

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

PUTNAM COUNTY ENVIRONMENTAL
COUNCIL, INC.; STEWARDS OF THE
ST. JOHNS RIVER, INC.; AND
LINDA YOUNG,

Petitioners,

vs.

DEPARTMENT OF ENVIRONMENTAL
PROTECTION AND GEORGIA-PACIFIC
CORPORATION,

Respondents.

OGC CASE NO. 01-0866
DOAH CASE NO. 01-2442

FINAL ORDER

On July 3, 2002, an Administrative Law Judge with the Division of Administrative Hearings ("DOAH") submitted a Recommended Order to the Florida Department of Environmental Protection ("the Department") in this administrative proceeding. The Recommended Order indicates that copies were served upon counsels for Petitioners, Putnam County Environmental Council, Inc., Stewards of the St. Johns River, Inc., and Linda Young (collectively the "Petitioners"), and the Co-Respondent, Georgia-Pacific Corporation ("Georgia-Pacific"). A copy of the Recommended Order is attached as Exhibit A.

Exceptions to the Recommended Order were timely filed on behalf of the Petitioners. Timely Responses to the Petitioners' Exceptions were subsequently filed on behalf of the Department and Georgia-Pacific. The Department also filed an Exception to Recommended Order requesting a bifurcated remand to DOAH for a

determination by the ALJ of the propriety of an award of the Department's attorney's fees and costs in this proceeding pursuant to § 120.595(1), Florida Statutes. The Petitioners then filed a "Response to Motion for Attorney's Fees Contained in DEP's Exception." On July 24, 2002, the Department filed a "Withdrawal of Exception to Recommended Order" withdrawing its request for a bifurcated remand to DOAH for a determination by the ALJ on the issue of attorney's fees and costs.

The Petitioners also filed a Motion to Disqualify Florida Department of Environmental Protection Personnel and Governor Jeb Bush from Final Order Decision-Making for Bias and Prejudice ("Motion to Disqualify"). Georgia-Pacific and the Department each filed a response in opposition to the Motion to Disqualify. The Department also filed a Motion to Strike the Motion to Disqualify on procedural grounds. The Petitioners subsequently filed an amendment to their Motion to Disqualify. The Petitioners' Motion to Disqualify, as amended, is addressed in this Final Order. The matter is now before the Secretary of the Department for final agency action.

BACKGROUND

Georgia-Pacific currently owns and operates a bleached and unbleached kraft pulp and paper mill in Putnam County, Florida (the "Mill"). The Mill was built in the 1940's before the establishment by the Department of water quality standards and classifications. In October of 1992, Georgia-Pacific applied to the Department for the renewal of its existing wastewater discharge permit. In June of 1994, Georgia-Pacific submitted an application to the Department for the construction and operation of an industrial wastewater treatment and disposal system. This 1994 application included a request to relocate the Mill's existing wastewater discharge from Rice Creek to the St.

Johns River. Because Georgia-Pacific submitted timely permit applications, it is authorized to continue Mill operations based on an "administratively extended permit."

The Mill presently discharges treated industrial wastewater into nearby Rice Creek pursuant to a temporary operating permit issued by the Department in June of 1994. Rice Creek, a Class III water of the State, is a small tributary of the St. Johns River. It is undisputed that Mill operation has not fully complied with all applicable Class III water quality standards in Rice Creek because of poor dilution of the treated effluent discharged from the Mill. The temporary operating permit issued by the Department in 1994 includes a compliance schedule requiring Georgia-Pacific to apply for and construct a new discharge pipeline to the St. Johns River, also a Class III water.

In June of 1994, Georgia-Pacific also applied to the U.S. Environmental Protection Agency ("EPA") for a related Mill permit under the National Pollutant Discharge Elimination System ("NPDES"). In May of 1995, the Department advised Georgia-Pacific that the EPA had granted the Department the authority to administer the NPDES program. The Department also advised Georgia-Pacific at that time that its state and NPDES permit applications were deemed to be combined into one Department permit.

In May of 2001, the Department issued a Notice of Intent to Issue industrial wastewater Permit Number FL0002763 ("Permit") to Georgia-Pacific. The proposed Permit includes a related Administrative Order Number 039-NE ("Administrative Order") establishing a compliance schedule. The Permit would, after implementation of the activities authorized in the Administrative Order, authorize construction and operation of a pipeline to discharge the Mill wastewater into the St. Johns River only if Georgia-

Pacific demonstrates that it cannot meet Class III water quality standards in Rice Creek.

DOAH PROCEEDING

This proceeding emanated from a verified petition filed by the Petitioners challenging the Department's Notice of Intent to Issue the Permit and related Administrative Order to Georgia-Pacific and requesting a formal administrative hearing. The matter was then forwarded to DOAH and Administrative Law Judge, Donald R, Alexander (the "ALJ"), was assigned to conduct a formal hearing. After various prehearing procedures, a lengthy formal hearing was held before the ALJ in February and March of 2002. The formal hearing was concluded on March 19, 2002. The parties were then allowed to submit to the ALJ Proposed Recommended Orders and Responses to Proposed Recommended Orders.

Included in the ALJ's Recommended Order is his finding that, regardless of whether the Mill discharge remains in Rice Creek or is relocated to the St. Johns River, the activities authorized and required in the proposed Permit and Administrative Order will lead to an improvement in water quality. The ALJ also found that Georgia-Pacific's proposed activities will result in a net environmental benefit and a substantial reduction in pollutant loading in both the St. Johns River and Rice Creek. (See Findings of Fact 149, 150, and 151). Based on these and other related findings and conclusions, the ALJ recommended that an agency final order be entered issuing the proposed Permit and approving the related Administrative Order "with the change in the permit conditions as requested in Georgia-Pacific Exhibit 102 and approved by the Department during the [final] hearing."

