FINAL ORDER

An Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH) on October 10, 2017, submitted a Recommended Order (RO) to the Department of Environmental Protection (DEP or Department) in the above captioned administrative proceeding. A copy of the RO is attached hereto as Exhibit A. DEP timely filed its Exceptions on October 25, 2017. The Intervenor Broward County filed its Exceptions untimely after 5:00 p.m. on October 25, 2017. The Intervenor City of Miramar filed a Notice of Joinder in DEP’s Exceptions with DOAH untimely on October 27, 2017. On November 1, 2017, the Petitioner Kanter Real Estate, LLC (Kanter) filed a motion to strike the City of Miramar’s Untimely Notice of Joinder to DEP’s Exceptions. Kanter filed responses to DEP’s Exceptions on November 6, 2017. This matter is now before the Secretary of the Department for final agency action.
BACKGROUND

On November 16, 2016, the Department of Environmental Protection (Department or DEP) issued a Notice of Denial - Oil & Gas Drilling Application (the Denial). The basis for the Denial was that the Petitioner:

failed to provide information showing a balance of considerations in favor of issuance given the particular criteria specified in Section 377.241, Florida Statutes, “Criteria for Issuance of Permits.” Specifically, [Kanter]’s information did not show a balance in favor of issuance when considering the nature, character and location of the lands involved; the nature, type and extent of ownership of [Kanter]; and the proven or indicated likelihood of the presence of oil in such quantities as to warrant the exploration and extraction of such products on a commercially profitable basis.

(RO pages 2 – 3).

On November 16, 2016, the Department also issued a notice of denial of an Environmental Resource Permit (the ERP Denial). The basis for the ERP Denial was that the Petitioner had not provided reasonable assurance that the proposed activity would comply with various provisions of the statutes, rules, and Applicant’s Handbook applicable to the activity.

The Petitioner timely filed separate petitions challenging the Oil and Gas Denial and the ERP Denial, both of which were dismissed by the Department with leave to amend. The Petitioner filed a separate Amended Petition for Formal Administrative Hearing for each of the denied permit applications on January 13, 2017. Those Amended Petitions were referred to the Division of Administrative Hearings on January 31, 2017, and thereafter consolidated. The hearing was scheduled to be held on May 22 through 26, 2017.

On March 14, 2017, Intervenor City of Miramar (Miramar) filed its Petition to Intervene, which was granted, over objection, on March 24, 2017.
On April 14, 2017, Intervenor Broward County, Florida (Broward County), filed its Verified Motion for Intervention, which was granted, over objection, on April 24, 2017.

On May 19, 2017, the parties filed a Joint Pre-hearing Stipulation for the Oil and Gas Permit (Pre-hearing Stipulation.), which contained, among other things, 52 stipulations of fact, each of which are adopted and incorporated herein. The Pre-hearing Stipulation identified the issues of fact remaining for disposition to be:

1. Whether the nature, character, and location of the lands involved weighs toward the approval of exploratory drilling.

2. Whether the nature, type, and extent of ownership of the applicant, “including such matters as the length of time the applicant has owned the rights claimed without having performed any of the exploratory operations so granted or authorized,” weighs toward the approval of exploratory drilling.

3. Whether, and the degree to which, Kanter can demonstrate “the indicated likelihood of the presence of oil, gas or related minerals in such quantities as to warrant the exploration and extraction of such products on a commercially profitable basis.”


On May 22, 2017, the Petitioner also filed a Motion in Limine on Historic Ownership and Use of Mineral Rights, which was denied by separate order, with the issues raised therein being subject to further analysis in the parties’ post-hearing submittals.

The final hearing commenced on May 22, 2017. During the proceedings, the parties announced a stipulation on the record that all issues related to the environmental resource permit (ERP) had been resolved, and that the parties agreed that the Petitioner had met its burden of demonstrating entitlement to issuance of the ERP. Thus, the parties agreed that they would not submit detailed proposed findings of fact on that issue and would submit proposed recommended orders reflecting the agreement, which they did.
A nine-volume Hearing Transcript was filed with DOAH on July 10, 2017. By agreement of the parties, 30 days from the date of the filing of the Transcript was established as the time for filing post-hearing submittals. On August 7, 2017, the Petitioner filed an unopposed Motion for Extension of Time to Submit Proposed Recommended Orders, which was granted, and extended the date for filing to August 17, 2017. The parties timely filed Proposed Recommended Orders with the ALJ, who then issued his RO on October 10, 2017.

**SUMMARY OF THE RECOMMENDED ORDER**

In the RO, the ALJ recommended that the Department enter a final order issuing ERP No. 06-0336409-001, and issuing Oil and Gas Drilling Permit No. OG 1366 with the conditions agreed upon and stipulated by the Petitioner, including a condition requiring that if water is to be transported on-site, it will add additional tanks to meet water needs that would arise during the drilling process, and a condition prohibiting fracking. (RO at pages 52 – 53).

On November 16, 2016, the Department entered its Notice of Denial of the Oil and Gas Drilling Permit. (RO ¶ 10). The Department denied the oil and gas drilling permit, because the Petitioner failed to provide information showing a balance of considerations in favor of issuance pursuant to Section 377.241 of the Florida Statutes. (RO ¶ 10).

**The Property**

The ALJ found that the Petitioner holds fee title to all surface rights, and title to all mineral rights, including rights to oil, gas, and other mineral interests, within Section 23 Township 51 South, Range 38 East, where the exploratory well (Well Site) for the proposed oil and gas drilling permit is located. (RO ¶ 15). The ALJ also found that the Petitioner’s property is encumbered by a Flowage Easement held by the South Florida Water Management District (SFWMD). The ALJ found that the Petitioner’s proposed exploratory well is consistent with the
Petitioner’s ownership interest and the SFWMD Flowage Easement, because the Petitioner has the legal property right to locate and drill an exploratory well. (RO ¶¶ 16-17).

