STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

FLORIDA AUDUBON SOCIETY, INC.,		
Petitioner,		
v.	**OGC CASE NO.**	**16-1346**
	DOAH CASE NO.	**16-7148**
TEXAS HOLD'EM, LLC; SQUEEZE ME INN, LLC; AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,		
Respondents.		
TOWN OF FORT MYERS BEACH, FLORIDA,		
Petitioner,		
v.	**OGC CASE NO.**	**16-1343**
	DOAH CASE NO.	**16-7149**
TEXAS HOLD'EM, LLC; SQUEEZE ME INN, LLC; AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,		
Respondents.		
FLORIDA AUDUBON SOCIETY, INC., AND TOWN OF FORT MYERS BEACH, FLORIDA,		
Petitioners,	**OGC CASE NOS.**	**17-0959**
v.		**18-0214**
	DOAH CASE NOS.	**18-1451**
TEXAS HOLD'EM, LLC; SQUEEZE ME INN, LLC; AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,		**18-2141**
Respondents.		

CONSOLIDATED FINAL ORDER

An Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH) on March 20, 2019, 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 exceptions on April 4, 2019. Texas Hold'em, LLC (Texas Hold'em), and Squeeze Me Inn, LLC (Squeeze Me Inn), collectively the Applicants, timely filed exceptions on April 4, 2019. The Petitioner Florida Audubon Society, Inc., (Audubon or Petitioners) timely filed one exception on April 9, 2019. No party filed responses to the exceptions.

This matter is now before the Secretary of the Department for final agency action.

BACKGROUND

These consolidated cases involve agency actions related to a "dune walkover" (dune walkover or Project) proposed by the applicants, Texas Hold'Em, LLC, and Squeeze Me Inn, LLC (the Applicants). To construct the proposed dune walkover, the Applicants filed: 1) an application for an Environmental Resource Permit (ERP); 2) an application for a letter of consent easement for the use of sovereignty submerged lands (SSL Authorization); 3) a petition for waiver from Florida Administrative Code Rules 62B-33.008(3)(c) and (d) to allow for completion and consideration of an application for a Coastal Construction Control Line (CCCL) permit (CCCL Waiver); and 4) an application for a CCCL permit (CCCL Permit).

On September 29, 2016, the Department of Environmental Protection (the Department or DEP), in its own capacity, and in its capacity as staff to the Board of Trustees of the Internal Improvement Trust Fund (BTIITF or BOT), issued Consolidated Environmental Resource Permit No. 36-0320034-001 and Letter of Consent Easement to Use Sovereign Submerged

Lands No. 360239365 (collectively the Consolidated Permit) to the Applicants for the construction of a 1,491.5 square-foot beach boardwalk.

On November 4, 2016, Petitioners, Audubon and the Town of Fort Myers Beach (Town), each filed an Amended Petition for Administrative Hearing challenging the Consolidated Permit. The Amended Petitions were transmitted to DOAH, assigned as Case Nos. 16-7148 and 16-7149, respectively, consolidated for hearing, and initially set to be heard on June 12 through 16, 2017.

The hearing on the Consolidated Permit cases was continued, and the cases placed in abeyance to allow for the associated CCCL Permit application to be processed by DEP.

On May 3, 2017, the Applicants amended their application to relocate the boardwalk outside of the established limits of the Little Estero Island Critical Wildlife Area (LEICWA). DEP reviewed the proposed changes and determined that the project, as amended, continued to meet the criteria for issuance of the Consolidated Permit, and transmitted the revised Notice of Intent and Revised Draft Environmental Resources Permit and State Owned Submerged Lands Authorization to DOAH on May 10, 2017.

DEP has established a CCCL for Little Estero Island. A permit is required before any person may conduct construction activities seaward of the CCCL. On May 4, 2017, after having determined that the proposed dune walkover was, in whole or in part, seaward of the CCCL, the Applicants applied for the CCCL Permit. On June 8, 2017, DEP issued a request for marine turtle impact review to the Florida Fish and Wildlife Conservation Commission (FFWCC). On July 27, 2017, FFWCC responded to the request with two recommended CCCL Permit conditions: that no construction occur during nesting season (May 1 through October 31); and that all vehicles be operated in accordance with FFWCC's Best Management Practices for Operating Vehicles on the Beach. Both conditions were accepted by the Applicants.