RULINGS ON THE DEPARTMENT'S MOTION TO STRIKE AND
THE PETITIONERS' MOTION TO DISQUALIFY, AS AMENDED

I conclude that the procedural defects in the Petitioners' original Motion to Disqualify addressed in the Department's Motion to Strike were substantially cured in the Petitioners' later amendments to the Motion to Disqualify. Consequently, the Department's Motion to Strike is denied as moot. In their Motion to Disqualify, the Petitioners allege bias and prejudice on the part of the Secretary and Governor Bush. The Petitioners request that the Secretary of the Department, all other Department employees, and the Governor be disqualified from "rendering a decision in this matter" and that "the function of adjudicatory decision-maker and administrative final order authority . . . properly be delegated to Florida Attorney General Robert Butterworth." My rulings on the merits of the Motion to Disqualify, as amended, are as follows:

1. The allegations set forth in the Motion to Disqualify are legally insufficient on their face to demonstrate "just cause" for the requested disqualifications under § 120.665, F.S., as interpreted by Florida case law. The Department is vested with the responsibility of regulating facilities which might reasonably be expected to be a source of pollution. As head of the Department, it is entirely appropriate for the Secretary to participate in and approve the Department's proposed actions in such important permitting matters.

2. Florida case law holds that an agency head may participate in the preliminary agency investigative process prior to the initiation of a formal administrative proceeding without being disqualified from entering a subsequent agency final order. See, e.g., Bay Bank & Trust Company v. Lewis, 634 So. 2d 672 (Fla. 1st DCA 1994) (concluding that the fact that an agency head served as investigator, prosecutor, and adjudicator in a

disciplinary hearing did not violate due process and was inadequate to disqualify him). See also Winslow v. Dept. of Professional and Occupational Regulation, 348 So. 2d 352, 353 (Fla. 1st DCA 1994).

3. The standards for disqualifying an agency head in an administrative action differ substantially from the standards for disqualification of a judge in a court proceeding, because "agency heads have significantly different functions and duties than do judges." Bay Bank & Trust Company, 634 So. 2d at 678-679. The unspecified remarks in numbered paragraph 6 of the Motion, which Petitioners attribute to me "upon information and belief" do not demonstrate just cause for disqualification under the Bay Bank rationale. These vague allegations fail "to allege specific facts relied on to objectively establish a sufficient ground for fear of . . . bias and prejudice." Id. at 678.

4. The Florida Administrative Procedure Act makes no provision for disqualifying any person from serving in an agency proceeding on grounds of bias, prejudice, or interest other than an "agency head." See § 120.665(1), F.S. Consequently, the Petitioners' requests that other Department employees and the Governor also be disqualified on grounds of bias or prejudice are not within the purview of this statute.

For the above reasons, the Petitioners' Motion to Disqualify, as amended, is denied.

STANDARDS OF ADMINISTRATIVE REVIEW

Pursuant to subsection 120.57(1)(l), Florida Statutes ("F. S."), a reviewing agency may only reject or modify the administrative law judge's conclusions of law and interpretations of administrative rules over which the agency has "substantive jurisdiction." Moreover, a reviewing agency may not reject or modify the findings of fact

of an administrative law judge, "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." See subsection 120.57(1)(l), F. S.

A reviewing agency may not reweigh the evidence presented at a DOAH formal hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. These evidentiary matters are within the province of the administrative law judge, as the trier of the facts. Belleau v. Dept. of Environmental Protection, 695 So.2d 1305 (Fla. 1st DCA 1997); Florida Dept. of Corrections v. Bradley, 510 So.2d 1122 (Fla. 1st DCA 1987); Heifetz v. Dept. of Business Regulation, 475 So.2d 1277 (Fla. 1st DCA 1985).

The scope of agency review of findings of fact in a recommended order is thus limited to ascertaining whether the administrative law judge's existing factual findings are supported by competent substantial evidence of record.¹ Brogan v. Carter, 671 So.2d 822 (Fla. 1st DCA 1996); North Port, Fla., v. Consolidated Minerals, 645 So.2d at 485 (Fla. 2d DCA 1994). Consequently, if the record in this case discloses any competent substantial evidence supporting the ALJ's findings of facts in the Recommended Order, I am bound by such findings in preparing this Final Order. Bradley, at 510 So.2d 1123.

RULINGS ON PETITIONERS' EXCEPTIONS TO THE RECOMMENDED ORDER

Primary Exceptions and Additional, Specific Exceptions to Recommended Order

The Petitioners' "Primary Exceptions" and "Additional, Specific Exceptions to Recommended Order" do not cite to any designated Findings of Fact or Conclusions of

¹ The Florida Supreme Court has defined the phrase "competent substantial evidence" to mean "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 Utility Company v. Florida Public Service Commission, 380 So.2d 1028, 1031 (Fla. 1980).

Law in the Recommended Order. Instead, these Exceptions consist of general allegations by the Petitioners of purported erroneous procedural and evidentiary rulings of the ALJ made prior to and during the course of the DOAH final hearing. Rulings in DOAH formal proceedings dealing with the admissibility and/or relevancy of evidence usually involve factual issues within the sound prerogative of the administrative law judges, as the finders of the facts. See e.g., Heifetz, at 475 So.2d 1279.

In the appellate decision in Florida Power & Light Company v. State of Florida Siting Board, 693 So.2d 1025 (Fla. 1st DCA 1997), Judge Benton issued a concurring opinion analyzing the 1996 amendments to the Administrative Procedure Act. Judge Benton concluded that, subsequent to these 1996 amendments, an agency reviewing a DOAH recommended order is precluded from overruling procedural or evidentiary rulings by an administrative law judge, except "in the most extreme cases" where the proceedings "did not comply with the essential requirements of law." Id. at 1028-29.

