, 44, 46, 48, 54-59, and 61 were admitted into evidence.

DEP presented the testimony of: Ann Seiler, an Environmental Specialist III within DEP's Siting Coordination Office; Justin Green, a former Program Administrator for the Siting Coordination Office; and Phillip Coram, a DEP Program Administrator who was accepted as an expert in environmental engineering. DEP Exhibits 23 and 28 were admitted into evidence.

SFWMD presented the testimony of: Simon Sunderland, SFWMD's Section Leader for Lower East Coast Planning, Permitting, and Compliance; and Jefferson Giddings, a Principal Scientist at SFWMD who was accepted as an expert in groundwater modeling. SFWMD Exhibits 1, 2, 10, and 13 were admitted into evidence.

ACI presented the testimony of: Steve Torcise, Jr., who is ACI's President; Marc Harris, a DEP employee responsible for issuing National Pollution Discharge Elimination System permits for power plants; Steven Krupa, who is in charge of the hydrogeology section in the SFWMD's Water Supply Department and who was accepted as an expert in hydrogeology and geology; William Nuttle, Ph.D., who was accepted as an expert in coastal

wetlands hydrology with emphasis in the area of water and salt budgets; Elezier Wexler, who was accepted as an expert in groundwater hydrology and groundwater transport modeling; and Edward Swakon, who was accepted as an expert in groundwater resources and groundwater monitoring. ACI Exhibits 9-11, 14-16, 18, 24-26, 28, 31, 34-36, 38, 42, 48-50, 50A, 51, 52, 57, 61, 63, and 65 were admitted into evidence.

No member of the public requested the opportunity to offer testimony on the proposed modification. No written comments were received from the public.

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

FINDINGS OF FACT

The Parties

1. FPL is a subsidiary of NextEra Energy and a regulated Florida utility. It provides electric service to 4.7 million customers in 35 counties. The Turkey Point Power Plant in southeast Miami-Dade County is one of 14 generating facilities operated by FPL.

2. DEP is the state agency charged with administering the PPSA pursuant to chapter 403, Part II.

3. SFWMD is a regional agency created by chapter 373, Florida Statutes, with regulatory authority over water use

permitting within its geographic jurisdiction, which includes the Turkey Point Power Plant site.

4. ACI owns 2,598 acres of land in southeast Miami-Dade County approximately four miles west of the Turkey Point CCS. ACI has used its property for agriculture and limerock mining for many years and continues to do so.

5. ACI withdraws and uses water from the Biscayne Aquifer pursuant to two SFWMD water use permits. ACI also has a Life-of-the-Mine Environmental Resource Permit issued by DEP for its mining activities. The Life-of-the-Mine permit requires that mining be terminated if monitoring data indicate the occurrence of chloride concentrations greater than 250 milligrams per liter ("mg/L") in the mine pit.

The Requested Modifications

6. FPL is requesting to modify the Conditions of Certification to authorize three projects related to water use: (1) construction and operation of the new UFA production wells for use in the CCS; (2) utilization of one of the new production wells as a dual purpose well to comply with a recent order of the U.S. Nuclear Regulatory Commission related to providing emergency cooling water supplies for the nuclear-fueled Units 3 and 4; and (3) re-allocation of authorized water withdrawn from an existing production well for Unit 5 (Well No. PW-3) as a source of process water for Units 3 and 4.

7. DEP received three written objections to the proposed production wells to provide water for use in the CCS. No objections were raised regarding the two other FPL projects and DEP issued a final order approving those two modifications. This proceeding involves only the proposal to construct and operate new UFA production wells to discharge water into the CCS.

Turkey Point

8. FPL's Turkey Point property covers approximately 9,400 acres in unincorporated Miami-Dade County, located 25 miles south of the City of Miami and along the coastline adjacent to Biscayne Bay.

9. Five electrical generating units were built at Turkey Point. Units 1 and 2 were built in the 1960s. Unit 2 ceased operating as a power generation facility in 2010. Units 3 and 4 are Florida's first nuclear generating units, which FPL constructed in the 1970s. Unit 5 is a natural gas combined cycle generating unit brought into service in 2007.

10. Units 1 through 4 pre-date the PPSA and were not certified when they were built. However, Units 3 and 4 were certified pursuant to the PPSA in 2008 when FPL applied to increase their power output, referred to as an "uprate." Unit 5 was built after the PPSA and was certified under the Act.

The CCS

11. The Turkey Point CCS is a 5,900-acre network of canals, which provides a heat removal function for Units 1, 3, and 4, and receives cooling tower blowdown from Unit 5.

12. FPL constructed the CCS in compliance with a 1971 consent judgment with the U.S. Department of Justice in order to terminate direct discharges of heated water into Biscayne Bay.

13. The CCS is not a certified facility under the PPSA, but it is an "associated facility," which means it directly supports the operation of the power plant.

14. The CCS functions like a radiator, which uses evaporation, convective heat transfer, and radiated heat loss to lower the water temperature. When cooling water enters the plant, heat is transferred to the water by flow-through heat exchangers and then discharged to the "top" or northeast corner of the CCS. Circulating water pumps provide counter-clockwise flow of water from the discharge point, down (south) through the 32 westernmost canals, across the southern end of the CCS, and then back up the seven easternmost canals to the power plant intake.

15. The full circuit through the CCS from discharge to intake takes about 48 hours and results in a reduction in water temperature of about 10 to 15 degrees Fahrenheit.

16. The CCS canals are unlined, so they have a direct connection to the groundwater. Makeup water for the CCS comes from process water, rainfall, stormwater runoff, and groundwater infiltration to replace water lost by evaporation and seepage.

17. When the CCS was first constructed, FPL and SFWMD's predecessor, the Central and Southern Florida Flood Control District, entered into an agreement to address the operation and management of the CCS. The agreement has been updated from time to time. The original agreement and updates called for monitoring the potential impacts of the CCS.

18. Operation of the CCS is also subject to a state industrial wastewater permit and National Pollution Discharge Elimination System ("NPDES") permit administered by DEP. The state industrial wastewater/NPDES permit is incorporated into the Conditions of Certification.

Hypersaline Conditions

19. The original salinity levels in the CCS were probably the same as Biscayne Bay.

20. However, because the salt in saltwater is left behind when the water evaporates, the water in the CCS becomes saltier. Salinity levels in the CCS are also affected by the amount of rainfall, air temperature, water temperature, the volume of flow from the power plant, and the rate of water circulation.

21. In 2008, when FPL applied for certification of the uprate of Units 3 and 4, it reported average salinity to be 50 to 60 Practical Salinity Units ("PSU"). This is a "hypersaline" condition, which means the salinity level is higher than is typical for seawater, which is about 35 PSU.

22. Higher salinity makes water denser, so the hypersaline water in the CCS sinks beneath the canals and to the bottom of the Biscayne Aquifer, which is about 80 feet beneath the CCS. At this depth, there is a confining layer that separates the Biscayne Aquifer from the deeper Upper Floridan Aquifer. The confining layer stops the downward movement of the hypersaline "plume" and it spreads out in all directions.

23. The 2008 Conditions of Certification included a Section X, entitled "Surface Water, Ground Water, Ecological Monitoring," which, among other things, required FPL and SFWMD to execute a Fifth Supplemental Agreement regarding the operation and management of the CCS. New monitoring was required and FPL was to "delineate the vertical and horizontal extent of the hyper-saline plume that originates from the cooling canal system" and "detect changes in the quantity and quality of surface and ground water over time due to the cooling canal system."

24. In response, FPL installed 14 clusters of groundwater monitoring wells, each cluster allowing data to be collected from shallow, middle, and deep zones of the Biscayne Aquifer.

25. In late 2013, salinity levels in the CCS began to spike, reaching a high of 92 PSU in the summer of 2014.

26. FPL presented evidence to show the salinity spikes in recent years are attributable in part to lower than normal rainfall and to higher turbidity in the CCS caused by algal blooms.

27. In addition, the retirement of Unit 2 and the uprate of Units 3 and 4 during this time-period reduced flow and circulation in the CCS, which contributed to increased temperatures in the CCS, more evaporation, and higher salinity levels.

28. ACI contends the uprate of Units 3 and 4 is the primary cause of recent, higher water temperatures and higher salinity. In support, ACI points to FPL's uprate application, which predicted the uprate would increase CCS water temperature and salinity, as well as other data indicating a correlation between the uprate and higher temperature and salinity. However, the uprate application was filed before Unit 2 was decommissioned in 2010. FPL presented evidence that elimination of the thermal output from Unit 2 offset the thermal output from the uprate of Units 3 and 4, so that the total thermal output is now about four percent less. ACI did not refute this thermal output calculation.

29. It is undisputed that evaporation is the main cause of hypersalinity in the CCS, but the testimony about the recent spike in salinity and the relative influence of contributing factors shows it is a complex subject due to the number of factors, most of which vary by season and even daily. The relative contribution of the factors affecting salinity in the CCS is one that scientists can disagree about because the analyses that have been conducted to date are not comprehensive or meticulous enough to end reasonable disagreement.

30. FPL has taken action to reduce salinity within the CCS by adding stormwater from the L-31E Canal (pursuant to emergency orders), adding water from shallow saline water wells, and removing sediment build-up in the canals to improve flow. These actions, combined with more normal rainfall, have decreased salinity levels in the CCS to about 45 PSU at the time of the final hearing.

Saltwater Intrusion

31. Historical data shows that when the CCS was constructed in the 1970s, saltwater had already intruded inland along the coast due to water withdrawals, flood control structures, and other human activities.

32. An interceptor ditch was constructed just west of and adjacent to the CCS to restrict the movement of saline water west of the ditch. This was supposed to be accomplished by pumping

water out of the ditch as necessary to keep its water level lower than the water level in the more western L-31E Canal so that a hydraulic gradient toward the east was maintained.