On August 11, 2017, the Applicants filed their Petition for Waiver of Rules 62B-33.008(3)(c) and (d), which was supplemented on October 3, 2017, and amended on November 9, 2017. The CCCL Waiver has the effect of allowing the required evidence of ownership of the property encompassed by the CCCL Permit application, and the written evidence that the proposed dune walkover does not violate local setback requirements or zoning codes to be submitted after issuance of the CCCL Permit, with a permit condition requiring submission of the information prior to DEP issuing a Notice to Proceed, which would authorize the Applicants to commence construction.

On September 29, 2017, the Applicants submitted revised construction and site plans for the proposed dune walkover that reduced its overall footprint from six to five feet across; lowered its height from three feet, ten inches to two feet, six inches above the sand; replaced steps with a ramp; and removed the 3-foot handrails.

On February 7, 2018, DEP issued a Final Order Granting Petition for Waivers, File No. LE-1567V, which granted the CCCL Waiver.

On March 2, 2018, Audubon and the Town each filed a Petition for Administrative Hearing challenging the CCCL Waiver. The Petitions were transmitted to DOAH, consolidated by the DOAH Clerk's office and assigned as Case No. 18-1451.

On March 30, 2018, DEP issued the proposed Permit for Construction or Other Activities Pursuant to Section 161.053, Florida Statutes, No. LE-1567, which authorized the construction of the dune walkover seaward of the CCCL.

On April 20, 2018, Audubon and the Town each filed a Petition for Administrative Hearing challenging the CCCL Permit. The Petitions were transmitted to DOAH, consolidated by DOAH Clerk's office and assigned as Case No. 18-2141.

On May 10, 2018, Case Nos. 16-7148, 16-7149, 18-1451, and 18-2141 were consolidated for hearing, and the final hearing on the consolidated cases was scheduled for September 18 through 21, 2018.

On June 28, 2018, DEP and the Applicants filed a Joint Notice of Revisions to Draft Environmental Resource Permit and State Owned Submerged Lands Authorization (Joint Notice), which incorporated the September 29, 2017, modifications into the Consolidated Permit. Audubon and the Town each filed a Petition for Formal Administrative Hearing, which were accepted as their Second Amended Petitions to challenge the Consolidated Permit as modified by the Joint Notice.

On September 11, 2018, the parties filed their Joint Prehearing Stipulation and an Amended Joint Prehearing Stipulation (JPS). The JPS contained 39 stipulations of fact and law, and eight stipulations of law, each of which is adopted and incorporated herein, if not specifically, then by reference. The list of stipulated facts provided a comprehensive listing of the various applications, submissions, amendments, petitions, and the like.

The statement of the issues of fact remaining for disposition provided by the parties did little to narrow the real issues in dispute. Having been provided with little to no limitation on the issues in dispute, the ALJ stated that he would attempt to address the permitting standards as comprehensively as possible.

The hearing convened on September 18, 2018, as scheduled.

The ERP under review, having been issued under the authority of chapter 373, Florida Statutes, was subject to the modified burden of proof established in section 120.569(2)(p), Florida Statutes. The SSL Authorization was issued under the authority of chapter 253, Florida Statutes; the CCCL Permit under the authority of chapter 161, Florida Statutes; and the CCCL

Waiver under the authority of section 120.542, Florida Statutes. Thus, the burden remained with the Applicants to demonstrate entitlement to those elements. To simplify the order of presentation, the Applicants and DEP presented their cases in full, with Petitioners' standing witnesses taken out of order for the witnesses' convenience.

Joint Exhibits 1 through 13, consisting of the Consolidated Permit file; the CCCL Permit file; the CCCL Waiver file; various surveys, sketches, and aerials related to the proposed dune walkover; the June 28 Revised Notice of Intent for the ERP/Consent and attached documents; and the resumes of DEP witnesses Tony McNeal, Megan Mills, and Richard Malloy, were received in evidence by stipulation of the parties.