Based on a review of the record before me, I conclude that the DOAH proceeding in this case does not constitute an extreme case where procedural and/or evidentiary rulings of the ALJ adverse to the Petitioners were so egregious as to violate the "essential requirements of law" within the purview of § 120.57(1)(l), F.S. The Petitioners were afforded a full formal hearing before the ALJ exceeding two weeks in length. During this lengthy formal hearing, the Petitioners presented the testimony of in excess of 15 witnesses. Seven of the Petitioners' witnesses were accepted by the ALJ to testify as experts in various fields. The cumulative testimony of the Petitioners' witnesses covers in excess of 1,300 pages in the transcript of the DOAH formal hearing.

Accordingly, the Petitioners' Primary Exceptions and Additional, Specific Exceptions to Recommended Order are denied.²

Numbered Exceptions 1-3

These two Exceptions deal with the issue of the "standing" of the Petitioners to challenge the Department's issuance of the Permit and Administrative Order. In Findings of Fact Nos. 3-4, the ALJ ruled that the Petitioners, Putnam County Environmental Council and Stewards of the St. Johns River, failed to prove their current corporate status or residency.³ As stated in my preceding ruling, the ALJ's evidentiary rulings are matters generally within his prerogative as the fact-finder in this proceeding. I would note that the Petitioners' citation to the testimony of Sandra Kokernoot is not conclusive as to the status of the Putnam County Environmental Council as a duly certified domestic non-profit corporation authorized to transact its affairs in this state as of the time of the DOAH proceeding in this case.

The ALJ correctly observed that Ms. Kokernoot merely testified that the Putnam County Environmental Council was incorporated on some undisclosed date prior to the formal hearing. However, domestic non-profit corporations are subject to dissolution for various reasons, including failure to file an annual report or to pay the annual report filing fee. See § 617.1420, F.S. Ms. Kokernoot did not testify as to the present

² The Petitioners do correctly note in these Exceptions that the ALJ's assertion in the Preliminary Statement that the Petitioners' various requests to amend their petition were all made "[d]uring the course of the final hearing" is not entirely correct. The record indicates that the Petitioners filed motions to amend their petition both prior to and after the commencement of the DOAH final hearing. However, I view this statement of the ALJ to be a minor preliminary matter having no bearing on the final disposition of this case and it is deemed to constitute harmless error.

³ In order to have standing to intervene and file a petition for an administrative hearing under § 403.412(5), F.S., an environmental association must be a duly certified domestic non-profit corporation in order to be deemed to be a "citizen of this state" within the purview of that statute. See Legal Environmental Assn. v. Dept. of Environmental Protection, 702 So.2d 1352 (Fla. 1st DCA 1997).

corporate status of the Putnam County Environmental Council. Cf. § 617.0128(3), F.S. The Petitioners also failed to cite to any record testimony dealing with the present corporate status of the Petitioner, Stewards of the St. Johns River.

In any event, I concur with the ALJ's observation in his Conclusion of Law 177 that the Petitioners have not been prejudiced by his adverse standing determinations. Each of the Petitioners have been granted a full formal hearing where they were allowed to present argument and extensive evidence on the merits of their claims. See Hamilton County Commissioners v. Dept. of Environmental Regulation, 587 So.2d 1378, 1383 (Fla. 1st DCA 1991) (concluding that the standing issue was "moot" in that case, since the substantive issues were fully litigated in the administrative proceedings). In addition, the ALJ determined in Finding of Fact No. 5 that the Petitioner, Linda Young, has standing to intervene in this permit proceeding pursuant to § 403.412(5), F.S., even if she does not have standing under §120.569, F.S.

Numbered Exceptions 4-108

The Petitioners have filed in excess of 100 Exceptions objecting to a majority of the ALJ's 175 separately numbered Findings of Fact in the Recommended Order. Many of these Exceptions contain identical allegations that various Findings of Fact are "not based on competent substantial evidence," "conclusory in nature," "vague," and "not supported by specific citations to the record." Several of these Exceptions also contain identical allegations that this case "should be remanded for further findings." The repetitive and voluminous nature of Petitioners' numbered Exceptions 4-108 have made it necessary to consolidate these Exceptions for purposes of orderly consideration and disposition in this Final Order. I address these consolidated Exceptions as follows:

1. The Petitioners repeatedly disagree in their Exceptions with various evidentiary rulings of the ALJ and with the weight and probative value assigned by the ALJ to the often conflicting expert testimony presented at the DOAH formal hearing. However, evidentiary matters such as admissibility, relevancy, and weight of evidence presented at a formal administrative hearing usually constitute "factual issues susceptible to ordinary methods of proof that are not infused with [agency] policy considerations". Schrimsher v. School Board of Palm Beach County, 694 So.2d 856, 862 (Fla. 4th DCA 1997) Martuccio v. Dept. of Professional Regulation, 622 So.2d 607, 609 (Fla. 1st DCA 1993). Such evidentiary matters are usually within the sound discretion of the ALJ, as the "fact-finder" in this proceeding. As noted above, an agency reviewing a recommended order may not reweigh the evidence presented at a DOAH formal hearing or attempt to resolve conflicts therein.

2. I thus have no authority to reevaluate the quantity and quality of the evidence presented at the formal hearing in this case, beyond making a determination that the evidence is competent and substantial. Brogan, 671 So.2d at 823. In the case of Scholastic Book Fairs, Inc. v. Unemployment Appeals Commission, 671 So.2d 287 (Fla. 5th DCA 1996), the court considered the meaning of the words "competency" and "substantial" within the context of agency review of DOAH recommended orders. The court observed that "competency" of evidence refers to its admissibility under legal rules of evidence and that "substantial" requires that there be some (more than a mere iota or scintilla), real, material, pertinent and relevant evidence. Id. at 289 n.3.