33. The "front" or westernmost line of saltwater intrusion is referred to as the saline water interface. More specifically, the saline water interface is where groundwater with chloride concentration of 10,000 mg/L or greater meets groundwater with a lower chloride concentration. DEP classifies groundwater with a chloride concentration less than 10,000 mg/L as G-II groundwater, and groundwater with a chloride concentration equal to or greater than 10,000 mg/L as G-III groundwater, so the saline water interface can be described as the interface between G-II and G-III groundwaters.

34. In the 1980s, the saline water interface had moved just west of the CCS interceptor ditch. Now, the saline water interface is four or five miles west of the CCS, and it is still moving west.

35. The groundwater that comes from the CCS can be identified by its tritium content because tritium occurs in greater concentrations in CCS process water than occurs naturally in groundwater. CCS water has been detected four miles west of the CCS.

36. CCS saline waters have also been detected northwest of the CCS, moving in the direction of Miami-Dade County's public water supply wellfields.

37. The hypersaline plume pushes the saline water interface further west. Although Respondents indicated there are other factors that affect saltwater intrusion, the preponderance of the evidence shows the CCS is now the primary reason the saltwater interface in this area is continuing to move inland.

38. Section X of the Conditions of Certification provides that, if monitoring data indicate harm or potential harm to the waters of the State, then additional measures shall be required by DEP to evaluate or to abate such impacts. DEP determined that the CCS is harming waters of the State by contributing to saltwater intrusion. Saltwater intrusion reduces the amount of fresh groundwater available for natural resources and water users.

39. ACI estimated that, with each day that passes, the westward march of the saltwater interface is causing the loss of 855,000 more gallons of fresh groundwater from the Biscayne Aquifer. Even if the amount is only half as much, it is a substantial loss.

40. The Biscayne Aquifer is the main source of potable water in Miami-Dade County and is designated by the federal

government as a sole source aquifer under the Safe Drinking Water Act.

41. When FPL applied to renew its NPDES permit, DEP was concerned about the effect the CCS was having on saltwater intrusion. DEP decided to administratively extend the NPDES permit, rather than renew it, while the agency determined what action should be taken to deal with the problem.

42. On December 23, 2014, DEP issued an Administrative Order ("AO") that requires FPL to prepare and submit for review and approval a Salinity Management Plan to reduce hypersaline conditions and their effect on saline water intrusion. The AO was challenged in a separate administrative proceeding and is not yet in effect.

43. A DEP administrator stated that DEP has not been able to identify a specific violation of state water quality standards attributable to the CCS, but his explanation did not reconcile the undisputed evidence that the CCS has a groundwater discharge of hypersaline water that is contributing to saltwater intrusion. Florida Administrative Code Rule 62-520.400, entitled "Minimum Criteria for Ground Water," prohibits a discharge in concentrations that "impair the reasonable and beneficial use of adjacent waters."

44. As explained in the Conclusions of Law, this is not an enforcement proceeding. However, Respondents thought it was

relevant to assert that FPL's proposal is not a response to a water quality violation. If so, it is relevant for the Administrative Law Judge to state that the record evidence and applicable law indicate FPL is in violation of the minimum criteria for groundwater in rule 62-520.400.

Effect of the Proposed Modification on Saltwater Intrusion

45. Respondents emphasize that the FPL proposal is better than a "no action" alternative. However, the Conditions of Certification require FPL to take action because operation of the CCS is harming water resources. Asserting that FPL's proposal is better than taking no action is no more meaningful than asserting that FPL's proposal would be beneficial.

46. FPL estimated that the addition of 14 mgd of water from the UFA, which has a salinity of about 2 PSU, would reduce salinity in the CCS to the salinity in Biscayne Bay, about 35 PSU, or even lower. ACI's evidence did not refute this estimate.

47. Adding UFA water to the CCS would also reduce water temperatures in the CCS. That is important in order to avoid exceeding the temperature limit imposed by the Nuclear Regulatory Commission on operation of the nuclear units, Units 3 and 4. The temperature limit is 104 degrees Fahrenheit and, if exceeded, would require Units 3 and 4 to be shut down.

48. The FPL proposal would remove the source of the hypersaline water. Hypersaline water would no longer be sinking beneath the CCS.

49. FPL presented evidence to show the low saline water would begin to mix with the hypersaline water already in the Biscayne Aquifer, the groundwater in the area would steadily "freshen," and the hypersaline plume would begin to shrink and eventually disappear.

50. ACI pointed out that the salt in the CCS and in the Biscayne Aquifer would not disappear, but ACI did not explain the significance of that fact. ACI did not explain how the modeling efforts by FPL failed to account for salt or explain how the presence of salt undermines the model's prediction that groundwater in the area would steadily freshen and the hypersaline plume would shrink and eventually disappear.

51. The testimony of ACI's expert hydrologists was persuasive in showing the two-dimensional groundwater model used by FPL and SFWMD to analyze and predict the effect of adding UFA water to the CCS was not the best tool for the task. A two-dimensional model cannot account for some of the factors affecting water movement and salinity. A three-dimensional model produces more reliable results and is a better predictive tool for these purposes. Nevertheless, differences between the results obtained from the two-dimensional modeling by FPL and the

three-dimensional modeling by ACI do not affect the recommendation to the Siting Board.

52. FPL and SFWMD estimated that the addition of 14 mgd of water into the CCS would reduce the rate of westward movement of CCS hypersaline saline waters in the Biscayne Aquifer and this, in turn, would slow the westward movement of the saline water interface.

53. No party believes the FPL proposal will halt the westward movement of the saline water interface.

54. ACI contends the FPL proposal would worsen groundwater conditions because adding water to the CCS would increase the hydraulic "head" in the CCS and exert a greater westward push on groundwaters in the Biscayne Aquifer, and a greater push on the existing hypersaline plume. However, the water in the CCS would be less dense after the UFA water is added, which Respondents' experts said would offset the increase in volume. ACI did not show how water density was accounted for in its own analyses. In addition, ACI's Exhibits 38, 39, 42, 51, and 63 appear to support Respondents' contention that the FPL proposal would slow the rate of saltwater intrusion.

55. The effect of the FPL proposal on the hypersaline plume is the most difficult question in the case. The evidence presented necessarily relied on many assumptions about physical features and processes, some of which had to be simplified for

practical analysis. FPL's evidence does not create certainty, but FPL met its *prima facie* burden to demonstrate that the proposed water use would be consistent with the public interest because the modification would improve current groundwater conditions. ACI's evidence raises serious questions, but was not sufficient to rebut FPL's showing.

56. Respondents estimate that it would take about 25 years for the saline water interface to reach ACI's property if the FPL proposal is implemented.

57. ACI's analysis focused, instead, on the movement of an advancing contour of much lower salinity, 250 mg/L, because this lower level is a limit in ACI's permit and would disrupt ACI's mining operations. This "too saline" water will reach ACI's property in 10 years, even with the FPL proposal.

Water Use Regulatory Criteria

58. ACI did not raise any issues regarding FPL's compliance with SFWMD water use criteria associated with the proposed withdrawal, itself. ACI does not contend that the proposed withdrawal of 14 mgd of water from the UFA would interfere with existing legal uses, cause saltwater intrusion, harm wetlands and surface waters, or adversely affect off-site land uses.

59. SFWMD reviewed the proposed use of the UFA water in the CCS for consistency with the public interest and determined that

the use was consistent because it would improve current conditions in the CCS and Biscayne Aquifer.

60. FPL provided reasonable assurance that the FPL proposal meets all applicable water use regulatory criteria.

PPSA Criteria for Approval

61. For the reasons stated above, the record evidence supports an affirmative determination by the Siting Board regarding the certification criteria in section 403.509(3)(a) through (g).

CONCLUSIONS OF LAW

Standing

62. Section 403.508(3)(e) describes the parties to a PPSA certification proceeding as including persons whose substantial interests are affected and being determined by the proceeding and who timely file a motion to intervene.

63. ACI has standing in this proceeding because the Conditions of Certification acknowledge and address the potential for harm to water resources caused by the CCS. The harm encompasses legal uses of the water resources, like ACI's uses, that will be affected by the operation of the CCS.

64. Respondents cite Agrico v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981), in support of their argument that ACI has not demonstrated standing because the proposed modification does not present an immediate threat to

ACI's property. The injury to ACI is immediate in the sense that it is predictable based on current conditions and does not require the occurrence of intervening events or forces. ACI's injury is no less immediate than the injury that would be suffered by anyone downstream of a pollution source, when the timing of the "impact" and the concentration of the pollution at the time of impact can be calculated by accepted scientific methods.

Burden and Standard of Proof

65. Respondents state that FPL, as the applicant for certification, has the ultimate burden of persuasion to demonstrate entitlement to the requested modifications, citing In re: Progress Energy Florida Levy Nuclear Project Units 1 and 2, 2009 Fla. ENV LEXIS 151 at *114; and Florida Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778, 787 (Fla. 1st DCA 1981). However, those cases pre-date the amendment of chapter 120, Florida Statutes, to create section 120.569(2)(p). This section now places the ultimate burden of persuasion on the challenger in all licensing proceedings arising under chapter 403 after the permit applicant has introduced the permit file constituting its *prima facie* case. This is a licensing proceeding arising under chapter 403. Therefore, ACI has the ultimate burden of persuasion in this proceeding.

66. The standard of proof is a preponderance of the evidence. See § 120.57(1)(j), Fla. Stat. (2015). FPL must demonstrate by a preponderance of the evidence that it has provided reasonable assurances of its compliance with all applicable regulatory criteria. Reasonable assurance contemplates a "substantial likelihood that the project will be successfully implemented." Metro. Dade Cnty. v. Coscan Fla., Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992). It does not require absolute guarantees.