The Applicants called the following witnesses: Kurt Kroemer, managing member of Squeeze Me Inn, LLC; Edward Rood, managing member of Texas Hold'Em, LLC; Robert Case, P.E., who was tendered and accepted as an expert in civil engineering; Michael Dombrowski, P.E., who was tendered and accepted as an expert in coastal engineering; and Shane Johnson, who was tendered and accepted as an expert in zoology and ecology. Applicants' Exhibits 4 through 7, 9, 10, 13 through 23, 25, and 72 through 74 were received in evidence. Applicants' Exhibit 73 consisted of the deposition testimony of Charles DeGraff, an expert in surveying, who was more than 100 miles from the hearing location on the date of the hearing. His deposition was accepted pursuant to Florida Rule of Civil Procedure 1.330 and was given the same weight as though the deponent testified in person.

DEP called Megan Mills, its ERP program administrator; and Tony McNeal, P.E., its CCCL program administrator, and offered Joint Exhibits 1 through 13.

Audubon called Julie Brashears Wraithmell, its president; and Brad Cornell, both on the issue of standing. The Town called Roger Hernsteadt, its manager; Jason Green, its community

development director; and Rae Burns, its environmental technician, on the issue of standing. Petitioners jointly called Ms. Burns; Dr. Robert Young, who was accepted as an expert in coastal geology and coastal management; and Nancy Douglass, an employee of the FFWCC. Petitioners' Exhibits 1, 2, 7, 25, 33, 42 through 44, 47, 49, 62, 64, and 72 were received in evidence.

A three-volume Transcript of the final hearing was filed on November 6, 2018. The parties were allowed 20 days from the filing of the Transcript within which to file their proposed recommended orders. Petitioners moved for a further extension of time to file their proposed recommended orders until December 10, 2018, which was granted. DEP moved to enlarge the page limit for the proposed recommended orders to 70 pages, which was also granted. All parties timely filed Proposed Recommended Orders, each of which was considered in the ALJ's preparation of his Recommended Order.

SUMMARY OF THE RECOMMENDED ORDER

The Parties

Squeeze Me Inn, LLC, is a limited liability corporation incorporated in the State of Florida. Kurt Kroemer is its managing member. Squeeze Me Inn, LLC, owns a single-family home at 8170 Estero Boulevard in Fort Myers Beach, Florida, and pays taxes on the property. Mr. Kroemer purchased the property through Squeeze Me Inn, LLC, based on his enjoyment of the beach. He visits the property five times per year on average and intends to retire there. (RO ¶ 1).

Texas Hold'Em, LLC, is a limited liability company incorporated in the State of Florida. Edward Rood is its managing member. Texas Hold'Em, LLC, owns a single-family home at 8150 Estero Boulevard in Fort Myers Beach, Florida, and pays taxes on the property. Mr. Rood

uses the home four to five times per year. He enjoys visiting the Gulf of Mexico and the adjacent beach area behind his house. (RO ¶ 2).

DEP is an agency of the State of Florida, pursuant to section 20.255, Florida Statutes. DEP is the permitting authority in this proceeding and issued the Consolidated Permit, the CCCL Waiver, and the CCCL Permit at issue in this proceeding to the Applicants. DEP performs staff duties and functions on behalf of the BTIITF related to the review of applications for authorization to use sovereignty submerged lands necessary for an activity regulated under chapter 373, part IV, Florida Statutes, for which DEP has permitting responsibility. § 253.002(1), Fla. Stat. DEP has been delegated the authority to take action, without any input from the BTIITF, on applications for authorization to use sovereignty submerged lands necessary for an activity regulated under chapter 373, part IV, Florida Statutes, for which DEP has permitting responsibility. § 253.002(1), Fla. Stat. (2018); Fla. Admin. Code R. 18-21.0051(2). (RO ¶¶ 3-4).

Audubon is an organization incorporated in the State of Florida. Audubon has roughly 20,000 members statewide, and 5,000 members in Southwest Florida, some of whom it contends are in the "direct vicinity" of the project. Audubon's mission statement is to protect birds and their habitat for the benefit of people and wildlife. (RO ¶ 5).