3. A review of the DOAH record indicates that there is more than an "iota" or "scintilla" of admissible evidence in this administrative proceeding supporting the ALJ's

challenged Findings of Fact. This competent substantial evidence includes the written data set forth in Georgia-Pacific's 1994 state and NPDES applications and subsequent submittals, and its Antidegradation Review; the Department's Notice of Intent to Issue, draft Permit, Administrative Order, and the WQBEL Technical Report. This competent substantial evidence also includes the cumulative testimony in support of the issuance of the Permit from a total of seven expert witnesses called by Georgia-Pacific and the Department to testify at the formal hearing.

4. Among the expert witnesses testifying at the formal hearing in support of the issuance of the Permit to Georgia-Pacific were Jerry Brooks, Dr. Glenn Daigger, Paul Paquin, and Jerry Owens. Jerry Brooks, the Department's Deputy Director of the Division of Water Resource Management, was accepted by the ALJ as an expert in the field of environmental management, with a specialty in water quality standards. Dr. Daigger, who has a Ph.D. in environmental engineering and is a registered Professional Engineer, was accepted as an expert in civil and environmental engineering and wastewater treatment, with a specialty in biological wastewater treatment. Paul Paquin, who has a Master's Degree in environmental engineering, was accepted as an expert in environmental engineering and water quality modeling. The record reflects that Mr. Paquin has been involved in several water quality studies in the St. Johns River watershed since 1974. Also testifying in favor of issuance of the Permit was Jerry Owen, the Department's Administrator in charge of regulatory programs for domestic and industrial wastewater, drinking water, underground injection control, and technical services section. Mr. Owen, a Professional Engineer since 1975, was accepted as an expert in environmental engineering, with a specialty in wastewater engineering.

5. The Petitioners did present testimony at the formal hearing of various expert witnesses, such as Dr. James Martin, Dr. William Cooper, and Dr. Christopher Koenig, who opposed the issuance of the Permit. The Petitioners' expert witnesses rendered opinion testimony that often conflicted with the opinion testimony of the Respondents' experts. Nevertheless, the decision of an administrative law judge to accept one expert's testimony 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 from which the finding could be reasonably inferred. See Collier Medical Center v. State, Dept. of HRS, 462 So. 2d 83, 85 (Fla. 1st DCA 1985); Florida Chapter of Sierra Club v. Orlando Utilities Commission, 436 So. 2d 383, 389 (Fla. 5th DCA 1983). Furthermore, the sufficiency of the facts required to form an expert opinion normally resides with the expert and any purported deficiencies in such facts require a weighing of the evidence, a matter also within the province of the ALJ, as the trier of the facts.⁴ Gershanik v. Dept. of Professional Regulation, 458 So.2d 302, 305 (Fla. 3rd DCA 1984), *rev. den.*, 462 So.2d 1106 (Fla. 1985).

6. The testimony of Petitioners' expert witnesses in opposition to the issuance of the Permit does not invalidate the opposing testimony of the expert witnesses of Georgia-Pacific and the Department in support of issuance of the Permit. The case law of Florida holds that, if there is competent substantial evidence to support the findings of fact of an administrative law judge, it is irrelevant that there may also be evidence to support contrary findings. Arand Construction Co. v. Dyer, 592 So.2d 276, 280 (Fla. 1st DCA 1991); Conshor, Inc. v. Roberts, 498 So.2d 622, 623 (Fla. 1st DCA 1986). I have

⁴ In his Findings of Fact Nos. 104-110, the ALJ expressly discounted the credibility of the expert testimony of the Petitioners' witness, Dr. Koenig, due to the lack of data and personal field studies to support his opinions.

already determined that there is competent substantial evidence of record supporting the challenged factual findings of the ALJ supporting the issuance of the Permit.

7. Throughout their Exceptions to the ALJ's Findings of Fact, the Petitioners consistently disagree with the ALJ's interpretations of, and inferences drawn from, the evidence presented at the DOAH formal hearing. These Exceptions consist, in substantial part, of the Petitioners' own favorable inferences and interpretations of the testimony of their expert witnesses at the DOAH formal hearing. Nevertheless, I am not free to modify the ALJ's findings of fact by reinterpreting the evidence or drawing inferences there from that are different from the reasonable interpretations made and inferences drawn by the ALJ from the evidence presented at the formal hearing. See, e.g., Heifetz, 475 So.2d at 1282.

8. In many of their Exceptions, the Petitioners also find fault with the ALJ for not annotating his findings with "specific citations to the record to enable Petitioners to formulate specific exceptions to the same" (numbered Exceptions 34, 35, 43, 54, 66, et al.). However, there are no provisions in the Administrative Procedure Act (Ch. 120, F.S.) or in the implementing Uniform Rules (Ch. 28, F.A.C.) requiring that findings of fact in a recommended order must be accompanied by "specific citations to the record." Rule 28-106.216(1), F.A.C., only requires that a recommended order "shall include a caption, time and place of hearing, appearances entered at the hearing, statement of the issues, findings of fact and conclusions of law, separately stated, and recommendation for final agency action." The Recommended Order in this case contains all of the components designated in Rule 28-106.216(1).

9. The Petitioners' Exceptions also contain repeated requests for a remand to DOAH for "more specific" or "more detailed" findings of fact on various issues identified by the ALJ in his Recommended Order (numbered Exceptions 23, 31, 43, 61, 63, et al.). Agencies reviewing recommended orders do have limited authority to remand administrative proceedings back to DOAH for further findings of fact in certain situations. One basis of agency remand to DOAH for further findings of fact is where the reviewing agency properly modifies or rejects a crucial conclusion of law of an administrative law judge, thereby requiring that certain additional factual issues be resolved. See, e.g., Manasota 88, Inc. v. Tremor, 545 So.2d 439, 441 (Fla. 2d DCA 1989); Miller v. Dept. of Environmental Regulation, 504 So.2d 1325, 1327 (Fla. 1st DCA 1987). Another basis for agency remand to DOAH for additional factual findings is where, for whatever reason, the administrative law judge has failed to perform his or her basic function of making findings of fact based on the evidence presented. Cohn v. Dept. of Professional Regulation, 477 So.2d 1039, 1047 (Fla. 3d DCA 1985).