The ALJ found that the Petitioner’s property, including the proposed Well Site, is in the historic Everglades, where water flowed naturally in a southerly direction. (RO ¶ 19). Beginning in the late 1800s, and extending well into the 1960s, canals, levees, dikes, and channels were constructed to drain, impound, or reroute the historic flows. (RO ¶ 20).

The ALJ found that the proposed Well Site is located in Water Conservation Area (WCA)-3, which was constructed as part of the Central and Southern Florida Flood Control project authorized by Congress in 1948, and was created primarily for flood control and water supply. (RO ¶ 21). The ALJ found that in the early 1960’s, two levees, L67-A and L67-C separated WCA-3 into WCA-3A to the west and WCA-3B to the southeast, and that the Well Site is in WCA-3A. (RO ¶ 22).

The ALJ found that the area between L67-A and L67-C, along with a levee along the Miami Canal, is known as the “Pocket.” The ALJ found that the proposed Well Site is located within the Pocket, on the southern side of L67-A. The ALJ also found that the L67-A and L67-C, and their associated canals, have dramatically disrupted sheet flow, altered hydrology, and degraded the natural habitat in the Pocket. The ALJ further found that the Pocket is impacted by invasive species, which have overrun the native species and transformed the area into a monoculture of cattails. The ALJ also found that the L67-A and L67-C, and their associated canals, impede wildlife movement. (RO ¶¶ 25-27). Furthermore, the ALJ found that the Department has permitted oil wells in the Raccoon Point wellfield within the Big Cypress National Preserve. (RO ¶¶ 28-29).
The Biscayne Aquifer

The ALJ found that the Pocket is not a significant recharge zone for the Biscayne Aquifer. The ALJ also found that the proposed Well Site is not within any 30-day or 120-day protection zones in places for local water supply wells. (RO ¶ 32).

The Sunniland Formation

The ALJ found that the preponderance of the evidence demonstrates that active generating source rock capable of producing hydrocarbons exists in the Sunniland Formation beneath the Petitioner's property. The ALJ also found that within the Sunniland Formation reef-like buildups of shells were buried by other materials that formed an impermeable layer over the porous oyster mounds, and allowed these mounds to become "traps" for oil migrating up from lower layers. (RO ¶¶ 36, 38). Furthermore, the ALJ found that the Sunniland Trend is an area of limestone of greater porosity within the Sunniland Formation, and provides a reasonable extrapolation of areas that may be conducive to oil traps. (RO ¶ 43). The ALJ found that two separate trends have been identified within the Sunniland Trend – the rudist-dominant West Felda Trend, and the Felda Trend, both of which are oil-producing strata. The ALJ found that the Felda Trend is more applicable to the Petitioner's property. (RO ¶ 44). The ALJ concluded a preponderance of the evidence indicates that the Petitioner's property, including the proposed Well Site, is within the Sunniland Trend and its Felda Trend subset. (RO ¶ 46).

The Dollar Bay Formation

The ALJ found that the Dollar Bay Formation, which exists beneath the Petitioner's property at a shallower depth than the Sunniland Formation, has the potential for oil production. (RO ¶ 51). The ALJ found that there have been three oil finds in the Dollar Bay formation, with at least one commercial production well. (RO ¶ 52).
Initial Exploratory Activities

The ALJ found that the Petitioner’s expert testimony regarding the seismic data supports a conclusion that the site is a “great prospect” for producing oil in such quantities as to warrant the exploration and extraction of such products on a commercially profitable basis. (RO ¶ 62).

Seismic Data Analysis

The ALJ found that the seismic lines purchased by the Petitioner consist of line 970, which runs southwest to northeast along the L67-A levee, and a portion of line 998, which runs from northwest to southeast along the Miami Canal levee. The ALJ also found that the anticline beneath the proposed Well Site is a “prospect,” which is an area with geological characteristics that are reasonably predicted to be commercially profitable.

Risk Analysis

The ALJ found that risk analysis for plays and prospects consists of four primary factors: the trap; the reservoir; the source; and preservation and recovery. Each of the four factors has three separate characteristics. Numeric scores are assigned to each of the factors based on seismic data; published maps and materials; well data, subsurface data, and evidence from other plays and prospects; and other available information. Chance of success is calculated based on the quantity and quality of the data supporting the various factors to determine the likelihood that the prospect will produce flowable hydrocarbons. (RO ¶ 79). The analysis and scoring performed by the Petitioner’s expert Mr. Aldrich was found by the ALJ to be a reasonable and factually supported assessment of the risk associated with each of the prospects that exist beneath the proposed Well Site. The ALJ found that Mr. Aldrich’s calculation that there was a four-percent chance of success, which means a 96 percent chance of failure, at the Well Site for the Dollar Bay prospect was reasonable and supported by the evidence. The ALJ also found that Mr.
Aldrich’s calculation that there was a twenty-percent chance of success, which means an 80 percent chance of failure, at the Well Site for the Upper Sunniland play was reasonable and supported by the evidence. (RO ¶¶ 80-82). The ALJ found that under the industry-accepted means of risk assessment, there is a 23-percent chance of success that at least one zone will be productive. (RO ¶ 83). The ALJ further found that a 23-percent chance that an exploratory well will be productive, is, in the field of oil exploration and production, a very high chance of success.

Commercial Profitability

The Petitioner’s expert Mr. Aldrich testified that the Petitioner’s project would be commercially self-supporting if it produced 100,000 barrels at $50.00 per barrel. Since his testimony was unrebutted, the ALJ accepted his testimony on this matter. The ALJ found that the evidence supports a finding that reserves could range from an optimistic estimate of 3 to 10 million barrels, to a very conservative estimate of 200 barrels per acre over 900 acres, or 180,000 barrels. The ALJ concluded that the preponderance of the evidence established the likelihood of the presence of oil in such quantities to warrant its exploration and extraction on a commercially profitable basis. (RO ¶¶ 86-87).