The Town is an incorporated municipality located on the west coast of Florida along the Gulf of Mexico. The proposed dune walkover is within the Town limits. (RO ¶ 6).

Standing

Audubon considers the LEICWA and its surrounding areas important, because it is "important to the birds." Audubon was involved in the process of establishing the LEICWA, and its members volunteer to help monitor and manage the LEICWA. The LEICWA is a renowned bird-watching site. Audubon members have assisted in "posting for nesting birds, as well as

fielding volunteers who are bird stewards. They chaperone the colony to protect it from disturbance, especially on busy beach going weekends." The interest in areas outside of the LEICWA is less apparent, though Audubon alleged that the areas around the LEICWA are important to the birds and, thus, Audubon's members, since "birds unfortunately don't recognize boundaries." In addition, Audubon alleged that the dune walkover would irreparably harm the lagoon and the coastal habitat seaward of it, which is important habitat for imperiled species that are critical for the enjoyment of Audubon's members. Audubon's interest in contesting the CCCL and the CCCL Waiver is tied to the reasons for its ERP and SSL standing. (RO ¶¶ 7-8).

The Town's interest in the Consolidated Permit and the CCCL Permit was related to the importance of the Ft. Myers Beach beaches, including those in the LEICWA, to the Town's economy from ecotourism. The Town's interest in shorebirds is that they contribute to the Town's economy by "draw[ing] people to select to visit Fort Myers Beach versus other areas of the state." The Town spends money for beach maintenance to compete for tourism dollars, but does not track the number of visitors to the beach where the Project would be located. The Town's interest in challenging the CCCL Waiver was that "it goes outside the normal process" and "creates confusion among applicants and the public." However, the CCCL Waiver would have no effect on the Town's processing of development orders. In addition, the Town was concerned that the boardwalk, as a frangible structure, could cause damage to the property of nearby private individuals. The interest in that regard was not to the property or resources of the Town, but to "[o]ur residents and our property owners." (RO ¶¶ 9-10).

The Project Area

Little Estero Island is part of a barrier island system that has developed over decades through the gradual accretion of sand onto the shoreline. (RO ¶ 12).

The proposed dune walkover is proposed to be constructed on property just west of Big Carlos Pass, a maintained navigational channel that connects inland coastal waters to the Gulf of Mexico. Big Carlos Pass is a tidally dominated inlet, which results in a very dynamic shoreline in its immediate vicinity. (RO ¶ 13).

Creation and Fate of the "Lagoon" and Current Shoreline

Fort Myers Beach experiences offshore sediment transport that transfers sand along the shoreline from Estero Island towards Big Carlos Pass. In addition, movement of water through Big Carlos Pass agitates and suspends sand, creating an "ebb shoal" at the Gulf side of the pass. Currents generated by wave action transport sand from the ebb shoal offshore along the shoreline on both sides of the pass. The sediment transport results in the development of shoals and swash bars offshore from the Project site. Those features are gradually pushed towards the shore, and eventually "weld" onto the shoreline. (RO ¶ 14).

Big Carlos Pass was recently (after the October 20, 2015, issuance of the authorizing permit) dredged to maintain, realign, and straighten the inlet channel. The dredged material, consisting of approximately 350,000 cubic yards of sand, was deposited along 4,500 linear feet just offshore to the west of the Project vicinity. (RO ¶ 15).

The process of accretion, and the "welding" of a shoreward-moving sandbar has resulted in the creation of an enclosed and shrinking body of water between the shoreline and the upland. What was previously the shoreline of the Gulf of Mexico is, for now, the landward shoreline of the "lagoon." (RO ¶ 16).

During significant storm events, the area can experience overwash, when storm-driven tides and waves overtop the existing Gulf shoreline, spilling into the lagoon. The overwash pushes sand into the lagoon, creating "fans" of sand and sediment, in a process by which the

lagoon is continually filled in and narrowed. As established by Mr. Dombrowski, the Applicants' coastal engineer, "what we would anticipate over time is that you keep on getting this over-topping of sand that keeps on filling in on the back side of the lagoon which will eventually fill in with sand." (RO ¶ 17).