10. I conclude that neither of these two bases for agency remand to DOAH exist in this case. I have not modified or rejected any crucial conclusion of law of the ALJ in the Recommended Order on review. Furthermore, there is no fundamental failure here of the ALJ to make findings of fact based on the evidence presented. To the contrary, the lengthy Recommended Order contains 175 separately numbered factual findings made by the ALJ. The Petitioners' requests for remand to DOAH for additional findings of fact seem to be based primarily on their personal disagreements with many of the existing findings of the ALJ. The Petitioners are entitled to disagree with the ALJ's

existing factual findings, but such disagreement does not warrant remand of this case back to DOAH for additional findings that are more favorable to the Petitioners.

11. In many of these Exceptions, the Petitioners request that I reject the ALJ's existing factual findings and replace them with additional factual findings proposed by the Petitioners in their Exceptions and/or in their attached Proposed Recommended Order (numbered Exceptions 4, 6, 8, 14, 27-28, 33, 36, et al.). Nevertheless, the Florida courts have repeatedly held that a state agency has no authority to make independent findings of fact in its final order that are supplementary to the existing factual findings contained in the recommended order on review. Florida Power & Light Co., 693 So.2d at 1026-1027; North Port, Fla., 645 So.2d at 487; Boulton v. Morgan, 643 So.2d 1103, 1105 (Fla. 4th DCA 1994).

12. In their numbered Exception 8, the Petitioners contend that the three proposed changes identified in the ALJ's Finding of Fact 22 constitute "substantial revisions" of the Permit under Rule 62-620.325(1), F.A.C., requiring a new public notice and new point-of-entry.⁵ This contention is rejected. As discussed in more detail in my rulings on the Petitioners' Exceptions to the ALJ's Conclusions of Law, it is the Department, not the Petitioners, that has the primary responsibility for interpreting its own administrative rules. The Petitioners do not cite to any testimony of Department officials at the formal hearing interpreting the three proposed changes to the Permit conditions as "major" or "substantial" modifications or revisions.

⁵ The three proposed Permit changes described in the ALJ's Finding of Fact 22 are (1) a request to relocate a groundwater monitoring well, (2) review of the proposed mixing zone in the St. Johns River for the transparency standard, and (3) allowing approval of the bleach plant monitoring plan to occur within 60 days after issuance of the Permit.

13. I conclude that none of the three proposed changes in the Permit conditions described in the ALJ's Finding of Fact 22 are "substantial" modifications or revisions warranting a new public notice and point-of-entry. See Department Rule 62-110.106(7)(a)4, F.A.C. (defining a substantial modification as a "relocation or modification of the activity or project that is reasonably expected to cause new or significantly greater adverse environmental impacts"). There are no findings by the ALJ in this case that any of the three proposed Permit changes are "reasonably expected to cause new or significantly greater adverse environmental impacts." Moreover, appellate decisions in this state have repeatedly upheld the validity of suggested environmental permit modifications based on findings set forth in DOAH recommended orders. See The Conservancy, Inc. v. A. Vernon Allen Builder, 580 So.2d. 772, 774 (Fla. 1st DCA 1991); Manatee County v. Dept of Environmental Regulation, 429 So.2d 360, 362 (Fla. 1st DCA 1983); Hopwood v. Dept of Environmental Regulation, 402 So.2d 1296, 1299 (Fla. 1st DCA 1981).

14. In their numbered Exception 21, the Petitioners also suggest that the ALJ erred by failing to address issues raised in their Proposed Recommended Order filed after the conclusion of the DOAH formal hearing. I find this suggestion to be without merit. The former provisions of the Administrative Procedure Act did require that an agency order "must include a ruling upon each proposed finding [of fact]" submitted by a party. See § 120.59(2), Florida Statutes (1995). However, the quoted statutory provisions were subsequently removed effective October 1, 1996, by the repeal of former § 120.59. See Ch. 96-159, §§ 24 and 44, Laws of Florida. See also Life Care Centers of America v. Sawgrass Care Center, 683 So.2d 609, 612-613 (Fla. 1st DCA

1996) (concluding that the Legislature intended to abolish the requirement of an agency ruling on each proposed finding of fact by the 1996 repeal of § 120.59).

15. The Petitioners' numbered Exception 48 objects to the last sentence of Finding of Fact 94 where the ALJ finds that, because of the relatively higher flow of the St. Johns River, the "increase in nitrogen concentration is so small as to be imperceptible." The Petitioners contend that the term "imperceptible" is a legally and scientifically meaningless standard. I do not find this contention to be persuasive. Words such as "imperceptible," "insignificant," "minimal," "negligible," and "undetectable" are similar terms having special meaning within the purview of the *de minimis* rationale incorporated into the environmental regulatory law of this state. See e.g., § 373.406(6), Florida Statutes (authorizing exemptions from regulation for activities having only "minimal" or "insignificant" adverse impacts). The *de minimis* rationale has also been approved in the administrative and judicial case law of Florida. See Caloosa Property Owners' Assn. v. Dept. of Environmental Regulation, 462 So.2d 523, 526 (Fla. 1st DCA 1985) (approving DER's interpretation of Ch. 403, F.S., as authorizing discharges of pollutants into water bodies where the effect on water quality is found to be "negligible"). Accord Sheridan v. Deep Lagoon Boat Club, Ltd., 22 F.A.L.R. 2358, 2366 (Fla. DEP 2000); Pacetti v. Smith, 8 F.A.L.R. 4050, 4054-56 (Fla. DER 1986).