STANDARDS OF REVIEW OF DOAH RECOMMENDED ORDERS

Section 120.57(1)(l), Florida Statutes, prescribes that an agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ “unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence.” § 120.57(1)(l), Fla. Stat. (2017); Charlotte County v. IMC Phosphates Co., 18 So. 3d 1089 (Fla. 2d DCA 2009); Wills v. Fla. Elections Comm’n, 955 So. 2d 61 (Fla. 1st DCA 2007). The term “competent substantial
“evidence” does not relate to the quality, character, convincing power, probative value or weight of the evidence. Rather, “competent substantial evidence” refers to the existence of some evidence as to each essential element and as to its admissibility under legal rules of evidence. See e.g., Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm’ n, 671 So. 2d 287, 289 n.3 ( Fla. 5th DCA 1996); Nunez v. Nunez, 29 So. 3d 1191, 1192 ( Fla. 5th DCA 2010).

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

The ALJ’s decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. See, e.g., Peace River/Manasota Reg’l Water Supply Authority v. IMC Phosphates Co., 18 So. 3d 1079, 1088 ( Fla. 2d DCA 2009); Collier Med. Ctr. v. State, Dep’t of HRS, 462 So. 2d 83, 85 ( Fla. 1st DCA 1985); Fla. Chapter of Sierra Club v. Orlando Utils. Comm’n, 436 So. 2d 383, 389 ( Fla. 5th DCA 1983). In addition, an agency has no authority to make independent or supplemental findings of fact. See, e.g., North Port, Fla. v. Consol. Minerals, 645 So. 2d 485, 487 ( Fla. 2d DCA 1994); Fla. Power & Light Co. v. Fla. Siting Bd., 693 So. 2d 1025, 1026-1027 ( Fla. 1st DCA 1997).
Section 120.57(1)(l), Florida Statutes, authorizes an agency to reject or modify an ALJ's conclusions of law and interpretations of administrative rules “over which it has substantive jurisdiction.” See *Barfield v. Dep’t of Health*, 805 So. 2d 1008 (Fla. 1st DCA 2001); *L.B. Bryan & Co. v. Sch. Bd. of Broward County*, 746 So. 2d 1194 (Fla. 1st DCA 1999); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140 (Fla. 2d DCA 2001). Considerable deference should be accorded to these agency interpretations of statutes and rules within their regulatory jurisdiction, and such agency interpretations should not be overturned unless “clearly erroneous.” See, e.g., *Falk v. Beard*, 614 So. 2d 1086, 1089 (Fla. 1993); *Dep’t of Envl. Reg. v. Goldring*, 477 So. 2d 532, 534 (Fla. 1985). Furthermore, agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be the only reasonable interpretations. It is enough if such agency interpretations are “permissible” ones. See, e.g., *Suddath Van Lines, Inc. v. Dep’t of Envl. Prot.*, 668 So. 2d 209, 212 (Fla. 1st DCA 1996).

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

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

RULINGS ON EXCEPTIONS

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

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

DEP Exception No. 1 regarding Paragraph 62

DEP takes exception to the findings of fact in paragraph 62, stating that the findings are not supported by competent substantial evidence. Paragraph 62 contains one sentence summarizing the testimony of Kanter’s expert Mr. Pollister regarding whether the proposed well “site is a ‘great prospect’ for producing oil in such quantities to warrant exploration and extraction of such products on a commercially profitable basis.” (RO ¶ 62). DEP correctly noted that counsel for Kanter asked Mr. Pollister the following question:

So, Mr. Pollister, do you have an opinion of whether there is a proven or indicated likelihood in the presence of oil in such quantities as to warrant the exploration and extraction of such products on a commercially profitable basis at the Kanter proposed oil site?

(T. Vol. I, p. 97 lines 12-17). DEP then acknowledged that counsel for DEP objected to the question, but was overruled by the ALJ. (T. Vol. I, p 97 line 18 – p. 98 line 17). DEP argues that Kanter’s counsel re-phrased the question as follows: “But what is your opinion?” (T. Vol. I, p. 98 line 20). The ALJ overruled DEP’s objection to the question, and the ALJ stated “Mr. Pollister, you may answer the question.” (T. Vol. I, p. 98 lines 16 – 17). Mr. Pollister testified that he believes that the proposed site is a “great prospect” based on his review of two lines of seismic data. (T. Vol. I, p. 99 lines 8-13). As a result, competent substantial evidence supports the ALJ’s finding in paragraph 62, as explained above.

Furthermore, DEP is required to accept the ALJ’s evidentiary rulings, since evidentiary rulings are matters within the ALJ’s sound “prerogative . . . as the finder of fact” and may not be reversed on agency review. Martuccio v. Dep’t of Prof’l Regulation, 622 So. 2d 607, 609 (Fla. 1st DCA 1993). Reading the expert’s testimony, DEP’s
objection, and the ALJ’s rulings as a whole, the first argument in DEP’s exception to paragraph 62 is denied.

Next, DEP argues that the findings in paragraph 62 should be rejected for two additional reasons. DEP argues that given the question presented to the witness and his answer, the testimony cannot be construed to express an opinion regarding any likely quantity of oil, or of commercial profitability. However, the ALJ’s finding is a reasonable inference from the record testimony. The ALJ can “draw permissible inferences from the evidence.” Heifetz v. Dep’t of Bus. Regulation, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). See also Walker v. Bd. of Prof’l Eng’rs, 946 So. 2d 604, 605 (Fla. 1st DCA 2006) (“It is the hearing officer’s function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence.”). Therefore, DEP’s exception to paragraph 62 based on its first reason is denied.