In addition to overwash, rain and stormwater can fill the lagoon, which can result in the creation of temporary drainage outlets. For example, the area was impacted by Tropical Storm Alberto on Memorial Day 2018. Ms. Burns visited the area after the storm, in June 2018, and observed more water in the lagoon and in surrounding areas, including the sandy areas within the LEICWA. By July 18, 2018, at which time the photographs that comprise Petitioners' Exhibit 7 were taken, the water levels in the lagoon were lower. During a visit nearer to the date of the hearing, there was less water in the lagoon due to diminished rainfall, and water no longer flowed through the remnants of the drainage channels. Thus, stormwater drainage, rather than tidal connection, is the most likely cause of the swashes observed in the series of photographs taken on July 18, 2018. (RO ¶ 18).

For the lagoon to be considered "tidal," there would have to be an established connection between the lagoon and the Gulf of Mexico to allow for the regular periodic exchange of waters through tidal ebbs and flows. Mr. DeGraff took a series of "water shots" of the levels in the lagoon and the Gulf of Mexico. Whereas water levels in the Gulf of Mexico changed with the tides, the water levels in the lagoon remained constant, which supports that there is no connection between the two water bodies. (RO ¶ 19).

Overwash and storm events may temporarily open one-way connections and outfalls of water between the lagoon and the Gulf of Mexico as a result of accumulation of water in the back-barrier environment. If enough water is pushed into the lagoon, it will find an exit, but the

flow is "not back and forth again through a particular cut," as would be the case with an established and regular tidal connection. (RO ¶ 20).

The ALJ concluded that the preponderance of the evidence demonstrates that the "lagoon" is not tidally connected to the Gulf of Mexico but is, rather, a feature that experiences no tidal ebb and flow and is, under normal conditions, disconnected from the Gulf of Mexico. (RO ¶ 21).

The big picture view of the process of shoaling, welding, filling, and narrowing of the "lagoon," and ultimate reestablishment of the previously existing shoreline is depicted in Petitioners' Exhibit 44, which the ALJ found to be a fascinating and visually compelling time-lapse of the Petitioners' Exhibit 44 images at https://earthengine.google.com /timelapse/#v=26.40708,-81.89551,11.491,latLng&t=0.00. (RO ¶ 22).

The persistent narrowing of the temporary lagoon is depicted in Petitioners' Exhibit 43. The ALJ found that exhibit 43, consisting of a series of aerial photographs, demonstrates convincingly the accretional nature of the area in front of the Applicants' property, and offers support for evidence that "over the last 50 plus years . . . and especially within the last ten to 15, is that this shoreline has been accreting." Competent, substantial evidence establishes that the accretional trend will naturally continue and may be further influenced by the deposition of dredged spoil from Big Carlos Pass, and supports the testimony of Mr. Dombrowski that the lagoon will naturally fill in with the cycle, at some future time, repeating itself. (RO ¶ 23).

In the area of the Project, the shoreline has been accreting at a rate of around 28 feet (or more) per year between 1999 and 2011. In the last 52 years, the shoreline to the east of the Project area has grown by more than 600 feet. To the west of the Project area, within the

LEICWA, overwash events and alluvial fans associated with such events demonstrate the accretional nature of the shoreline. (RO ¶ 24).

Mr. Kroemer owns a Hobie Wave Runner sailboat, which requires about 12 inches of water, and two kayaks, which require two to three inches of water that he uses in the Gulf of Mexico. To access the Gulf, Mr. Kroemer paddles or pushes the boats - depending on the season - through the lagoon and then takes them over land to the Gulf. The water levels in the lagoon are not sufficient to allow for the sailboat to traverse year-round. (RO ¶ 25).

The ALJ found that the greater weight of the evidence supports a finding that the water area over which the dune walkover is proposed will, as a process of accretion, fill with sand creating an unimpeded pathway to the Gulf of Mexico, as was the case prior to the most recent accretionally welded sand bar. The suggestion that the shoreline will erode and ultimately become open water is not supported by the evidence. (RO ¶ 26).