Nonprocedural Agency Requirements

67. Section 373.223(1) provides that "[t]o obtain a [water use] permit pursuant to the provisions of this chapter, the applicant must establish that the proposed use of water: (a) Is a reasonable-beneficial use as defined in s. 373.019; (b) Will not interfere with any presently existing legal use of water; and, (c) Is consistent with the public interest."

68. ACI claims in its Proposed Recommended Order that FPL failed to demonstrate a need for the amount of water it requested and did not consider mitigative measures, but these issues were not raised in ACI's amended petition to intervene.

69. ACI claims the proposed use of the 14 mgd of water, in contrast to the withdrawal of the water, was not properly reviewed by SFWMD under the reasonable-beneficial use criteria. However, SFWMD reviewed the proposed use of the water under the

public interest test, which is consistent with its rules and practices. The FPL proposal is consistent with the public interest because it would likely improve current groundwater conditions. It would also reduce water temperature in the CCS to avoid the shutdown of the nuclear generating units pursuant to Nuclear Regulatory Commission requirements.

70. FPL's proposed modification does not create any inconsistencies with the industrial wastewater/NPDES permit.

71. FPL provided reasonable assurance that the proposed modification would comply with all applicable water use regulatory criteria.

72. However, ACI urges the Siting Board to deny the proposed modification because ACI believes it perpetuates a problem created by the CCS and fails to prevent the eventual contamination of the groundwater resources that ACI relies on for its agricultural and mining operations. ACI does not propose a condition or conditions under which FPL's proposal could be approved.

73. ACI points out that the Conditions of Certification are "fully enforceable," but this is not an enforcement proceeding. Because the preponderance of the evidence demonstrates the FPL proposal would result in an improvement in groundwater conditions, the requested modification, itself, does not fail to comply with the Conditions of Certification.

74. Respondents are probably correct that, in this certification proceeding, it is sufficient for the Siting Board's approval of FPL's proposed modification that the modification would result in an improvement over current groundwater conditions. However, it is appropriate to inform the Siting Board that the operation of the Turkey Point Power Plant, as authorized by the Siting Board under the Conditions of Certification, has caused harm to water resources because of the effects of the CCS, and the modification requested by FPL will not prevent further harm from occurring.

RECOMMENDATION

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

RECOMMENDED that the Siting Board enter a final order approving the modifications to the Turkey Point Conditions of Certification as proposed on December 23, 2014, with the addition of the following condition, which was stipulated by the parties:

> FPL shall monitor the proposed Floridan production wells (F-1, F-2, F-3, F-4 and F-5) on a quarterly basis for: water level or pressure; temperature; pH, Total Dissolved Solids; specific conductance; major anions/cations (including chlorides); NH3; total nitrogen; and total phosphorus. This monitoring data shall be made available to Miami-Dade County as well as FDEP and the SFWMD. On a semi-annual basis, Miami-Dade County may collect groundwater samples of the proposed Floridan production wells (F-1, F-2, F-3, F-4 and F-5) for constituents including

but not limited to 018/16 and Strontium (87Sr/86Sr).

DONE AND ENTERED this 25th day of January, 2016, in Tallahassee, Leon County, Florida.

BRAM D. E. CANTER
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of January, 2016.

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(eServed)

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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

STATE OF FLORIDA
SITING BOARD

FLORIDA POWER AND LIGHT COMPANY
TURKEY POINT POWER PLANT UNITS 3-5
MODIFICATION TO CONDITIONS OF
CERTIFICATION
_____ /

DOAH Case No.: 15-1559EPP
OGC Case No.: 14-0510
License No. PA03-45E

INTERVENOR ATLANTIC CIVIL, INC.'S
EXCEPTIONS TO RECOMMENDED ORDER

Intervenor, ATLANTIC CIVIL, INC. ("ACI"), by and through its undersigned counsel and pursuant to § 120.57(k), Fla. Stat., and Rule 28-106.217, F.A.C., hereby files the following Exceptions to the Recommended Order dated January 25, 2016.

I. INTRODUCTION

On September 5, 2014, Florida Power and Light Company ("FPL") submitted a request to the Department of Environmental Protection ("DEP") to modify the Conditions of Certification under the Power Plant Siting Act (the "Act") for Turkey Point Power Units 3, 4 and 5 pursuant to Section 403.516 (1)(c), Fla. Stat.

On December 23, 2014, DEP noticed its Intent to Modify the Conditions of Certification to Site License PA03-45 certifying the construction and operation of six wells to withdraw 14 million gallons a day ("MGD") of water from the UFA and to discharge it into the cooling canal system ("CCS") to manage salinity and temperature in the CCS ("Modification"), as well as other modifications not at issue in this proceeding. On January 7, 2015, DEP published public notice of its intent to approve the Modification.

On or about February 6, 2015, DEP received three separate sets of written objections to DEP's proposed approval of the Modification. The written objections were filed on behalf of: (1)

Atlantic Civil, Inc.; (2) Miami-Dade County; and (3) Tropical Audubon Society, Blair Butterfield, Charles Monroe, and Jeffrey Mullins.

On March 11, 2015, FPL initiated this proceeding by filing a Petition for Modification of Certification and Expedited Administrative Proceedings pursuant to Section 403.516(1)(c), Fla. Stat. and Rule 62-17.211(1)(b), F.A.C.

On March 19, 2015, DEP issued a partial Final Order Modifying the Conditions of Certification to PA03-45 that are not at issue in this proceeding. J-1. Also on March 19, 2015, DEP referred the remaining conditions at issue to the Division of Administrative Hearings ("DOAH") for resolution.

On March 24, 2015, ACI filed a Motion to Intervene in DOAH Case Number 15-1559EPP. ACI's Motion to Intervene was denied without prejudice on April 1, 2015. On April 3, 2015, ACI filed an Amended Motion to Intervene, which was granted by the undersigned on April 13, 2015. Based upon further discovery, ACI filed a Second Motion to Intervene on October 30, 2015, which was granted by the undersigned on November 13, 2015.

The final hearing in this matter was held in Miami, Florida on December 1-4, 2015 before Administrative Law Judge ("ALJ'") Bram E. Canter.

II. STANDARD OF REVIEW

The ALJ's findings of fact must be based on a preponderance of the evidence of record or on matters officially recognized. § 120.57(1)(j), Fla. Stat. An agency reviewing a recommended order may not reject or modify the findings of fact of an ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order that the findings of fact were not based on competent and substantial evidence." § 120.57(1)l), Fla. Stat.; *Charlotte Cty. v. IMC Phosphates Co.*, 18 So. 3d 1089 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n.*, 955

So. 2d 61 (Fla. 1st DCA 2007). A reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or re-judge the credibility of witnesses. *Belleau v. Dept. of Envtl. Prot.*, 695 So. 2d 1305, 1307 (Fla. 2d DCA 1997); *Dunham v. Highlands Cty. Sch. Bd.*, 652 So. 2d. 894 (Fla. 2d DCA 1995). If there is competent and substantial evidence to support an ALJ's finding of fact, it is irrelevant that there may also be competent and substantial evidence supporting a contrary finding. *See, e.g. Arand Construction Co. v. Dyer*, 592 So. 2d 276, 280 (Fla. 1st DCA 1991); *Conshor, Inc. v. Roberts*, 498 So. 2d 622 (Fla. 1st DCA 1986).

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

Section 120.57(1)(l), Fla. Stat., authorizes an agency to reject or modify an ALJ's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." *Barfield v. Dept. of Health*, 805 So. 2d 1008 (Fla. 1st DCA 2001); *Deep Lagoon Boat Club, Ldt. v. Sheridan*, 784 So. 2d 1140 (Fla. 2d DCA 2001).

The labeling of a finding as a finding of fact or a conclusion of law by the ALJ or the agency is not determinative. The agency may not convert a legal conclusion into a factual finding by calling it a finding of fact. *See Pillsbury v. Dept. of Health and Rehab. Servs.*, 744 So. 2d 1040, 1041-42 (Fla. 2d DCA 1999). The agency must examine the true nature and substance of the ALJ's finding to determine whether it is a finding of fact or conclusion of law. *JJ Taylor Companies, Inc. v. Dept. of Bus. And Prof'l. Reg.*, 724 So. 2d 192 (Fla. 1st DCA 1999). Matters susceptible to ordinary methods of proof, such as determining the credibility of witnesses or the

weight to be given to a particular piece of evidence are inherently factual in nature. By contrast, if a matter is infused with overriding policy considerations, it is a conclusion of law. *Pillsbury*, 744 So. 2d at 1042; *Baptist Hosp., Inc. v. State Dept. of Health and Rehab. Servs.*, 500 So. 2d 620 (Fla. 1st DCA 1986).

III. EXCEPTIONS TO RECOMMENDED ORDER'S FINDINGS OF FACT

Exception No. 1 – Reject or Modify Finding of Fact No. 28

In Finding of Fact No. 28, the ALJ addressed evidence regarding the causal relationship between the operation of Units 3 and 4 in their post-uprate condition and elevated water temperatures and higher average salinity levels in the CCS:

> **ACI contends the uprate of Units 3 and 4 is the primary cause of recent, higher water temperatures and higher salinity. In support, ACI points to FPL's uprate application, which predicted the uprate would increase CCS water temperature and salinity, as well as other data indicating a correlation between the uprate and higher temperature and salinity. However, the uprate application was filed before Unit 2 was decommissioned in 2010. FPL presented evidence that elimination of the thermal output from Unit 2 offset the thermal output from the uprate of Units 3 and 4, so that the total thermal output is now about four percent less. ACI did not refute this thermal output calculation.**

(Recommended Order, Finding of Fact No. 28).

In Finding of Fact No. 28, the ALJ points to evidence presented by FPL that the uprate application for Units 3 and 4 was filed before fossil fuel-burning Unit 2 was decommissioned in 2010, and goes on to rely on a "thermal output calculation" presented by FPL suggesting that eliminating thermal output from Unit 2 offset increased thermal output from Units 3 and 4 "so that the total thermal output is now about four percent less" for the Turkey Point Power Plant.