DEP then argues that the findings in paragraph 62 should be rejected, because the ALJ erred in overruling DEP’s objection regarding the question that resulted in the testimony summarized in paragraph 62 of the RO and from which DEP filed its exception. 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); see Barfield v. Dep’t of Health, 805 So. 2d 1008 (Fla. 1st DCA 2002). 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. Thus, DEP’s exception to paragraph 62 based on the above reason is also denied.
DEP notes that Mr. Pollister’s testimony cited in paragraph 62 of the RO is “the only scintilla of evidence that would arguably support a general finding regarding commercial profitability.” Section 120.57(1)(l), Fla. Stat., states that an agency reviewing a recommended order may not reject or modify the findings of fact of an administrative law judge, unless the agency determines that the findings of fact were not based on competent substantial evidence. The term “competent substantial evidence” does not relate to the quality, character, convincing power, probative value or weight of the evidence; rather it refers to the existence of some quantity of evidence. *Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm’r*, 671 So. 2d 287, 289 n.3 (Fla 5th DCA 1996). As a result, “a scintilla of evidence” constitutes the existence of some quantity of evidence; and thus, competent substantial evidence exists to support the finding in paragraph 62 that the “site is a ‘great’ prospect for producing oil in such quantities as to warrant the exploration and extraction of such products on a commercially profitable basis.” (T. Vol. I, p. 97 lines 12-17; T. Vol. I, p. 98 line 21). DEP’s exception to paragraph 62 based on the above reason is also denied.

Finally, DEP argues that no competent substantial evidence supported any projection of future price. However, the ALJ’s finding is a reasonable inference from the record testimony regarding current prices. The ALJ can “draw permissible inferences from the evidence.” *Heifetz*, 475 So. 2d at 1281. *See also Walker*, 946 So. 2d at 605 (“It is the hearing officer’s function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence.”). DEP’s exception to paragraph 62 based on its final argument is denied.

Therefore, based on the foregoing reasons, DEP’s Exception No. 1 is denied.
DEP Exception No. 2 regarding Paragraph 86

DEP takes exception to the findings in paragraph 86, which find that the Kanter project would be commercially self-supporting if it produced 100,000 barrels at $50.00 per barrel. DEP argues that the ALJ’s findings are not supported by competent substantial evidence.

However, the ALJ’s finding is supported by competent substantial evidence in the form of expert testimony from Jeffrey Aldrich. (T. Vol. V, p. 422 line 21 – p. 423 line 9). Therefore, DEP’s exception to paragraph 86 is denied.

DEP Exception No. 3 regarding Paragraph 87 and footnote 9

DEP takes exception to the findings of fact in paragraph 87 and footnote 9, arguing that no competent substantial evidence supports the findings in the first sentence, second sentence, or footnote 9. DEP argues that the finding in the first sentence is not supported by competent substantial evidence, because the testimony concerning estimated volumes refers to “fields” and not “reserves” as stated in the findings of fact. However, Kanter’s expert, Mr. Aldrich, refers to “reserves” and not “fields” when he testified that “I would expect [this prospect] to fall along that trend line and that the expected reserve size that you would get would be someplace within the 3 to 10 million barrels, yes.” (T. Vol. V, p. 341 lines 8-11) (emphasis added). Therefore, DEP’s exception to the first sentence of paragraph 87 is denied.

DEP takes exception to the second sentence of paragraph 87, arguing that no competent substantial evidence supports the commercial profitability from either a single well or a combination of wells. DEP argued that the only testimony supporting the ALJ’s finding that there was a “likelihood of the presence of oil in such quantities as to warrant its exploration and extraction on a commercially profitable basis” was related to the installation and associated costs of a single exploratory well – not a “field,” as described in Mr. Aldrich’s testimony. However,
as explained above, Mr. Aldrich’s testimony refers to “reserves” and not “fields” when he testified that the reserve size would get someplace within 3 to 10 million barrels. (T. Vol. V, p. 341 lines 8-11). Mr. Aldrich specifically testified that the proposed drilling prospect would be commercially profitability as follows:

Q. Okay. And at current oil prices, is this prospect worth drilling to an oil production company?
A. Yes, sir. It doesn’t take much.
Q. Which is?
A. It would probably be economical at about 100,000.
Q. So 100,000 barrels, which is much below where you had pegged it?
A. Yes, sir.
Q. And what price of oil are you using in your mind.
A. About $50 a barrel.
Q. Which is about where it is today?
A. Yes, sir.


DEP further argues that no competent substantial evidence supported any projection of the future price per barrel. However, the ALJ’s finding is a reasonable inference from the record testimony regarding current prices per barrel. As stated above, the ALJ can “draw permissible inferences from the evidence.” Heifetz, 475 So. 2d at 1281. See also Walker, 946 So. 2d at 605. DEP’s exception to the second sentence in paragraph 87 is thus denied.

DEP takes exception to the findings of fact in footnote 9 arguing that the footnote should be construed, in part, as conclusions of law. DEP first argues that there is no competent substantial evidence to support the finding of fact that under the Petroleum Reserve Management System (PRMS) auditing standards, oil companies are not allowed to develop any economic models with respect to prospective petroleum reserves that have not been proven. However, the ALJ’s finding is supported by competent substantial evidence in the form of expert testimony.
from Jeffrey Aldrich. (T. Vol. IX, p. 840 line 23 – p. 841 line 25). Thus, DEP’s exception to footnote 9 for the above reason is denied.

Next, DEP argues that footnote 9 contains an “erroneous conclusion of law, that an economic projection or analysis is ‘inappropriate.’” However, the ALJ’s finding is supported by competent substantial evidence in the form of expert testimony from Jeffrey Aldrich, and should not be reclassified as a conclusion of law. (T. Vol. IX, p. 840 line 23 – p. 841 line 25).

Specifically, Kanter’s expert Jeffrey Aldrich testified that the Petroleum Reserve Management System auditing standards contain three auditing classifications – standards for commercial reserves, standards for discovered reserves that are not commercial yet, and standards for prospective resources, known as prospects. He explained that “we have whole guidelines on them [prospective resources], and they do not have any economics run on them. We’re actually not allowed to state any economics on them under the PRMS guidelines.” The ALJ’s finding is supported by competent substantial evidence in the form of expert testimony from Jeffrey Aldrich. (T. Vol. IX, p. 840 line 23 – p. 841 line 18). Thus, DEP’s exception to footnote 9 for the above reason is denied.