16. I do agree with those portions of Petitioners' Exceptions asserting that some of the ALJ's challenged Findings of Fact are not pure "factual" findings (numbered Exceptions 9, 32, 73, 103, et al.). The ALJ's Findings of Fact 7-175 do appear to contain some mixed statements of fact and law where the ALJ applies the material findings of fact to the statutory and rule provisions applicable to this contested permit

proceeding. Nevertheless, a reviewing agency is not bound by the labels affixed to "findings of fact" or "conclusions of law" in a DOAH recommended order. If a finding of fact or conclusion of law is improperly labeled in a recommended order, the label is to be disregarded and the matter treated as if it were properly labeled. Battaglia Properties v. Land and Water Adj. Comm., 629 So.2d 161, 168 (Fla. 5th. DCA 1994).

I do not find any reversible legal errors in those portions of the ALJ's Findings of Fact 7-175 where the ALJ has interpreted various environmental rules and statutes in light of the material facts as found in his Recommended Order.

For the reasons set forth in detail above, the Petitioners' numbered Exceptions 4-108 are denied.

Numbered Exceptions 109-110

These two Exceptions object to the ALJ's Conclusion of Law 177 dealing with the "standing" issue. The ALJ reiterates his prior determination that the Petitioners, Putnam County Environmental Council and Stewards of the St. Johns River, do not have standing to intervene in this permit proceeding under § 403.412(5), F.S. Those portions of the Petitioners' numbered Exceptions 109-110 dealing with standing to intervene under § 403.412(5) are denied for the reasons set forth in my prior rulings denying the Petitioners' numbered Exceptions 1-3.

In Conclusion of Law 177, the ALJ also concluded that none of the Petitioners have standing to bring this administrative action under § 120.569, F.S., "because the proposed agency action will result in environmental improvement, as opposed to harm, and Petitioners have failed to show that they will suffer an injury in fact." In prior years, this agency has rendered final orders concluding that the issue of whether a party has

demonstrated the necessary "special injury" in order to have standing to bring an administrative action under §120.569, F.S., is determined by the sufficiency of the averments in the petition, rather than the sufficiency of the proof presented at a DOAH formal hearing on the merits of the petitioner's claims. See, e.g., Walther v. Indian River County, 18 F.A.L.R. 1818, 1824-1825 n.6 (Fla. DEP 1996); Hageman v. Carter, 17 F.A.L.R. 3684, 3691 n.2 (Fla. DEP 1995). See also Village Park v. Dept. of Business Regulation, 506 So.2d 426, 433 (Fla. 1st DCA 1981).

In any event, I repeat my conclusion that the issue of the Petitioners' standing to bring this administrative action has been rendered moot because each of the Petitioners were provided a lengthy DOAH formal hearing at which the claims in their Petition were fully litigated on their merits. See Hamilton County Commissioners, 587 So.2d at 1383.

The Petitioners also claim in numbered Exception 110 that adverse evidentiary and procedural rulings of the ALJ during the DOAH proceeding "violated their constitutional rights to both substantive and procedural due process." However, administrative agencies lack jurisdiction to consider the alleged unconstitutionality of the actions of administrative officials. See, e.g., Hays v. Dept. of Business Regulation, 418 So.2d 331 (Fla. 3d DCA 1982); Harmon Brothers Rock Co. v. Dept. of Environmental Regulation, 15 F.A.L.R. 2183, 2186 (Fla. DER 1993). In addition, I have previously ruled in this Final Order that the record of the DOAH proceeding does not demonstrate the existence of evidentiary and/or procedural rulings of the ALJ so egregious in nature as to violate the "essential requirements of law" within the purview of § 120.57(1)(l), F.S.

In view of the above, the Petitioners' numbered Exceptions 109-110 are denied.

Numbered Exception 111 and 112

These two Exceptions object to the ALJ's Conclusion of Law 182 and 183. The Petitioners' basic contention is that the ALJ erred by precluding them from asserting claims in the DOAH proceeding that the activities authorized in the Permit and related Administrative Order would violate purported standards set forth in the federal Clean Water Act for matters such as dioxin concentrations in fish tissue. Like the ALJ, I also reject this contention of the Petitioners. The ALJ correctly concluded that the Petitioners' claims alleging violations of federal environmental laws are beyond the jurisdiction of this state administrative proceeding. See Curtis v. Taylor, 648 F.2d 946, 948 (5th Cir. 1980) (concluding that, in a state administrative hearing under § 120.57, F.S., a DOAH hearing officer was not empowered to consider claims that state actions were invalid based on alleged violations of federal law).

The Curtis rationale has been followed in a series of Florida administrative decisions. Rowe v. Oleander Power Project, 22 F.A.L.R. 1173, 1177 (Fla. DEP 1999); Miccosukee Tribe v. South Florida Water Management District, 20 F.A.L.R. 4482, 4486-4487 (Fla. DEP 1998), *affirmed per curiam*, 721 So.2d 389 (Fla. 3d DCA 1998); Legal Environmental Assistance Foundation v. Dept. of Environmental Regulation, 11 F.A.L.R. 5227 (Fla. DER 1989). See also Metro. Dade County v. Coscan Florida, Inc., 609 So.2d 644, 650 (Fla. 3d DCA 1992) (concluding that a DOAH hearing officer erred by relying on federal standards for protection of endangered species, rather than the standards set forth in the Florida Statutes).

The sole legal authority cited by the Petitioners' in support of their federal law claims is the DOAH final order in Flowers v. Dept. of Health & Rehabilitative Services,

11 F.A.L.R. 3637 (Fla. DOAH 1989). I find the Petitioners' reliance on the DOAH final order in the Flowers case to be misplaced. The Flowers final order arose out of a proceeding challenging a proposed agency rule under former § 120.54(4), F.S. (1987), now § 120.56(2), F.S. (2001). Thus, unlike the present case or the Curtis case and its cited Florida progeny, the Flowers case did not involve a proceeding brought under § 120.57(1), F.S., challenging a proposed agency action. Moreover, to the extent that the Flowers final order could be reasonably construed to hold that parties contesting a Department permit under § 120.57(1) are entitled to present claims that federal environmental standards not incorporated into state statutes or rules will be violated, then I decline to follow such a holding by a DOAH hearing officer in 1989.