Vegetation

The vegetation in the vicinity of the proposed dune walkover and surrounding the lagoon include mangroves; shrubby plants, including bay cedar and marsh elder; and facultative grass species, such as hurricane grass. The Project area is becoming increasingly more vegetated, with plant communities pioneering at the ground cover level, followed by shrubs and small trees. The area is generally undergoing natural ecological succession. The vegetation in the areas over which the proposed dune walkover is to be constructed, including the ground cover, is too thick to be conducive for shorebird nesting, which generally occurs in areas that are open, and sandy or shelly. The mangroves that fringe the lagoon range from five to seven feet in height, and the shrubby vegetation in the Project area can be up to four feet in height. (RO ¶¶ 27-28).

Wildlife

The beaches in the area are used by shorebirds and migratory birds for nesting, foraging, and loafing. Birds that have been observed in the general vicinity of the LEICWA include Snowy Plovers, Wilson's Plovers, American Oystercatchers, Black Skimmers, and Least Terns. (RO ¶ 29).

Snowy Plovers, American Oystercatchers, Black Skimmers, and Least Terns are designated by the FFWCC as threatened bird species. Those species are also identified by DEP as "Listed Wildlife Species that are Aquatic or Wetland Dependent and that Use Upland Habitats for Nesting or Denning" in A.H. Table 10.2.7-1, with Snowy Plovers and Least Terns listed as "State-designated Threatened," and American Oystercatchers and Black Skimmers listed as "State Species of Special Concern." Wilson's Plovers are not a species listed as threatened, of special concern, or of any other protected classification by the FFWCC or DEP. (RO ¶¶ 30-31).

Snowy Plovers, American Oystercatchers, Black Skimmers, and Least Terns prefer clear, open sand for nesting. They lay their eggs on the sand or in shallow "scrapes" or depressions in the sand. The eggs generally match the substrate, and the coloration of the chicks allows them to blend in with the sand, providing a camouflaging defense against predators. Those species are colony nesters, nesting in groups as a reproductive strategy. Wilson's Plovers also prefer open sandy areas, but will occasionally nest in nearby sparsely vegetated areas, referred to by Mr. Johnson as "salt and pepper" coverage, which have pockets of open sand. Such areas exist waterward of the proposed terminus of the dune walkover. Wilson's Plovers are solitary nesters. Shorebirds will typically not nest in areas with vegetative cover. Mangroves and other tall, woody species of plants create perching opportunities for crows and other avian predators, while

ground-dwelling predators like snakes can move through vegetation and predate shorebird nests. (RO ¶¶ 32-34).

Applicants' Exhibits 6 and 9 depict the extent of shorebird utilization, including nesting, of habitat in the immediate Project vicinity based on a series of 2017 and 2018 site visits, historic aerial photographs, and FFWCC shorebird data. Applicants' Exhibit 6 provides a visual representation of the wide utilization of the open raked beach area east of the Project for nesting, with only scattered use of "salt and pepper" vegetated areas by non-threatened Wilson's Plovers. Applicants' Exhibits 6 and 9, in combination with Mr. Johnson's testimony and field notes, is found to be the most accurate and representative depiction of the utilization of the Project area by shorebirds. (RO ¶ 35).

There have been shorebird sightings on the sandy shoreline waterward of the terminus of the proposed dune walkover. The closest recorded bird sighting to the Project area, involving a Wilson's Plover nest scrape and, subsequently, a nesting female at that location, was approximately 150 feet southwest of the waterward terminus of the dune walkover in an area of "salt and pepper" vegetation. During his site visits in 2017, Mr. Johnson observed considerable pedestrian traffic along the shoreline waterward of the Project area. It was in this general area that he had noted the presence of Wilson's Plovers. He explained that Wilson's Plovers can tolerate pedestrian traffic as long as it does not "get right up on" their nests. When nesting areas are roped off, Wilson's Plovers can tolerate pedestrian traffic up to the protective barrier as long as it does not encroach into the protected area. (RO ¶¶ 36-37).