Next, DEP argues that footnote 9 contains an erroneous conclusion of law that economic projections should be made after the project is complete. Contrary to DEP’s argument, the ALJ’s finding is supported by competent substantial evidence in the form of expert testimony from Jeffrey Aldrich, and should not be reclassified as a conclusion of law. (T. Vol. IX, p. 840 line 23 – p. 841 line 18). As explained by Kanter’s expert witness Jeffrey Aldrich economic runs are not allowed to be conducted for prospective resources under the Petroleum Reserve Management System that establishes auditing standards for the petroleum industry. Thus, DEP’s exception to footnote 9 for the above reason is denied.
Therefore, based on the foregoing reasons, DEP’s exceptions to both sentences in paragraph 87 and footnote 9 are denied.

**DEP Exceptions No. 4, 5, 6, 7, and 8 regarding Paragraphs 99, 100, 103, 109, and 110**

DEP takes exception to conclusions of law in paragraphs 99, 100, 103, 109, and 110. The ALJ has interpreted Section 377.241, Florida Statutes, in Paragraphs 99, 100 and 103, to place an “overriding legislative concern” with the effect of divided mineral interests on rights of surface ownership. (RO ¶ 99 and 100). Furthermore, the ALJ, cited to a DOAH permit challenge in which the applicant withdrew its application before the deadline for the final order, and thus DEP’s Secretary did not have the opportunity to accept or reject counsel’s arguments or the ALJ’s legal conclusions when the ALJ quoted that “When enacted in 1961, the overall purpose of the statute was to institute a permit process in order to protect landowners from undue burdens from mineral leases.” *Mosher v. Dep’t of Envtl. Prot.*, Case No. 13-4254 and 13-4920 (DOAH Recommended Order June 3, 2014; Application withdrawn by Stipulation before DEP’s Secretary wrote the Final Order) (RO ¶ 103).

“The reviewing agency is not bound by the legal arguments made or legal positions advocated by its attorneys of record in the DOAH proceedings.” *Haile Cmty. Ass’n v. Florida Indus. & Dep’t of Envtl. Prot.*, Case No. 95-5531, 1996 WL 533801, at *9, n. 1 (Fla. DEP September 5, 1996, Fla. DOAH July 23, 1996), citing *Ridgewood Properties v. Dep’t of Cmty. Affairs*, 562 So. 2d 322, 323 (Fla. 1990); *Cordes v. Dep’t of Envtl. Regulation*, 582 So. 2d 652, 655 (Fla. 1st DCA 1991); *Tamaron Utilities, Inc. v. Dep’t of Envtl. Prot.*, 16 F.A.L.R. 3112, 3124 n. 3 (Fla. DEP 1994). Accordingly, arguments of counsel in a formal proceeding, when not later endorsed by the agency head in a final order, are of no value in providing agency practice or
previous interpretations of rules or statutes. Thus, arguments made in the Mosher case hold no value in DEP’s interpretation of Chapter 377, Florida Statutes.

Instead, I conclude that the overall purpose of Section 377.241, Florida Statutes, is to identify several factors for DEP to weigh and balance when evaluating whether to issue an oil or gas permit. *Coastal Petroleum Co. v. Florida Wildlife Fed’n, Inc.* 766, So. 2d 226, 228 (Fla. 1st DCA 1999) (Appellate court agreed that DEP is to weigh and balance the criteria in Section 377.421 to determine whether to issue an oil drilling permit). The interpretation of Section 377.241 in this Final Order is more reasonable than that of the ALJ in RO paragraphs 99, 100, and 103. See § 120.57(1)(l), Fla. Stat. (2017).

Thus, DEP’s exceptions No. 4, 5, and 6 to conclusions of law in paragraphs 99, 100, and 103 of the RO are granted. The ALJ’s conclusions are accordingly modified in this Final Order. See § 377.241(2), Fla. Stat. (2017).

DEP’s exception No. 7 takes exception to conclusion of law in paragraph 109 of the RO. DEP argues that the ALJ’s conclusion of law in paragraph 109 is inconsistent with existing administrative and judicial interpretation. The ALJ concluded that the “property upon which the Well Site is to be located has no special characteristics that would make it susceptible to pollution” and that “the area is far less likely to impact natural resources than other Department-permitted wells.” (RO ¶ 109).

DEP administers and enforces the provisions of both chapter 373 and chapter 377, Florida Statutes, and the rules promulgated thereunder, including those applicable to oil and gas permitting. (RO ¶ 2 on page 8); see also § 120.57(1)(l), Fla. Stat. (2017) (agency can reject or modify a judge’s conclusions of law and interpretations of administrative rules “over which it has substantive jurisdiction.”); *MacPherson v. Sch. Bd. of Monroe County*, 505 So. 2d 682, 683
I conclude that the overall purpose of Section 377.241(1) of the Florida Statutes is to weigh and balance the “nature, character and location of the lands involved” when evaluating whether to issue an oil or gas permit. Coastal Petroleum, Final Order at 6, citing § 377.241, Fla. Stat. (2017) (“The first criterion to be considered by the Department is the ‘nature, character, and location of the lands involved.’”). The lands proposed for the Well Site are located in the endangered Everglades ecosystem, which is world renowned for its unique environmental characteristics. In accordance with the Everglades Forever Act, the Florida Legislature has dedicated the Everglades to long term restoration. See § 373.4592, Fla. Stat. (2017) (Section 373.4592(17), Florida Statutes, shall be known as the Everglades Forever Act).

Thus, DEP’s exception No. 7 to conclusions of law in paragraph 109 of the RO is granted. The interpretation in this Final Order is more reasonable than that of paragraph 109 in the ALJ’s RO. See § 120.57(1)(l), Fla. Stat. (2017). The ALJ’s conclusions are accordingly modified in this Final Order.

DEP takes exception to conclusion of law in paragraph 110 of the RO, concluding that it should be rejected, because it is inconsistent with existing administrative and judicial interpretation.

As explained above, DEP administers and enforces the provisions of chapter 377, Florida Statutes, and the rules promulgated thereunder, including those applicable to oil and gas permitting. (RO ¶ 2 on page 8); see also § 120.57(1)(l), Fla. Stat. (2017) (agency can reject or modify a judge’s conclusions of law and interpretations of administrative rules “over which it
has substantive jurisdiction.”); *MacPherson*, 505 So. 2d at 683 *Siess*, 468 So. 2d at 478; *Alles*, 423 So. 2d at 626.