First, no "thermal output calculation" was presented by FPL. Both ACI and the ALJ questioned Mr. Scroggs regarding exactly what he was measuring in his citation to "total thermal

output." Ultimately, Mr. Scroggs conceded that the referenced four percent reduction was a reduction in the theoretical maximum thermal capacity from all units into the CCS (*i.e.*, all units running at 100 percent output.) (Tr. 1, p. 55, ln. 21 – p. 56, ln. 8).

Mr. Scroggs testified that this maximum theoretical thermal capacity would only be achieved, if at all, during peak power output in the summer. (Tr. 1, p. 56, ln. 23 – p. 57, ln. 9). However, nuclear Units 3 and 4 run at 100% output at all times – whether during high or low power output periods (Tr. 1, p. 56, ln. 17-21). In their uprated condition, Units 3 and 4 consistently add more thermal output into the CCS than they did in their pre-uprated condition. (Tr. 1, p. 75, ln. 6-14). This increased thermal output from Units 3 and 4 occurs year-round, thereby increasing CCS temperatures and salinity even in low power production periods, whereas the remaining fossil fuel plant – Unit 1 and former Unit 2 are only brought on line for short periods in the summer to supplement Units 3 and 4 during peak power generation events.

Mr. Scroggs did not testify that Turkey Point operated at maximum available thermal capacity year-round, whether before or after the uprate or the retirement of Unit 2. Therefore, the actual thermal output year-round – in practice – was established to be different than the theoretical maximum available thermal output offered by FPL. The "normal thermal output" and the increased evaporation and salinity in the CCS is already elevated under the post – uprate condition before the remaining fossil fuel plant (Unit 1) is ever turned on during peak power output in the summer.

FPL's semantics did not establish the *actual* operational effect of the power plants upon conditions in the CCS. In fact, the evidence at hearing was that FPL never studied the effect of power plant operations on temperature or salinity in the CCS and this relationship was not reflected in any of FPL's modeling, analysis or expert testimony. Mr. Scroggs testified at hearing that he

was unfamiliar with the concept of a "heat budget," a tool which is used to measure thermal discharges and allows utilities and regulatory agencies to monitor heat dissipation schemes. (Tr. 1, p. 99, ln. 10-18 *typo* peak budget should read heat budget).

By contrast, Dr. William Nuttle acting as a consultant for the District, was asked to evaluate any relationship between the operation of the power plants and the conditions in the CCS. Dr. Nuttle's data was drawn from FPL data collection beginning in 2011 – after Unit 2 had already been retired. Even with Unit 2 out of commission, Dr. Nuttle advised the District that there was a strong relationship between the operation of the power plants and rises in temperature and salinity in the CCS. In 2015, Dr. Nuttle conducted further analysis at the direction of ACI and established a *direct, causational relationship* between the operation of the power plants and the rises of salinity in the CCS after 2011 – which post-dates the retirement of Unit 2. (Tr. 5, p. 594, ln. 6 – p. 595, ln. 23) FPL provided no analysis to contradict Dr. Nuttle's expert testimony and analysis, which remains the *only* evidence in the record regarding the effect of power plant operations upon salinity in the CCS.

Finding of Fact No. 28, falls victim to the verbal shell game played by Mr. Scroggs. Finding of Fact No. 28 is based on Mr. Scroggs' estimate of a theoretical maximum available thermal output – which may or may not have actually been reached since 2011, and if so, on what frequency and what duration. There is no evidence to indicate that either way. By contrast, ACI's evidence related to the *actual* thermal output experienced at Turkey Point, and the *actual* evaporation and salinity in the CCS. (ACI-52, p. 5 and 13, ACI-65, p. 2 and 10). Finding of Fact No. 28, which is based on a misunderstanding of Mr. Scroggs' testimony (which itself mixes and comingles different measurements), should be rejected and modified to find that operation of Units 3 and 4 in their uprated conditions have been the primary cause of increased average temperature

and salinity in the CCS since 2011. No other factor claimed by FPL was demonstrated to definitively impact the drastic increases in temperature and salinity within the CCS. The facts from the record demonstrate that the Uprate has caused conditions in the CCS to deteriorate and the impact of the Uprate itself should be re-evaluated.

Exception No. 2 – Reject or Modify Finding of Fact Nos. 49 and 50

In Finding of Fact No. 49, the ALJ addressed FPL's evidence that the "freshening" of the CCS would cause the hypersaline plume to "**eventually disappear.**" ACI only takes issue with the finding of fact that the hypersaline plume will shrink and eventually disappear and this is addressed in the analysis of Finding of Fact No. 50.

In Finding of Fact No. 50, the ALJ addressed the impact of continued salt-loading from the CCS into the Biscayne Aquifer:

> **ACI pointed out that the salt in the CCS and in the Biscayne Aquifer would not disappear, but ACI did not explain the significance of that fact. ACI did not explain how the modeling efforts by FPL failed to account for salt or explain how the presence of salt undermines the model's prediction that groundwater in the area would steadily freshen and the hypersaline plume would shrink and eventually disappear.**

(Recommended Order, Finding of Fact No. 50).

The phrase "eventually disappear" in Finding of Fact No. 49 and the entirety of Finding of Fact No. 50 simply overlooks or misstates the collective expert opinions offered by all parties in the Final Hearing.

No expert for any party testified that the existing 25 square mile hypersaline plume of CCS water would "freshen and shrink" as found by the Recommended Order. In fact, Finding of Fact No. 50 stands in direct contradiction to Finding of Fact No. 53.

Water is considered "hypersaline" when the salinity is above seawater or roughly above ~34 Practical Salinity Units (PSU). Mr. Giddings on behalf of the District, and Mr. Anderson on behalf of FPL, both modeled the behavior of the plume following the introduction of the proposed 14 MGD into the CCS. Both models ran simulations out 25 years. Mr. Giddings' model concludes that under the proposed modification, "SFWMD's model indicates a continued increase in the western movement of the hypersaline plume." (Tr. 4, p. 496, ln. 14-17; SF-13, p. 4 and 40). FPL's groundwater model also concurs that the plume and the saltwater interface will continue to move west under the proposed modification. (J-6, p. 15, FPL-22). In both FPL and the District's simulations, the CCS plume and the saltwater interface never stop moving west. *Id.* The Recommended Order's Findings of Fact that either model showed the plume "shrinking and disappearing" is flatly contradicted by the models and the testimony of the modelers and there is no competent and substantial evidence to support the finding.

Mr. Krupa, a District expert in hydrology, who assisted in the development of the 2009 Monitoring Plan required under Condition of Certification X and oversaw District experts regarding the CCS such as Dr. Nuttle, testified that with the introduction of 14 MGD under the proposed modification, seepage of CCS water into the Biscayne Aquifer **will increase**. (Tr. 5, p. 553, ln. 25 – 554, ln. 6). Krupa agreed that the current load of salt mass – 3,000,000 pounds per day – will continue to seep from CCS into the Biscayne Aquifer – simply accompanied by more water through bottom seepage, as that is the only manner in which excess salt mass can leave the CCS. (Tr. 5, p. 554, ln. 7 – 555, ln. 5). Both the District's modeler and FPL's modeler agreed that this seepage of more water, albeit less salty, would be less dense than the existing hypersaline water beneath the CCS – but would nevertheless sink and continue to load salt from the CCS into

the Biscayne Aquifer. (Tr. 2, p. 244, ln. 23 – p. 245, ln. 1; Tr. 4, p. 493, ln. 14 – 494, ln. 14; SF-13, p. 26, 47 and 51).

The study and testimony of both FPL and District modelers was that volumes of less salty and less dense CCS water would encounter the existing, denser hypersaline CCS plume already occupying the limestone beneath the CCS, and this seepage would press downward on the denser plume, displacing it, cutting the plume into two plumes and pushing the CCS water away from the CCS. (Tr. 4, p. 457, ln. 4 - 23; p. 493, ln. 14 - 494 ln. 14; SF-13, p. 37-40; J-6, p. 15, FPL-22). This will occur even with a reduction in the salinity inside the CCS because as FPL's modeler conceded, the driving head created by the water elevation in the CCS will ultimately offset and overcome the decreased density (due to decreased salinity) in the CCS water continuing to seep from the bottom of the CCS into the Biscayne Aquifer. (Tr. 2, p. 244, ln. 23 – 246, ln. 19).

There is no testimony or exhibit that supports the finding in Finding of Fact No. 50 or the finding that the hypersaline plume will "eventually disappear" in Finding of Fact No. 49. Finding of Fact No. 50 is directly at odds with the model and opinions it cites. FPL's model and the District's model simply did not reach the findings attributed to them by the Recommended Order. For that reason, part of Finding of Fact Nos. 49 and 50 are unsupported by any competent and substantial evidence present in the record and must be rejected or modified accordingly.

IV. EXCEPTIONS TO RECOMMENDED ORDER'S CONCLUSIONS OF LAW

Exception No. 3 – Conclusion of Law No. 68 Must be Rejected

In Conclusion of Law No. 68, the ALJ concludes that FPL's failure to demonstrate the need for the volume and duration of water (14 MGD per day for an indeterminate period of time equating to more than 5 billion gallons being pumped into the CCS each year) was not raised by ACI in these proceedings:

ACI claims in its Proposed Recommended Order that FPL failed to demonstrate a need for the amount of water it requested and did not consider mitigative measures, but these issues were not raised in ACI's amended petition to intervene.

(Recommended Order, Conclusion of Law No. 68).

First, the ALJ is correct that no specific allegation regarding FPL's failure to demonstrate an open-ended need for five billion gallons per year, and the District's failure to consider mitigative measures were not raised in those specific words in ACI's Petition. Nevertheless, the issues were identified and raised in the proceeding.