Sea turtles also have the potential to nest just above the high tide mark in the dunes waterward of the proposed dune walkover. A staked sea turtle nest west of the Project area was observed by Ms. Burns during her July 2018 visit to the area. Sea turtles do not typically nest in

vegetated areas. Given both the distance to and vegetative cover at the waterward terminus of the dune walkover, sea turtles would be unlikely to migrate to the Project area to excavate a nest. There was no evidence that pedestrian access to the location at which Ms. Burns observed the staked sea turtle nest was restricted. Rather, the evidence establishes that pedestrian traffic is allowable and common along the shoreline. People walking along the shore could easily happen upon the staked area, just as Ms. Burns did, and just as Mr. Johnson did during his visits to the area. In that regard, the Applicants, even if they were to take a longer and more circuitous route to the shoreline, would not be restricted in walking along the shoreline in the vicinity of the nest. The ALJ concluded that the preponderance of the evidence establishes that the proposed dune walkover will have no adverse effect on nesting sea turtles in the area. (RO ¶¶ 38-39).

The LEICWA

Property to the west of the proposed dune walkover has been designated by the State of Florida as the LEICWA. The LEICWA includes some vegetated land adjacent and parallel to the footprint of the proposed dune walkover. The proposed dune walkover is not within the boundary of the LEICWA. At times, portions of the LEICWA are roped off by the FFWCC to demarcate shorebird nests and nesting colonies, and to channel pedestrian access through the LEICWA. The ALJ concluded that there was no persuasive evidence that pedestrian traffic through the LEICWA is disruptive to the birds using the LEICWA or to their nesting patterns. (RO ¶¶ 40-41).

Posted and roped-off areas are not intended to identify the geographic extent of the LEICWA, and are often not specific to shorebird nest sightings, but instead represent larger areas "to allow the birds to have more availability to choose where they're going to nest." (RO ¶ 42).

Roughly 300 feet east of the Project area and the LEICWA boundary (as scaled using Petitioner's Exhibit 6) is a large raked, sandy area which is maintained free of vegetation. A large number of shorebirds and shorebird nests have been documented on the open, sandy area. The open, sandy area is directly abutted to its north by homes and by what appear to be larger multi-family structures. In addition, the open area is "preferred by a lot of beach goers to have open sand to walk through instead of walking through vegetation. So it's been manipulated mechanically to be open." The ALJ concluded that there was no evidence that the direct proximity of such residential structures, their inhabitants, and beachgoers have any disruptive affect on the large nesting colonies inhabiting that area. (RO ¶ 43).

A four-foot-high, three-foot-wide education kiosk placed by the FFWCC is located on the shore side of the LEICWA. A roughly seven-foot-high, 15-inch-wide sign, educating beachgoers about the LEICWA and of the needs of the birds that frequent the area has been placed at the edge of the LEICWA. Neither of the signs incorporate any features designed to discourage their use as perches. Both of the signs provide an elevated and unobstructed vantage point into the LEICWA's primary nesting area. The signs, which are much greater in height and nearer to the LEICWA's preferred shorebird nesting habitat than the proposed dune walkover "can serve as perches" for predatory birds in the area. Although there was evidence that Petitioners' members and employees monitor the signs for evidence that they are being used as perches, there was no evidence to suggest what might happen if they were. (RO ¶ 44).

Although the dune walkover is not within the boundary of the LEICWA, Ms. Wraithmell testified that "[t]he birds unfortunately don't recognize boundaries." The ALJ concluded that while birds may not recognize boundaries, regulators must. Standards that apply within a designated critical wildlife area do not apply outside of a critical wildlife area, even within feet

of the boundary. That is why boundaries, including legal descriptions, are set. Since the proposed dune walkover is not within the boundary of the LEICWA, the ALJ concluded that standards applicable within critical wildlife areas cannot be applied. (RO ¶ 45).

The Proposed Dune Walkover

The dune walkover is proposed as a 1,491.50 square-foot (298.3 feet in length by 5 feet in width) piling-supported wooden walkway five feet in width. Its original six-foot width was reduced to five feet, which remains adequate to accommodate the anticipated need for the use of a wheelchair or mobility device by one of the Applicants. The steps at the waterward end of the proposed dune walkover were replaced with ramps, also for use by a wheelchair or similar device. The replacement of the initially proposed stairs with a ramp will also reduce "lift" forces in the event of a storm. (RO ¶ 46).