In paragraph No. 110, the ALJ concluded that the “greater weight of the evidence establishes that the potential for harmful discharges and the potential for harm to groundwater and the public water supply are insignificant” and that impossibility cannot be the permitting standard. (RO ¶ 110). DEP argues that the degree of risk has no bearing on application of Section 377.241(1); instead, the nature of the lands involved is what is at issue. In support of this position, DEP quoted the *Florida Wildlife Federation v. Coastal Petroleum Co.* Final Order:

Apparently the ALJ reaches her conclusion that Coastal’s permit ‘meets’ the first criterion on the basis that the chance of an oil spill is remote. (Finding of Fact 38). However, Petitioners correctly point out that the relevant criterion is not the chance of a blowout, but the nature of the lands involved.”


I agree with the ALJ’s conclusion that “impossibility of risk” from an oil and gas exploratory drilling operation is not the permitting standard. (RO ¶ 110). However, I also agree with DEP’s conclusion that it is not the degree of risk that has bearing on application of Section 377.241(1). Instead, Section 377.241(1), Florida Statutes, directs the Department to consider the “nature, character, and location of the lands involved.” § 377.241(1), Fla. Stat. (2017).

The ALJ’s conclusions of law in paragraph 110 are inconsistent with existing administrative, judicial and statutory interpretation. *See Coastal Petroleum* Final Order, 1998 WL 300047 at *5.

Therefore, DEP’s exception No. 8 to the conclusion of law in paragraph 110 of the RO is granted in part, and denied in part. The ALJ’s conclusions are modified in this Final Order to
weigh the “nature, character, and location of the lands involved” in accordance with § 377.241, Florida Statutes. The interpretation in this Final Order is more reasonable than that of paragraph 109 in the ALJ’s RO. See § 120.57(1)(l), Fla. Stat. (2017). The ALJ’s conclusions are accordingly modified in this Final Order.

DEP Exceptions No. 9, 10 and 11 regarding Paragraphs 113, 115, and 116

DEP takes exception to conclusions of law in paragraphs 113, 115, and 116 of the RO, which interpret Section 377.241, Florida Statutes, when DEP is determining whether to issue an oil and gas permit. Specifically, Section 377.241(2), Florida Statutes, directs DEP to consider the following factors “(2) The nature, type and extent of ownership of the applicant, including such matters as the length of time the applicant has owned the rights claimed without having performed any of the exploratory operations so granted or authorized.” § 377.241(2), Fla. Stat. (2017).

DEP administers and enforces the provisions of chapter 377, Florida Statutes, and the rules promulgated thereunder, including those applicable to oil and gas permitting. (RO ¶ 2 on page 8); see also § 120.57(1)(l), Fla. Stat. (2017) (agency can reject or modify a judge’s conclusions of law and interpretations of administrative rules “over which it has substantive jurisdiction.”); MacPherson, 505 So. 2d at 683 Siess, 468 So. 2d at 478; Alles, 423 So. 2d at 626.

In paragraph 113, the ALJ concludes that the primary consideration of Section 377.241(2) is the balance between the legal interests of the fee simple owner versus the interests of the mineral rights owners, stating that a balance is unnecessary, since Kanter holds the surface interests and the mineral rights to the proposed Well Site. (RO ¶ 113). DEP argues that Kanter has conveyed away virtually all rights to surface development through conveyance of the flowage easement over the subject property.
I reject the ALJ’s interpretation of Section 377.241(2) that the primary consideration of Section 377.241(2) is the balance between the legal interests of the fee simple owner versus the interests of the mineral right owners and the ALJ’s conclusion that a balance is unnecessary, since Kanter holds the surface interest and mineral rights to the proposed well site. I conclude that whether the permit applicant holds both the surface interest and the mineral rights to the proposed well site is but one factor to balance when determining whether to issue an oil and gas permit. Section 377.241(2) also requires DEP to weigh the “length of time the applicant has owned the rights claimed without having performed any . . . exploratory operations.” § 377.241(2), Fla. Stat. (2017). The interpretation of Section 377.241 in this Final Order is more reasonable than that of the ALJ. See § 120.57(1)(l), Fla. Stat. (2017).

The ALJ’s interpretation of Section 377.421, Florida Statutes, implies that the three criteria to be considered by DEP when determining whether to issue an oil and gas permit are a checklist. The three criteria do not constitute a pass-fail checklist for an applicant; rather, they are guidelines for balancing interests.

Instead, Section 377.421, Florida Statutes, should be interpreted as calling for a weighing process where each criterion is evaluated and then weighed against the other factors. See Coastal Petroleum Final Order, 1998 WL 300047 at *10 (DEP’s Final Order concluded that the ALJ’s “Conclusions of Law again misread the statutory criterion as a pass-fail test. . . . The Department is charged instead with balancing interests.”) The First District Court of Appeal approved this weighing and balancing process on appeal in Coastal Petroleum Co. v. Florida Wildlife Fed’n, Inc. 766, So. 2d 226, 228 (Fla. 1st DCA 1999).

Furthermore, the canon of statutory construction known as the reenactment canon directs an agency that when a court has interpreted part of a statute, subsequent reenactment of the same
statutory provisions may be considered legislative approval of the previous judicial interpretation. *Remington v. City of Ocala/United Self Insured*, 940 So. 2d 1207, 1210 (Fla. 1st DCA 2006); *Sam's Club v. Bair*, 678 So. 2d 902, 903-04 (Fla. 1st DCA 1996). Following *Coastal Petroleum*, the legislature amended or "reenacted" Section 377.241, Florida Statutes, without changing the text of the three factors. Ch. 2013-205, § 12, at 11, Laws of Florida. See also, e.g., *Music City, Inc. v. Duncan's Estate*, 185 Colo. 245, 248, 523 P. 2d 983, 985 (1975) ("[W]here a legislature re-enacts or amends a statute and does not change a section previously interpreted by settled judicial construction, it must be concluded that the legislature has agreed with the judicial construction.").