Both the need for the amount of water being sought and the consideration of mitigative measures in connection with the proposed use are criteria in Rule 62-40.410, which is expressly incorporated and referenced in the text of Rule 40E-2.301(1)(e), as the criteria that must be applied in determining reasonable and beneficial use. Both rules state that they are mandatory in the review of an application for water use through utilization of the word "shall." Both of these determinations are specifically identified as required criteria in evaluating whether or not the proposed use of water is a reasonable beneficial use.

Given the procedure under the Power Plant Siting Act, ACI filed no petition, but moved to intervene under §403.516(1)(c)(2) and 403.508(3)(e), Fla. Stat. ACI's Petition to Intervene and Amended Petition to Intervene specifically identified the fact that the proposed water use was not a reasonable beneficial use of water. Moreover, the Power Plant Siting Act requires the parties to file a Statement of Issues to be determined at the Final Hearing. In this pleading required by the Siting Act, ACI specifically identified these very issues with great specificity:

ACI's Statement of the Issues at ¶5 states "[w]hether pumping 14 mgd of UFA water to the IW/CCS will violate Condition of Certification XII-A.3 which requires that the project meet all substantive requirements of Chapter 373, Florida Statutes and Chapter 40E-2, F.A.C. Pumping

14 mgd of UFA water into the IW/CCS in violation of Section 373.223(1), Florida Statutes, or Rule 40E-2.301, F.A.C. would be inconsistent with Sections 403.509(3)(a), (b), (e), (f), and (g), Florida Statutes." Further Section 403.509(3)(b) specifically states whether the operation of the electrical power plant will comply with applicable nonprocedural requirements of agencies.

Whether the proposed water use was a reasonable and beneficial use was also identified in the Joint Prehearing Stipulation as an issue to be tried and determined by the ALJ. In the issues of law remaining to be litigated section at ¶3, ACI stated "[w]hether the proposed modification meets the non-procedural requirements of the SFWMD for issuance of a water use permit."

To the extent that the Recommended Order failed to consider and apply the enumerated items in either Rule to determine reasonable, beneficial use the Recommended Order violates the requirements of both Rules. The District similarly did not consider these factors. The District's reviewer confessed that he was not even familiar with Rule 62-40.410, despite it's clear reference in Rule 40E-2.301(1)(e), which requires the water uses to be evaluated under the former rule to determine whether any proposed use of water is a reasonable and beneficial use (Tr. 4, p. 443 ln. 19- 444 ln. 5).

Exception No. 4 – Conclusion of Law No. 69 Must be Rejected

Similarly, in Conclusion of Law No. 69, the ALJ concluded that, despite ACI's allegation that the District did not review FPL's proposed water use under the reasonable and beneficial use criteria, the District nevertheless reviewed the proposed use under the public interest test:

> **ACI claims the proposed use of the 14 mgd of water, in contrast to the withdrawal of the water, was not properly reviewed by SFWMD under the reasonable-beneficial use criteria. However, SFWMD reviewed the proposed use of the water under the public interest test, which is consistent with its rules and practices. The FPL proposal is consistent with the public interest because it would likely improve current groundwater conditions. It would also reduce water temperature in the CCS to avoid the shutdown of the nuclear generating units pursuant to Nuclear Regulatory Commission requirements.**

(Recommended Order, Conclusion of Law No. 69).

Conclusion of Law No. 69 must be rejected as it constitutes an unreasonable and incorrect application of the applicable statutes and rules that must be applied to FPL's proposed water use. A proposed water use must be both a reasonable and beneficial use and in the public interest. The reasonable beneficial use criteria and the public interest criteria are two separate and distinct requirements under law – not one as the Recommended Order suggests. A proposed water use is not a reasonable beneficial use merely if it simply meets the public interest criteria. It must meet ***both*** criteria. Section 373.223(1), Fla. Stat. states that:

> To obtain a permit pursuant to the provisions of this chapter, the applicant must establish that the proposed use of water:
> (a) Is a reasonable beneficial use as defined in s.373.019, Fla. Stat.;
> (b) Will not interfere with any presently existing legal users of water; and
> (c) Is consistent with the public interest.

§373.223(1), Fla. Stat.

"Reasonable beneficial use" is a defined term in Chapter 373, Part II:

> "Reasonable beneficial use means the use of water in such quantity as is necessary for economic and efficient utilization for a purpose and in a manner that is ***both*** reasonable and consistent with the public interest.

§ 373.019(16), Fla. Stat. (emphasis supplied).

Under the statute, there is some overlap in that a reasonable beneficial use must ***also*** be consistent with the public interest. However, the plain ordinary terms of the statute make it very clear that consistency with the public interest is only one component of the reasonable beneficial use definition. The use must also be demonstrated by the applicant to be for a quantity of water necessary for economic and efficient utilization and for a purpose and in a manner that is ***both***

reasonable and consistent with the public interest – not just a use of water that is consistent with the public interest. The Recommended Order's interpretation of the statute must be rejected as contrary to the plain and ordinary meaning assigned to the terms of the statute. The Recommended Order must also be rejected because it renders the reasonable beneficial use criteria set forth in § 373.223(1)(a) superfluous to the separate public interest consistency requirement in § 373.223(1)(c). (Recommended Order, Conclusion of Law No. 69).

This interpretation also violates the clear and unequivocal requirements of Rule 62.-40.410, F.A.C., which identifies no less than 18 factors that must be considered in determining whether a water use is "reasonable and beneficial" separate and apart from consistency with the public interest.

On this issue, the District witness confessed that he was not "totally familiar' with the mandatory criteria for evaluating a reasonable and beneficial use under Rule 62.40.410, F.A.C. (Tr. 4, p. 443 ln. 19- 444 ln. 5). The record shows that the District neither applied the criteria mandated for all water use permits under Rule 62-40.410, F.A.C., at the time FPL's application was being reviewed, nor did the District provide any evidence at hearing that FPL's application was consistent with each of the factors enumerated in the Rule.

The Recommended Order concludes that the District reviewed the use of the water under the public interest test. However, it is uncontested that the District did not review the use of the water under the reasonable and beneficial use criteria in Rule 62-40.410, F.A.C. No mitigative measures were considered in evaluating FPL's application, – either at the permit stage or at Final Hearing – despite this being a mandated criteria for determining a reasonable and beneficial use. This was discussed extensively in ACI's Proposed Recommended Order, but the Recommended

Order, like the District reviewer, does not analyze whether the 14 MGD modification would meet these criteria. Conclusion of Law No. 69 must therefore be rejected.

Exception No. 5 – Conclusion of Law No. 70 Must be Rejected

In Conclusion of Law No. 70, the ALJ concludes that **"FPL's proposed modification does not create any inconsistencies with the industrial wastewater/NPDES permit."**

Conclusion of Law No. 70 is directly contradicted by both the industrial wastewater/NPDES permit and the ALJ's own Finding of Fact Nos. 43 and 44 where the ALJ found that "the undisputed evidence that the CCS has a groundwater discharge of hypersaline water that is contributing to saltwater intrusion" and that "the record evidence and applicable law indicate FPL is in violation of the minimum criteria for groundwater in rule 62-520.400." The ALJ in Finding of Fact No. 53 also found that FPL's proposed modification would not halt the saltwater intrusion caused by the CCS – it would only somewhat reduce the rate of its advance westward. Hence, FPL proposal will continue the very same violation – just at a somewhat reduced rate.

However, FPL's industrial wastewater/NPDES permit expired and was administratively extended because the Department witnesses testified that the Department could not re-issue the permit until the groundwater contamination issues were resolved. (Tr. 3, p. 323, ln. 18- p. 324, ln. 6). The industrial wastewater/NPDES permit is incorporated into the State License under Condition of Certification XI. The permit clearly states that "The Permittee's discharge to ground water shall not cause a violation of the minimum criteria for ground water specified in Rule 62-520.400, F.A.C. and 62-520.430, F.A.C."

Accordingly, Conclusion of Law No. 70 is simply incorrect and is belied by both the Findings of Fact and the plain terms of the industrial wastewater/NPDES permit itself. Conclusion of Law No. 70 must be rejected for this reason.

Exception No. 6 – Conclusion of Law No. 71 Must Be Rejected

Conclusion of Law No. 71, which states that **"FPL provided reasonable assurance that the proposed modification would comply with all applicable water use regulatory criteria"** must be rejected for the reasons stated in greater detail in Exceptions Nos. 4 and 5. Finding of Fact Nos. 34 – 37 establish that FPL's CCS water, identified by elevated levels of the radioactive isotope tritium, is the primary cause of saltwater intrusion in the area. Similarly Finding of Fact Nos. 43 and 44 already establish that discharges from the CCS are violating minimum criteria for groundwater in Rule 62-520.400, F.A.C., and Finding of Fact Nos. 52 and 53 clearly find that FPL's proposal will result in a continuation of this activity – albeit at a reduced rate. Therefore, Conclusion of Law No. 71 must be rejected, as a reasonable and beneficial use of water cannot be one that causes and perpetuates a continued violation of state groundwater quality standards.

Additionally, Conclusion of Law No. 71 goes against the evidence adduced at hearing that ACI's legal existing uses of the Biscayne Aquifer will be impacted by FPL's operation of the CCS under the modification. (Recommended Order, Finding of Fact Nos. 53, 56 and 57). Section 373.223(1)(b) states that FPL must demonstrate that the permit **"[w]ill not interfere with any presently existing legal users of water."** Despite differences in timing, the modeling done by all parties demonstrates that ACI's existing legal use will be impacted. The ALJ admits that nothing within the modification will stop that harm. (Recommended Order, Conclusion of Law No. 74)

Exception No. 7 – Conclusion of Law No. 72 Must be Rejected

In Conclusion of Law No. 72, the Recommended Order somehow places the burden on ACI to formulate conditions for the modification of FPL's state license to address the ALJ's own Finding of Fact that FPL is causing saltwater intrusion in the area, that FPL is violating state groundwater standards, and that FPL's proposed modification will simply continue both the saltwater intrusion and the groundwater violations, albeit at a reduced rate:

> **However, ACI urges the Siting Board to deny the proposed modification because ACI believes it perpetuates a problem created by the CCS and fails to prevent the eventual contamination of the groundwater resources that ACI relies on for its agricultural and mining operations. ACI does not propose a condition or conditions under which FPL's proposal could be approved.**

(Recommended Order, Conclusion of Law No. 72).