In light of the above rulings, the Petitioners' numbered Exceptions 111-112 are denied.

Numbered Exception 113

In this Exception, the Petitioners specifically attack the ALJ's determination in his Finding of Fact 30 that the Department complied with the requirements of Rule 62-650.500, F.A.C., in connection with the approval and public notice of its 1998 Level II Water Quality Based Effluent Limitations for the Georgia-Pacific Corp. Palatka Mill ("WQBEL Technical Report"). This 1998 WQBEL Technical Report established effluent limitations for the proposed Mill discharge to the St. Johns River. However, I find no fault with the ALJ's mixed statement of fact and law in Finding of Fact 30 under the facts presented in this case.

I also conclude that the Petitioners' claim that they were not given proper notice in order to have been able to challenge the WQBEL Technical Report when it was

prepared back in March of 1998 is moot. A DOAH formal hearing is not merely an administrative review of prior preliminary agency action, but is a *de novo* proceeding intended to formulate final agency action. See, e.g., Hamilton County Commissioners v. State Dept. of Environmental Regulation, 587 So. 2d 1378, 1387 (Fla. 1st DCA 1991); Florida Dept. of Transportation v. J.W.C. Company, Inc., 396 So.2d 778, 785 (Fla. 1st DCA 1981). Thus, the focus at the DOAH formal hearing below was not what the Department did or failed to do during the process of approval of the WQBEL Technical Report in 1998. Rather, the primary issue before the ALJ was whether Georgia-Pacific provided reasonable assurance at this time that its proposed activities under the Permit and related Administrative Order would not violate applicable environmental standards.

The record in this case reflects that, despite Georgia-Pacific's objections, the ALJ allowed the Petitioners to present argument and extensive evidence in the DOAH proceeding relating to the allegations in their Petition attacking the sufficiency of the Mill effluent limitations set forth in the WQBEL Technical Report. Consequently, the Petitioners have suffered no harm or prejudice due to a purported lack of proper notice of the approval of the WQBEL Technical Report back in 1998. Accordingly, the Petitioners' numbered Exception 113 is denied.

Numbered Exceptions 114-123

These Exceptions of the Petitioners object to the ALJ's Conclusions of Law 182-186 and 188-192. The ALJ's challenged legal conclusions conclude, in their entirety, that Georgia-Pacific has provided reasonable assurance in this proceeding that the activities authorized in the Permit and related Administrative Order will not violate

applicable environmental standards and rules set forth in Chapter 403, F.S., and Chapter 62, F.A.C.

The ultimate determination of whether the facts found in a recommended order constitute "reasonable assurance" of an applicant's entitlement to a regulatory permit from the Department is a decision that must be made, in the final analysis, by this agency, rather than by an administrative law judge.⁶ See, e.g., Singer Island Civic Assn. v. Simmons, 24 F.A.L.R. 1295, 1301 (Fla. DEP 2002); Miccosukee Tribe of Indians v. South Florida Water Management District, 20 FALR 4482, 4491 (Fla. DEP 1998), *affirmed*, 721 So.2d 389 (Fla. 3d DCA 1998); Save our Suwanee v. Piechocki, 18 FALR 1467, 1471 (Fla. DEP 1996); Barringer v. E. Speer and Associates, 14 FALR 3660, 3667 n.8 (Fla. DER 1992). Nevertheless, based on a review of the governing statutory and rule provisions as applied to the material facts found by the ALJ, I also determine that Georgia-Pacific has provided reasonable assurance in this proceeding that it is entitled to issuance of the Permit and related Administrative Order.

My determination that Georgia-Pacific has provided reasonable assurance that the proposed activities authorized in the Permit and Administrative Order will not violate applicable environmental rules and standards is supported by the following significant findings of the ALJ approved in my prior rulings herein:

148. The proposed Permit will not lead to the increase in discharge of any parameter, and the Permit is more stringent and adds additional parameters or limits. In addition, there is a trend of improved performance for the treatment system.

149. . . . Regardless of whether the discharge remains in Rice Creek or is relocated to the St. Johns River, the proposed Permit and Administrative

⁶ The term "reasonable assurance" as set forth in § 373.414(1), Florida Statutes, has been interpreted by the Florida courts to mean "a substantial likelihood that the project will be successfully implemented." Metro. Dade County v. Coscan Florida, Inc., 609 So.2d 644, 648 (Fla. 3d DCA 1992).

Order will lead to an improvement in water quality as opposed to a degradation of water quality.

150. Based on improvements with respect to specific conductance parameters, the ability to relocate the discharge into the middle of the St. Johns River where better mixing will occur (relative to the confluence of Rice Creek), and anticipated improvements in grass beds, the proposed pipeline will lead to a net environmental benefit in the St. Johns River and Rice Creek.

151. The project as set forth in the proposed Permit and Administrative Order will be clearly in the public interest because it will result in full achievement of water quality standards and full compliance with the designated use of the receiving water body. The project will result in a substantial reduction in pollutant loading in Rice Creek and the St. Johns River, regardless of the whether the discharge will be located in Rice Creek or in the St. Johns River.

152. The Department adequately evaluated other discharge locations, alternative treatment, and disposal alternatives. Studies, including a land application pilot project, demonstrated that land application was not feasible based upon impacts to groundwater resources. The Petitioners did not dispute the Department's analysis of those factors under applicable rules.