Therefore, DEP's exception No. 9 to the conclusions of law in paragraph 113 of the RO is granted. The interpretation of Section 377.241 in this Final Order is more reasonable than that of the ALJ. See § 120.57(1)(l), Fla. Stat. (2017). The ALJ’s conclusions are modified in this Final Order to reflect that DEP must consider the length of time the permit applicant has owned the rights claimed without having performed any exploratory operations, evaluate each criterion listed in Section 377.421(1)–(3), Florida Statutes, and then weigh and balance each of the three criteria against each other. §§ 377.241(1)–(3), Fla. Stat. (2017).

DEP takes exception to conclusions of law in paragraphs 115, and 116, which interpret Section 377.241, Florida Statutes. In paragraphs 115 and 116, the ALJ concludes that there is no factual or legal basis to give any weight to the fact that Kanter has owned its property, including the Well Site, since 1975. DEP argues that there is no dispute that Kanter owned the land but has not applied for a permit for at least 39 years. DEP also points out that in the *Coastal Petroleum* oil and gas permit application final order, the second factor weighed against the permit applicant, because the applicant had delayed seeking an oil and gas permit for "many
years.” DEP argued that the Coastal Petroleum final order analysis focused on the applicant’s delay in exploring for petroleum, rather than the type of interest held by the applicant.

I reject the ALJ’s interpretation of Section 377.241(2), Florida Statutes, that no weight should be given to the fact that Kanter has owned its property, including the Well Site, since 1975 without performing any exploratory operations. The correct interpretation of Section 377.241(2) requires DEP to consider the length of time the permit applicant has owned the rights claimed without having performed any exploratory operations. § 377.241(2), Fla. Stat. (2017).

The interpretation of Section 377.241 in this Final Order is more reasonable than that of the ALJ. See § 120.57(1)(l), Fla. Stat. (2017).

Therefore, DEP’s exceptions No. 9, 10, and 11 to the conclusions of law in paragraphs 113, 115, and 116 of the RO are granted. The ALJ’s conclusions are modified in this Final Order to reflect that DEP must weigh the length of time the permit applicant has owned the rights claimed without having performed any exploratory operations, evaluate each criterion listed in Section 377.241, Florida Statutes, and then weigh and balance each of the three criteria against each other. § 377.241, Fla. Stat. (2017).

DEP Exception No. 12 regarding Paragraph 119

DEP takes exception to the ALJ’s conclusions of law in paragraph 119 that “Section 377.241(3) requires consideration of whether there is an ‘indicated likelihood’ of the presence of oil in commercially-profitable quantities. Subsection (3) does not require a guarantee.” (RO ¶ 119). DEP argues that paragraph 119 should be rejected in its entirety. The rulings in DEP Exceptions No. 1, 2 and 3 above are incorporated herein.

Thus, DEP’s exception No. 12 to paragraph 119 of the RO is denied.
DEP Exception No. 13 regarding Paragraph 120 and the ALJ’s recommendations

DEP takes exception to the ALJ’s conclusion in paragraph 120 and his recommendation, arguing that each of the factors weigh against the applicant obtaining a permit. Alternatively, DEP argues that if a contrary conclusion is reached, then DEP should reweigh the factors in Section 377.241, Florida Statutes, and deny the application for Oil and Gas Permit No. OG 1366. The rulings above in DEP Exceptions No. 1 through 12 are incorporated herein.

Thus, DEP’s exception to the ALJ’s conclusion of law in paragraph 120, and DEP’s exception to the ALJ’s recommendation, are granted to the extent that DEP is directed to evaluate each of the three factors in Section 377.241 and then weigh each of the factors against the other factors. This interpretation of Section 377.241 in this Final Order is more reasonable than that of the ALJ. See § 120.57(1)(l), Fla. Stat. (2017).

Upon re-weighing the three factors in Section 377.241, Florida Statutes, against each other, I conclude that the proposed oil and gas exploratory permit must be denied.

RULINGS ON BROWARD COUNTY’S EXCEPTIONS

Broward County Exception No. 1

Broward County takes exception to the ALJ’s Conclusion of Law in paragraph 109 that “The property upon which the Well Site is to be located has no special characteristics that would make it susceptible to pollution.”

The deadline to file exceptions expired at 5:00 p.m. on October 25, 2017. See Fla. Admin. Code R. 28-106.217(1) (Exceptions and Responses) (“Parties may file exceptions to findings of fact and conclusions of law contained in recommended orders with the agency responsible for rendering final agency action within 15 days of entry of the recommended order.”) and Fla. Admin. Code R. 28-106.104(3) (“Any document received by the office of the
agency clerk before 5:00 p.m. shall be filed as of that day but any document received after 5:00 p.m. shall be filed as of 8:00 a.m. on the next regular business day.”). Broward County filed its exceptions with DEP after 5:00 p.m. on October 25, 2017; and thus, Broward County’s exceptions were filed late. Because Broward County’s exceptions were filed late, Broward County’s Exception No. 1 is rejected.

**Broward County Exception No. 2**

Broward County takes exception to the last sentence of the conclusion of law in paragraph 120, which states that “balancing policy interests is the province of the [Department]’ [Id. at 12], the Department is nonetheless constrained by the evidence in this case, which establishes no reasonable basis in fact or law to deny the Application.”

The deadline to file exceptions expired at 5:00 p.m. on October 25, 2017. See Fla. Admin. Code R. 28-106.217 (Exceptions and Responses) (“Parties may file exceptions to findings of fact and conclusions of law contained in recommended orders with the agency responsible for rendering final agency action within 15 days of entry of the recommended order.”) and Fla. Admin. Code R. 28-106.104(3) (“Any document received by the office of the agency clerk before 5:00 p.m. shall be filed as of that day but any document received after 5:00 p.m. shall be filed as of 8:00 a.m. on the next regular business day.”). Broward County filed its exceptions with DEP after 5:00 p.m. on October 25, 2017; and thus, Broward County’s exceptions were filed late. Because Broward County’s exceptions were filed late, Broward County’s Exception No. 2 is rejected.