In the ALJ's November 13, 2015 order granting ACI's amended intervention in the proceeding he stated the following, "[t]he Siting Board has the authority to determine under what conditions the certified facility will be operated. The proposed modification is directly related to ACI's alleged harm. ACI's allegation are sufficient to establish its standing in this modification proceeding ***to request that the Siting Board impose conditions that will prevent the harm***." (emphasis added).

ACI has done exactly what the ALJ asked of it. (See ACI's PRO at Statement of the Issues (2), ¶¶ 104, 105, 107, Recommendation). There is no requirement apparent from the statute or implementing rules that imposes a burden upon an intervenor to formulate and propose specific conditions for issuance of a modification to a State License.

It is somewhat ironic that ACI specifically raised and argued that the consideration of "mitigative measures" upon the water use was a requirement for an applicant establishing a reasonable and beneficial use – and the District, FPL and the Recommended Order all failed to apply that clear permit criteria in Rule 62-40.410(f), F.A.C. Yet, it is somehow incumbent upon ACI itself to identify, design and propose these same mitigative measures that should have been considered and conditioned upon FPL's proposed water use in the first place.

Even more ironically, the existing State License in Condition X already identifies a list of measures that can be taken – most significantly including remediation of FPL's proven legacy of

damage to the Biscayne Aquifer and the freshwater supply in Southeastern Miami-Dade County.

ACI made clear for the record that harm was occurring to the water resources of the state, that the CCS is the primary cause of saltwater intrusion, that violations of state groundwater standards are and will continue to occur, and that ACI's legal existing use will be harmed.

The Recommended Order specifically recommends that the Siting Board be apprised of all of these facts which ACI successfully proved. However, the actual terms for conditions upon FPL's – state license is a more appropriate determination for the Siting Board – not ACI.

Notwithstanding the role reversal imposed by Conclusion of Law No. 72, ACI still believes that limiting the proposed water use to periods where supplemental water is actually required based upon specific need (*i.e.*, a specified level of hypersalinity or temperature) was an option specifically mentioned in ACI's Proposed Recommended Order. Additionally, if the burden rests with ACI to propose conditions than ACI would propose a slurry wall at the western side of the CCS to prevent CCS water from leaving FPL's permitted Zone of Discharge, extraction wells west of the L-31E, and lining the bottoms of the western portion of CCS to cut off or drastically reduce the more than 15 MGD of seepage of CCS water into the groundwater would be other possible mitigative methods. Finally, FPL should be required in the State License to remediate its existing contaminate plume to achieve an actual, timely recession of the saltwater intrusion it has been causing in the area – a measure that any other party would be required to do by the Department where groundwater contamination has been found.

Respectfully submitted, this
9th day of February, 2016.

/s/ Andrew J. Baumann
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished for filing via electronic mail this 9th day of February, 2016 to:

Lea Crandall
Agency Clerk
3900 Commonwealth Boulevard
Mail Station 35
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STATE OF FLORIDA
SITING BOARD

FLORIDA POWER AND LIGHT COMPANY
TURKEY POINT POWER PLANT UNITS
3-5 MODIFICATION TO CONDITIONS
OF CERTIFICATION
_____/

OGC Case No. 14-0510
DOAH Case No. 15-1559-EPP

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION'S
EXCEPTION TO RECOMMENDED ORDER

The State of Florida Department of Environmental Protection submits the following as its exception to the Recommended Order:

The Department takes exception to the paragraph 33 of the Recommended Order, in that the references to "chloride concentration" should be removed, with "total dissolved solids" substituted in place of that term. The reference to "chloride concentration" is an apparent scrivener's error, and the sentences would not be supported by competent substantial evidence with the term "chloride concentration" in place. Testimony on the subject referred only to total dissolved solids. [T. III at 347, 359 (Coram)]. Furthermore, given the adopted rule, accepting the paragraph as a finding would presuppose an erroneous conclusion of law. Fla. Admin. Code R. 62-520.410(1).

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WHEREFORE the Department requests entry of a final order adopting the recommended order with the correction of the scrivener's error noted above.

DATED on this 9th day of February 2016.

STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served a true and correct copy of this document, via Electronic mail, upon the below on this 9th day of February 2016:

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STATE OF FLORIDA
SITING BOARD

FLORIDA POWER AND LIGHT COMPANY
TURKEY POINT POWER PLANT UNITS
3-5 MODIFICATION TO CONDITIONS
OF CERTIFICATION

DOAH Case No. 15-1559EPP
OGC Case No.: 14-0510
License No. PA03-45E

/

JOINT RESPONSE TO INTERVENOR ATLANTIC CIVIL, INC.'S EXCEPTIONS TO THE RECOMMENDED ORDER

Pursuant to Rule 28-106.217, Florida Administrative Code ("F.A.C."), the Florida Department of Environmental Protection ("Department" or "DEP"), South Florida Water Management District ("SFWMD"), and Florida Power & Light Company ("FPL") (collectively "Respondents"), by and through undersigned counsel, hereby respond to the Exceptions to Recommended Order filed by Intervenor, Atlantic Civil, Inc. ("ACI").

I. Introduction

This proceeding involves FPL's petition, pursuant to section 403.516(1)(c), Florida Statutes ("F.S.") of the Florida Electrical Power Plant Siting Act ("PPSA") and Rule 62-17.211(1)(b)7., F.A.C., for approval of portions of a modification to the Site Certification for Turkey Point Units 3-5 which the Department proposed on December 23, 2014. The proposed modification at issue would authorize construction and operation of six new production wells that would enable FPL to withdraw brackish water from the Upper Floridan Aquifer ("UFA") for use in the Turkey Point cooling canal system ("CCS") to help reduce salinity and temperature levels within the CCS and help improve conditions in adjacent groundwaters.

Following public notice of its intent to approve the modification, DEP received three separate sets of written objections filed on behalf of: (1) ACI; (2) Miami-Dade County; and (3) Tropical Audubon Society and certain of its members. By the time of the final hearing, however, both Miami-Dade County and Tropical Audubon Society (and its members) withdrew from the

proceeding, leaving ACI as the only party opposed to the proposed modification. The South Florida Water Management District filed a notice of intent to be a party pursuant to section 403.508(3)(b), F.S., and appeared in support of DEP's proposed modification.

Following the final hearing and the parties' submittal of proposed recommended orders, the Administrative Law Judge ("ALJ") entered a Recommended Order on January 25, 2016. In the Recommended Order, the ALJ specifically found that "the modification would *improve* current groundwater conditions" and that ACI's own modeling evidence "appear[s] to support Respondents' contention that the FPL proposal would *slow* the rate of saltwater intrusion." Rec.Order ("RO"), at ¶¶ 54, 55 (emphasis added); see also ¶¶ (concluding that the modification would improve groundwater conditions). The ALJ also determined "FPL provided reasonable assurance that the FPL proposal meets all applicable water use regulatory criteria" and that "the record evidence supports an affirmative determination by the Siting Board regarding the certification criteria in section 403.509(3)(a) through (g)." Id. at ¶¶ 60, 61. Accordingly, the ALJ recommended that the Siting Board enter a final order approving the modifications to the Turkey Point Conditions of Certification as proposed on December 23, 2014, with the addition of a new condition to which all parties stipulated. Id. at pp. 24-25.

On February 9, 2016, ACI filed Exceptions to the Recommended Order. Importantly, ACI did not take exception to the ALJ's findings of fact that the proposed modification would improve groundwater conditions.[1] Nor did ACI take exception to the ALJ's determination that the proposed modification satisfies the applicable PPSA criteria. Instead, ACI focusses on certain isolated statements in the Recommended Order regarding the cause and effect of existing

[1] Florida case law holds that when a party does not file any exceptions to certain findings of fact the party "has thereby expressed its agreement with, or at least waived any objection to those findings of fact." See Envtl. Coalition of Fla., Inc. v. Broward Cnty., 586 So.2d 1212, 1213 (Fla. 1st DCA 1991).

conditions within the CCS and suggests that additional conditions should be imposed to remedy existing groundwater impacts. However, as the ALJ implicitly recognized, when, as here, an applicant seeks to modify an existing permit or license, regulatory review only includes that portion of the existing permit or license that is proposed to be modified. See Friends of the Everglades, Inc. v. Dep't of Envt. Reg., 496 So. 2d 181, 183 (Fla. 1st DCA 1986). The "reasonable assurance" requirement "focuses on the activity for which permitting is presently sought, and does not . . . cast upon the applicant the burden of providing 'reasonable assurances' anew with respect to the original project already constructed in accordance with a valid permit." Id. Thus, the determination of whether FPL has provided reasonable assurances in this proceeding is focused on the impacts of the proposed modification. Because the ALJ found that the proposed modification will *improve* current groundwater conditions, there is no basis to reject the ALJ's ultimate recommendation of approval. As further discussed below, ACI's exceptions fail to provide any proper basis for rejecting any Finding of Fact or Conclusion of Law in the Recommended Order, much less any basis for rejecting the ALJ's ultimate recommendation of approval.

II. Standard of Review of Recommended Orders

Under sections 120.569 and 120.57, F.S., 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), F.S., 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 DCA

1991); 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), F.S. 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).