155. The proposed discharge into the St. Johns River will not adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats. Instead, the proposed discharge would provide a benefit to fish and wildlife, and their habitats.

156. No persuasive evidence was presented that the proposed discharge to the St. Johns River would adversely affect the fishing or recreational values or marine productivity in the vicinity of the proposed discharge. Indeed, the record demonstrates a beneficial effect as to those factors.

171. There is no present, reasonable alternative means of disposing of wastewater other than to discharge it into waters of the State. In their Petition, Petitioners contested the Department's general antidegradation analysis, but did not allege that any alternative means of disposal were improperly overlooked.

The ALJ's challenged Conclusions of Law 114-123 are consistent with the interpretations of applicable provisions of Chapter 403, F.S., and Chapter 62, F.A.C., as testified to at the formal hearing by various officials of the Department. The ALJ's challenged legal conclusions are also supported by the established case law principle

that a state agency has primary responsibility for interpreting statutes and rules within its regulatory jurisdiction and expertise. Public Employees Relations Commission v. Dade County Police Benevolent Association, 467 So.2d 987, 989 (Fla. 1985); Florida Public Employee Council, 79 AFSCME v. Daniels, 646 So.2d 813, 816 (Fla. 1st DCA 1994).

Such statutory and rule interpretations by the regulatory agency charged with their enforcement are entitled to great deference and should not be overturned unless they are "clearly erroneous." See, e.g., Dept. of Environmental Regulation v. Goldring, 477 So.2d 532, 534 (Fla. 1985); Reedy Creek Improvement Dist. v. Dept. of Environmental Regulation, 486 So.2d 642, 648 (Fla. 1st DCA 1986). Furthermore, these statutory and rule interpretations by the enforcing agency do not have to be the only or even the most desirable interpretations. It is enough if the agency interpretations are "permissible" ones. Suddath Van Lines, Inc. v. Dept. of Environmental Protection, 668 So.2d 209, 212 (Fla. 1st DCA 1996); Little Munyon Island v. Dept. of Environmental Regulation, 492 So.2d 735, 737 (Fla. 1st DCA 1986).

Ch. 403, F.S., entitled "Environmental Control," contains regulatory provisions that the Department has been charged by the Legislature to enforce. Also, Ch. 62, F.A.C., contains permitting rules duly adopted by the Department. I conclude that the interpretations of the pertinent provisions of Ch. 403 and Rules 62-620, et al., as testified to by Jerry Brooks, Jerry Owen, James Maher, and Dr. Wayne Magley in this case are not "clearly erroneous." I further conclude that these agency interpretations are "permissible" interpretations which should be affirmed in this Final Order.

Based on the above rulings, the Petitioners' numbered Exceptions 114-123 are denied.

Numbered Exceptions 124 and 125

The Petitioners' final Exceptions object to the ALJ's recommendation that the Department enter a final order issuing the Permit (with minors changes identified in Finding of Fact 22) and approving the related Administrative Order. In my prior rulings herein, I have upheld the ALJ's Findings of Fact and Conclusions of Law upon which his related recommendation was based. Consequently, I also accept his ultimate recommendation that the Permit be issued (with the minor changes) and the Administrative Order be approved. The Petitioners' numbered Exceptions 124 and 125 are thus denied.

CONCLUSION

In his introductory Finding of Fact 6, the ALJ observed that the parties in this case have presented "extensive and conflicting evidence" regarding the issues raised in the pleadings. The ALJ further stated that, in "resolving the numerous conflicts in that testimony," he accepted the more credible and persuasive evidence as set forth in his subsequent findings in the Recommended Order. In such administrative hearings where there is extensive conflicting testimony, "it is the role of the hearing officer (now 'administrative law judge') to decide the issue one way or the other." Heifetz, 475 So.2d at 1281.

In this case, the ALJ obviously decided that the more credible and persuasive testimony at the DOAH formal hearing was presented by the witnesses called by Georgia-Pacific and the Department. I find no grounds in the record or in the governing

law to substitute my judgment for that of the ALJ in resolving the numerous conflicts in the testimony in a manner that ultimately supports issuance of the Permit and approval of the Administrative Order.

IT IS THEREFORE ORDERED:

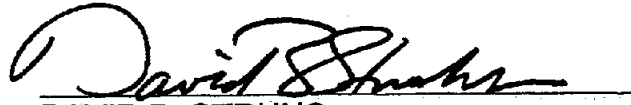
- A. The Petitioners' Motion to Disqualify, as amended, is denied on its merits.
- B. The Recommended Order (Exhibit A) is adopted in its entirety and incorporated by reference herein.
- C. Administrative Order No. 039-NE is approved in its entirety.
- D. Permit No. FL0002763 is hereby ISSUED, subject to the conditions set forth in the draft permit and related Administrative Order. The issuance of the Permit is also subject to the modifications in the Permit conditions described in the ALJ's Finding of Fact 22 and in Georgia-Pacific's Exhibit 102, which are deemed to be additional special conditions to the Permit.

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

The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the clerk of the Department.

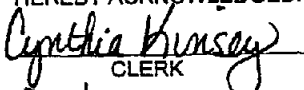
DONE AND ORDERED this 6 day of August, 2002, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION


DAVID B. STRUHS
Secretary

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

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


CLERK
Deputy

8/6/02
DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order has been sent by United States Postal Service to:

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Keyser & Woodward, P.A.
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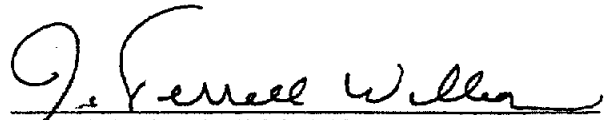
Ann Cole, Clerk and
Donald R. Alexander, Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

and by hand delivery to:

Francine M. Ffolkes, Esquire
Thomas R. Gould, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this 6th day of August, 2002.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



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