**RULINGS ON CITY OF MIRAMAR’S NOTICE OF JOIN DER IN DEP’S EXCEPTIONS**

The City of Miramar filed a Notice of Joinder in DEP’s Exceptions with the Division of Administrative Hearings on October 27, 2017.
Parties may file exceptions with the agency responsible for issuing the final order within 15 days after entry of DOAH’s recommended order. The deadline to file exceptions with DEP expired at 5:00 p.m. on October 25, 2017. See Fla. Admin. Code R. 28-106.217(1) (Exceptions and Responses) (“Parties may file exceptions to findings of fact and conclusions of law contained in recommended orders with the agency responsible for rendering final agency action within 15 days of entry of the recommended order.”) and Fla. Admin. Code R. 28-106.104(3) (“Any document received by the office of the agency clerk before 5:00 p.m. shall be filed as of that day but any document received after 5:00 p.m. shall be filed as of 8:00 a.m. on the next regular business day.”). Not only did the City of Miramar untimely file its Notice of Joinder in DEP’s Exceptions, but it filed its notice with the wrong entity. The Notice of Joinder should have been filed with DEP; however, the city incorrectly filed its notice with DOAH. Because the City of Miramar’s Notice of Joinder in DEP’s Exceptions was filed late and incorrectly with DOAH instead of DEP, the City of Miramar’s joinder in DEP’s exceptions is rejected.

CONCLUSION

DEP must weigh and balance the three factors identified in Section 377.421, Florida Statutes, against each other to determine whether the proposed exploratory well drilling permit for oil should be issued. In accordance with Section 377.241, Florida Statutes, the “lands involved” are located in the environmentally sensitive Everglades. (RO ¶ 19). In addition, the permit applicant has chosen not to exercise its mineral rights for a long time, which weighs against issuance of the permit. (RO ¶ 114).

In weighing and balancing the three factors in Section 377.241(1) – (3), DEP must consider the significance of the environmentally sensitive Everglades. The Florida Legislature
emphasized the significance of the Everglades, when it stated in Section 373.4592, known as the Everglades Forever Act, that:

(a) The Legislature finds that the Everglades ecological system not only contributes to South Florida’s water supply, flood control, and recreation, but serves as the habitat for diverse species of wildlife and plant life. The system is unique in the world and one of Florida’s great treasures. The Everglades ecological system is endangered as a result of adverse changes in water quality, and in the quantity, distribution, and timing of flows, and, therefore, must be restored and protected.

(e) It is the intent of the Legislature to pursue comprehensive and innovative solutions to issues of water quality, water quantity, hydroperiod, and invasion of exotic species which face the Everglades ecosystem. The Legislature recognizes that the Everglades ecosystem must be restored both in terms of water quality and water quantity and must be preserved and protected in a manner that is long term and comprehensive. The Legislature further recognizes that the EAA and adjacent areas provide a base for an agricultural industry, which in turn provides important products, jobs, and income regionally and nationally. It is the intent of the Legislature to preserve natural values in the Everglades while also maintaining the quality of life for all residents of South Florida, including those in agriculture, and to minimize the impact on South Florida jobs, including agricultural, tourism, and natural resource-related jobs, all of which contribute to a robust regional economy.

§ 373.4592(1)(a) and (e), Fla. Stat. (2017). See also § 373.4592(17), Fla. Stat. (2017) (Section 373.4592 shall be known as the “Everglades Forever Act”).

In the Coastal Petroleum Final Order, DEP concluded that the balancing test in Section 377.241, Florida Statutes, weighed against issuance of an oil and gas exploratory permit to the permit applicant, Coastal Petroleum Company. DEP concluded as follows:

Weighing evidence is the province of the trier of fact, but balancing policy interests is the province of the agency. *Cross v. Dep’t of Health & Rehab. Servs.*, 658 So. 2d 1139, 1143 (Fla. 1st DCA 1995) (“Striking the proper balance between competing policy considerations” is a decision to be made by an agency, as guided by the legislature); *Florida Power Corp. v. Dep’t of Envtl. Regulation*, 638 So. 2d 545, 546 (Fla. 1st DCA), review denied, 650 So. 2d 149 (Fla. 1994) (affirming DER’s determination “that the public interest in the extent of the impact on the environment . . . was a policy matter for its determination and not a question of fact to be resolved by the hearing officer.”). In the present case, the
balance tips against issuance of a permit to drill an exploratory well nine miles south of St. George Island.


Similarly, in the present case using the same criteria in Section 377.241, Florida Statutes, the balance tips against issuance of an oil and gas permit to drill an exploratory well in the environmentally sensitive Everglades.

DEP has not issued an oil and gas exploration permit since 1967 within the Everglades lands subject to conservation and restoration under § 373.4592, Florida Statutes. Thus, the last oil and gas exploration permit within such lands was 50 years ago,¹ well before Section 373.4592, known as the Everglades Forever Act, was enacted by the Florida Legislature in 1991. *See* ch. 91-80, §§ 1, 2 (1991). The Florida Legislature has not amended its position regarding the need to preserve and restore the Everglades since 1991, nor has DEP issued an oil and gas exploration permit within this boundary of the Everglades once such lands became subject to restoration under the Everglades Forever Act. *See* § 373.4592, Florida Statutes.

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

ORDERED that:

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

B. ERP Permit No. 06-0336409-001 is APPROVED; and

¹ DEP acknowledges that the RO does not identify when the last permit was issued in the Everglades. Accordingly, this specific information did not form the basis of the agency's decision, but merely reflects that DEP has not changed its long-standing policy to deny oil and gas permits within lands subject to Everglades restoration.
C. Oil and Gas Drilling Permit No. OG 1366 is DENIED.

JUDICIAL REVIEW

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

DONE AND ORDERED this 2nd day of November, 2017, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION

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

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

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

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and by electronic filing to:

Division of Administrative Hearings
The DeSoto Building
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this 2nd day of November, 2017.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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