III. Specific Responses to ACI's Exceptions

Exception No. 1

In this exception, ACI contends that the ALJ's Finding of Fact No. 28 "should be rejected and modified to find that operation of Units 3 and 4 in their uprated conditions have been the primary cause of increased average temperature and salinity in the CCS since 2011." *ACI Exceptions*, at pp. 6-7. The specific Finding of Fact at issue states:

> 28. ACI contends the uprate of Units 3 and 4 is the primary cause of recent, higher water temperatures and higher salinity. In support, ACI points to FPL's uprate application, which predicted the uprate would increase CCS water temperature and salinity, as well as other data indicating a correlation between the uprate and higher temperature and salinity. However, the uprate application was filed before Unit 2 was decommissioned in 2010. FPL presented evidence that elimination of the thermal output from Unit 2 offset the thermal output from the uprate of Units 3 and 4, so that the total thermal output is now about four percent less. ACI did not refute this thermal output calculation.

As ACI recognizes, FPL witness Steven Scroggs testified regarding the effect of the decommissioning of Unit 2 on thermal output capacity. Specifically, at page 54 of the hearing transcript, Mr. Scroggs testified as follows:

> **Q. Can you approximate the amount of that decrease in overall thermal output from the power plants and into the CCS?**
>
> A. Yes. The net decrease is approximately four percent less after the uprate as a maximum thermal capacity compared to the pre-uprate condition of thermal capacity.

In arguing that Finding of Fact No. 28 should be "rejected," ACI essentially claims that Mr. Scroggs' approximation did not amount to a "thermal output calculation" (as the ALJ characterized it) because it concerned "maximum thermal capacity" rather than "actual thermal output." Based on that supposed distinction, ACI argues that the Siting Board should reject Finding of Fact No. 28 and modify it to determine that the uprate of Units 3 and 4 was the "primary" cause of recent CCS salinity levels, based solely on the testimony of ACI's witness.

As noted above, however, 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), F.S. Here, the ALJ accurately described Mr. Scroggs testimony, although perhaps not exactly as ACI would have it. As such, Finding of Fact No. 28 is supported by competent, substantial evidence and is therefore binding on the Siting Board. See Fla. Dep't of Corr., 510 So. 2d at 1123; Charlotte Cnty., 18 So. 3d at 1092. Furthermore, in reviewing an ALJ's recommended order, an agency has no authority to make independent or supplementary findings of fact. See Florida Power & Light Co., 693 So.2d at 1026-27; Manasota 88, Inc., 545 So. 2d at 441. Thus, the Siting Board must reject ACI's

invitation to "modify" Finding of Fact No. 28 to determine the "the primary cause of increased average temperature and salinity in the CCS since 2011."

In any event, ACI fails to explain how rejection or modification of Finding of Fact No. 28 would affect the outcome of this proceeding. As the ALJ found in Finding of Fact No. 29, to which ACI did not take exception, "the relative influence of contributing factors" on CCS salinity is "a complex subject" that "scientists can disagree about." RO, at p. 12. In the end, however, this ultimately has no bearing on the determinative issue of whether the proposed modification will improve conditions within the CCS and adjacent groundwaters and thereby satisfy the applicable statutory criteria. As noted above, ACI did not take exception to the ALJ's critical findings on those issues in Findings of Fact Nos. 54-55 and 61.

For these reasons, ACI's Exception No. 1 must be denied.

Exception No. 2

In this exception, ACI similarly argues that Findings of Fact 49 and 50 "must be rejected or modified accordingly." *ACI Exceptions*, at p. 9. In their entirety, those findings state:

> 49. FPL presented evidence to show the low saline water would begin to mix with the hypersaline water already in the Biscayne Aquifer, the groundwater in the area would steadily "freshen," and the hypersaline plume would begin to shrink and eventually disappear.
>
> 50. ACI pointed out that the salt in the CCS and in the Biscayne Aquifer would not disappear, but ACI did not explain the significance of that fact. ACI did not explain how the modeling efforts by FPL failed to account for salt or explain how the presence of salt undermines the model's prediction that groundwater in the area would steadily freshen and the hypersaline plume would shrink and eventually disappear.

ACI contends that, "[t]he phrase 'eventually disappear' in Finding of Fact No. 49 and the entirety of Finding of Fact No. 50 simply overlooks or misstates the collective expert opinions

offered by all parties in the Final Hearing." *ACI Exceptions*, at p. 9. In doing so, ACI improperly asks the Siting Board to reweigh the evidence.

Contrary to ACI's assertion, both the specific statement at issue in Finding of Fact 49 (that FPL presented evidence to show "that the hypersaline plume would begin to shrink and eventually disappear") and the pertinent discussion in Finding of Fact 50 (regarding "the [FPL] model's prediction that groundwater in the area would steadily freshen and the hypersaline plume would shrink and eventually disappear") are fully supported by the testimony of FPL's expert groundwater modeling witness, Peter Andersen, and FPL Exhibit 22, which was admitted into the record.[2] Specifically, at pages 134-136 of the hearing transcript, Mr. Andersen referred to FPL Exhibit 22 to present the results of his modeling, which showed "the progression of the reduction in the hypersaline plume [shown in red on FPL Exhibit 22] and the reduction also to the saline conditions." Hearing Transcript, at p. 136, lines 16-18. As Mr. Andersen explained, "at 10 years [into the simulation] you see that red or hypersaline area beginning to shrink and disappear" and, by the end of the simulation period, the aquifer "almost looks like [it] would for a regular coastal situation where it's predominantly green or saline water." Id., lines 3-11. Thus, the record indisputably contains competent, substantial evidence supporting the statements at issue in Findings of Fact 49 and 50. See Duval Util. Co., 380 So. 2d at 1031 ("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.'").

[2] Hearing Transcript, at p. 115. By agreement of the parties and with the ALJ's approval, the pertinent portion of Mr. Andersen's testimony was adopted from the record in a different proceeding (DOAH Case No. 15-1746) as if presented live at the final hearing in this proceeding. In the transcript, Mr. Andersen refers to FPL Exhibit 14 (which was the exhibit number in the other proceeding), but that exhibit was entered into the record of this proceeding as FPL Exhibit 22. See Id. at p. 116.

Although ACI points to what it contends to be countervailing evidence (and confuses the "hypersaline plume" with the "saltwater interface"),[3] 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, 658 So. 2d at 1138 (citations omitted). "[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., 2001 WL 1917274, at *4 (citations omitted); see also, Fla. Chapter of Sierra Club, 436 So. 2d at 388-89 ("Simply because some evidence is disregarded, that does not mean that the findings themselves are not based on other substantial, competent evidence, which the finder in his judgment relied upon."). Because, Findings of Fact 49 and 50 are supported by competent, substantial evidence, they cannot be rejected.

For these reasons, ACI's Exception No. 2 must be denied.

Exception No. 3

In this exception, ACI contends that Conclusion of Law No. 68 "must be rejected." *ACI Exceptions*, at p. 9. In its entirety, that paragraph of the Recommended Order states:

> 68. ACI claims in its Proposed Recommended Order that FPL failed to demonstrate a need for the amount of water it requested and did not consider mitigative measures, but these issues were not raised in ACI's amended petition to intervene.

[3] Contrary to ACI's suggestion, there is no inconsistency between the ALJ's findings in paragraphs 49-50 and paragraph 53. Paragraph 53 refers to the "saltwater interface," described by the ALJ in Finding of Fact 33 as the "'front' or westernmost line of saltwater intrusion . . . . where groundwater with [TDS] concentration of 10,000 mg/L or greater meets groundwater with a lower [TDS] concentration." This should be distinguished from the "hypersaline plume" referenced in paragraphs 49-50, which means "the salinity level [is] higher than is typical for seawater, which is about 35 PSU [35,000 mg/L TDS]." FOF ¶21; J-6, p.1.

ACI freely admits that "the ALJ is correct that no specific allegation regarding FPL's [alleged] failure to demonstrate an open-ended need for five billion gallons per year, and the District's [alleged] failure to consider mitigative measures were not raised in those specific words in ACI's Petition." Id. at p. 10. ACI nevertheless contends "that the issues were identified and raised in the proceeding" by virtue of generic references to various regulatory and statutory provisions in ACI's original and amended petitions to intervene, its [amended] statement of issues, and the prehearing stipulation. However, none of those references contain any specific allegations regarding FPL's "need" for UFA water or consideration of "mitigative measures." Thus, the ALJ's statement in Conclusion of Law 68 is accurate.

Furthermore, ACI misconstrues how Rule 62-40.410, F.A.C., is applied during the review process. The factors enumerated in Rule 62-40.410, F.A.C., are not applied separate from Rule 40E-2.301, F.A.C., and the Applicant's Handbook for Water Use Permit Applications within the South Florida Water Management District ("Applicant's Handbook"). In fact, Rule 40E-2.301, F.A.C., clearly states that in order to satisfy the enumerated conditions for permit issuance, including requirement to demonstrate a need and quantity of water as well as the practicality of mitigating any harm by adjusting the quantity or method of use, the applicant must provide reasonable assurances that the criteria in the Applicant's Handbook is met. R. 40E-2.301(2), F.A.C. In other words, FPL demonstrated it considered the factors in Rule 62-40.410, F.A.C., when it met the criteria in the Applicant's Handbook.

The ALJ found that FPL "provided reasonable assurances that the proposal meets all applicable water use regulatory criteria." RO, at ¶ 60. ACI did not take exception to this Finding of Fact. Thus, ACI agrees with, or at least waives any objection to this Finding of Fact and the Conclusion of Law that stems from the Finding of Fact. See Envtl. Coalition of Fla., Inc., 586 So. 2d at 1213.

In any event, ACI fails to explain how rejection of Conclusion of Law 68 would affect the outcome of this proceeding. In Finding of Fact 60 and Conclusion of Law 71, the ALJ determined, without limitation, that FPL provided reasonable assurance that the proposed modification meets "*all* applicable water use regulatory criteria."[4] (Emphasis added). Likewise, in Finding of Fact 61 (to which ACI did not take exception), the ALJ also concluded "that the record evidence supports an affirmative determination by the Siting Board regarding the certification criteria in section 403.509(3)(a) through (g)." Thus, the ALJ addressed all the regulatory and statutory provisions that ACI claims to have put at issue and, therefore, ACI can establish no prejudice even assuming *arguendo* that the statement at issue in Conclusion of Law 68 was somehow incorrect.

For these reasons, ACI's Exception No. 3 must be denied.

Exception No. 4

In this exception, ACI seeks to have the Siting Board reject Conclusion of Law No. 69, which provides:

> 69. ACI claims the proposed use of the 14 mgd of water, in contrast to the withdrawal of the water, was not properly reviewed by SFWMD under the reasonable-beneficial use criteria. However, SFWMD reviewed the proposed use of the water under the public interest test, which is consistent with its rules and practices. The FPL proposal is consistent with the public interest because it would likely improve current groundwater conditions. It would also reduce water temperature in the CCS to avoid the shutdown of the nuclear generating units pursuant to Nuclear Regulatory Commission requirements.

ACI claims that the District's regulatory interpretation, which the ALJ discussed and effectively adopted in this conclusion of law, "must be rejected" because, ACI argues, a proposed water use

[4] Although ACI takes exception to Conclusion of Law 71, as discussed below, there is no basis to reject that conclusion.

must be demonstrated to be "**both** reasonable and consistent with the public interest – not just a use of water that is consistent with the public interest." *ACI Exceptions*, at p. 13.

As the agency with the primary responsibility of interpreting its water use regulatory criteria, the District is afforded substantial deference. See Harloff v. City of Sarasota, 575 So.2d 1324, 1327 (Fla. 2d DCA 1991). As such, the District's interpretations of statutes and rules within its regulatory jurisdiction do not have to be the only reasonable interpretations; they need only be "permissible" and "reasonable." See, e.g., Suddath Van Lines, Inc., 668 So.2d at 212. Here, ACI cites no legal authority to suggest that the District's interpretation is impermissible. Nor does it offer any logical basis to suggest why FPL's proposed use could be in "the public interest" and yet not be "reasonable and beneficial." Furthermore, the District's interpretation is entirely reasonable in light of the ALJ's undisputed findings of fact that the proposed use will *improve* existing conditions and *slow* the rate of saltwater intrusion.[5] Those findings are fully supported by groundwater modeling performed by the District, as well as FPL and ACI, all of which assumed continuous use of the entire requested amount (14 mgd) of UFA water. [Coram, T.340-41; SFWMD-10; SFWMD-13; Giddings, T.466; Andersen, T.139-40; FPL-22; Wexler, T.683-85; ACI-38].

Again, ACI bases its argument on a misreading of the conditions for permit issuance set forth in Rule 40E-2.301, F.A.C., and the factors listed in Rule 62-40.401, F.A.C. As stated above in response to Exception No. 3, an applicant demonstrates it has considered the factors listed in Rule 62-40.410, F.A.C., by providing reasonable assurances it meets the criteria in the

[5] As the ALJ also found in Finding of Fact 58 (to which ACI did not take exception): "ACI did not raise any issues regarding FPL's compliance with SFWMD water use criteria associated with the proposed withdrawal, itself [as opposed to the proposed "use" within the CCS]. ACI does not contend that the proposed withdrawal of 14 mgd of water from the UFA would interfere with existing legal uses, cause saltwater intrusion, harm wetlands and surface waters, or adversely affect off-site land uses."

Applicant's Handbook. F.A.C. R. 40E-2.301(2), F.A.C. The ALJ found that the proposed modification met all applicable water use regulatory criteria. RO, at ¶ 60. The record demonstrates that the District reviewed the proposed modification for compliance with the applicable reasonable-beneficial criteria. See Hearing Transcript, at pp. 410, 430, 431-32, 440, 441, 445. Additionally, the ALJ found that the proposed modification would improve conditions. RO, ¶¶ 46-48, 52. Therefore, ACI's statement that the District did not consider mitigative measures is irrelevant because the District and the ALJ did not find that harm would occur. It is also clear from the record that separate analyses were performed for compliance with the reasonable-beneficial and the public interest prongs of Section 373.223(1), F.S., in a manner consistent with District criteria.

For these reasons, ACI's Exception No. 4 must be denied.

Exception No. 5

This exception challenges Conclusion of Law No. 70, in which the ALJ concluded that "FPL's proposed modification does not create any inconsistencies with the industrial wastewater/NPDES permit." *ACI Exceptions*, at p. 14. In arguing that the proposed modification is "inconsistent" with the DEP permit because it is not expected to completely "halt" the westward movement of the saline water interface, ACI once again ignores the ALJ's undisputed findings that "the modification would *improve* current groundwater conditions" and that ACI's own modeling evidence "appear[s] to support Respondents' contention that the FPL proposal would *slow* the rate of saltwater intrusion." RO, at ¶¶ 54, 55 (emphasis added). As discussed above, the determination of whether FPL has provided reasonable assurances in this proceeding is focused on the impacts of the proposed modification; not the totality of pre-existing conditions. See Friends of the Everglades, Inc., 496 So. 2d at 183 (based on evidence that a proposed permit modification would improve water quality, the applicant provided

reasonable assurances of compliance with DEP standards even though project would completely resolve pre-existing violations). Because the ALJ found that the proposed use of UFA water within the CCS will *improve* conditions in adjacent groundwaters, there is no basis to conclude that the proposed modification will cause or contribute to any violations of standards that may currently exist.

For these reasons, ACI's Exception No. 5 must be denied.

Exception No. 6

In this exception, ACI contends that "Conclusion of Law No. 71, which states that 'FPL provided reasonable assurance that the proposed modification would comply with all applicable water use regulatory criteria' must be rejected for the reasons stated in greater detail in Exceptions Nos. 4 and 5." As such, this exception must be rejected for the same reasons stated in FPL's responses to Exceptions Nos. 4 and 5 above.

Furthermore, contrary to ACI's additional assertion in Exception No. 6, there are no findings in the Recommended Order – indeed no evidence in the record to suggest – that the proposed modification will interfere with any presently existing users of groundwater. Quite the opposite, the ALJ specifically found that "the modification would *improve* current groundwater conditions" and that ACI's own modeling evidence "appear[s] to support Respondents' contention that the FPL proposal would *slow* the rate of saltwater intrusion." RO, at ¶¶ 54, 55 (emphasis added). Thus, the only record evidence suggests that, rather than causing interference with ACI's existing use, the proposed modification will benefit ACI by slowing the rate of saltwater migration toward its property.

For these reasons, ACI's Exception No. 6 must be denied.

Exception No. 7

Finally, in its seventh exception, ACI takes issue with Conclusion of Law No. 72, which provides:

> 72. However, ACI urges the Siting Board to deny the proposed modification because ACI believes it perpetuates a problem created by the CCS and fails to prevent the eventual contamination of the groundwater resources that ACI relies on for its agricultural and mining operations. ACI does not propose a condition or conditions under which FPL's proposal could be approved.

Contrary to ACI's suggestion, at the final hearing, ACI did not offer any conditions of certification to address its concerns, much less evidence to support any such conditions. Moreover, in arguing that Conclusion of Law 72 "somehow [improperly] places the burden on ACI to formulate conditions for the modification," ACI simply ignores the preceding conclusion of law in which the ALJ determined that "FPL provided reasonable assurances that the proposed modification would comply with all applicable water use regulatory criteria," as well as the ALJ's determination, in Findings of Fact 60 and 61, that "FPL provided reasonable assurance that the FPL proposal meets all applicable water use regulatory criteria" and "that the record evidence supports an affirmative determination by the Siting Board regarding the certification criteria in section 403.509(3)(a) through (g)." Under well-established precedent, once FPL provided a *prima facie* showing of "reasonable assurances," it was incumbent on ACI to present "contrary evidence of equivalent quality" to show why the proposed modification should be rejected or additional conditions imposed. See Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 789 (Fla. 1st DCA 1981). ACI did no such thing.[6] To the contrary, as the ALJ found in

[6] To the extent the ALJ invited ACI "to request that the Siting Board impose conditions" in his November 13, 2015 order granting ACI's second amended motion to intervene, ACI did not take advantage of the invitation. Nowhere in the record, did ACI propose any specific condition of certification or offer any evidence in support.

Finding of Fact 54, ACI's evidence "appear[s] to support Respondents' contention that the FPL proposal would *slow* the rate of saltwater intrusion." In the face of the ALJ's findings, and without any evidentiary support whatsoever, ACI cannot now be heard to suggest that the Siting Board arbitrarily impose additional conditions of certification.

For these reasons, ACI's Exception No. 7 must be denied.

CONCLUSION

For the reasons discussed above, none of ACI's exceptions states a legally proper basis for overturning any Finding of Fact or Conclusion of Law in the Recommended Order, much less any basis for rejecting the Administrative Law Judges' ultimate recommendation that the Siting Board approve the proposed modification. Accordingly, Respondents respectfully request that the Siting Board issue a final order adopting the recommended order and approving the proposed modification to the Conditions of Certification for Turkey Point Units 3-5 with the additional condition recommended by the Administrative Law Judge and stipulated to by the parties.

Counsel for the Department and the District have authorized the undersigned counsel for FPL to indicate their joinder in this Response.

Respectfully submitted this 19th day of February, 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically served on this 19th day of February, 2016, to the following:

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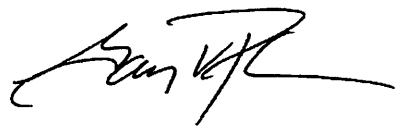

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