The dune walkover will serve to minimize foot traffic on the native dune vegetation, and channel the foot traffic from its terminus to the shore of the Gulf of Mexico. As such, the dune walkover will have a beneficial effect on the native vegetation in its immediate area. (RO ¶ 47).

As originally proposed, the dune walkover was to have been three feet, ten inches above the ground surface, with three-foot-high handrails. To address the concerns posed by others, particularly the FFWCC, the height was lowered to two feet, six inches above the ground surface, which is the maximum height for a structure to be built without handrails. The handrails were removed in their entirety, and the design does not contain any pickets or other "non-structural members." Thus, the proposed dune walkover is, at its highest point, two feet, six inches above the ground surface. Mangroves in the vicinity of the dune walkover are generally from five to seven feet in height, and commonly occurring shrubby vegetation of four feet in height was observed in the area. Thus, the dune walkover is well below the elevation of the

surrounding vegetation. The dune walkover, as currently proposed, has no value as a perch or vantage point for avian predators. (RO ¶ 48).

The posts that support the structure will be round, six inches in diameter, and installed five feet deep into the sand. The posts will not be encased in concrete, but will be wrapped to prevent leaching of any potentially toxic compounds into the environment. The walking surface of the dune walkover will be made of slatted decking, with a one-half inch space between each deck board. The proposed ERP indicated that gaps will allow sufficient light penetration to maintain the underlying vegetative habitat. The ALJ concluded that there was no persuasive evidence to the contrary. (RO ¶ 49).

In its final configuration, the proposed dune walkover is fully compliant with, though substantially smaller and less intrusive than, the generally acceptable siting, design, and elevation provisions set forth in the DEP Beach and Dune Walkover Guidelines. The construction plans do not require the use of vehicles, other than to deliver the material to the site. There will be no placement of fill. There will be no lighting, either in construction or in operation. (RO ¶¶ 50, 52).

As mitigation for the minimal impacts associated with the crossing of the lagoon, and at DEP's direction, the Applicants purchased 0.01 saltwater forest and 0.1 saltwater herbaceous mitigation credits in the Pine Island Mitigation Bank, to offset for any remaining impacts not avoided through the design modifications. The ALJ concluded that the evidence established, by a preponderance of the competent, substantial, and persuasive evidence adduced at the hearing, that the proposed mitigation was sufficient to offset any environmental impacts resulting from the proposed Project, even before its width was decreased from six feet to five feet. (RO ¶ 53).

The alterations to the proposed dune walkover as described herein were largely made to address the concerns expressed by the FFWCC in its comments of August 27, 2015; July 20, 2016; and July 27, 2017, and the proposed ERP and CCCL Permit incorporates all of the conditions requested by the FFWCC. It was established that the Applicants have addressed and met the FFWCC's concerns regarding the proposed Project. (RO ¶ 54).

Environmental Resource Permit

The issuance or denial of an ERP is generally governed by section 373.414, Florida Statutes, chapter 62-330, Florida Administrative Code, and the Environmental Resource Permit Applicant's Handbook, Volume I (A.H.). Section 373.4131(1) requires DEP to adopt statewide environmental resource permitting rules. DEP has done so through the adoption of rules 62-330.301 and 62-330.302, Florida Administrative Code. (RO ¶¶ 55-56).

The Applicants met their burden of demonstrating they met all applicable standards and were entitled to issuance of the ERP by entering the application and DEP's notice of intent of issue the ERP in evidence. Therefore, a finding that there was insufficient evidence introduced by Petitioners to rebut the prima facie case is sufficient to establish that the grounds for issuance have been met. (RO ¶ 57).

Based on the entirety of the record of this proceeding, the ALJ concluded that the Applicants provided reasonable assurances that the proposed dune walkover meets the requirements for the ERP. (RO ¶ 58).

Rule 62-330.301(1)

Rule 62-330.301(1), Florida Administrative Code, provides that an applicant for an ERP must provide reasonable assurance that the permitted activity will not cause adverse affects. The standards established by rule are further described in the A.H. (RO ¶ 59)

Water quantity impacts: Rule 62-330.301(1)(a) and A.H. Section 10.2.2.4

Piling supported structures do not typically impact a water body's depth or flow. The ALJ concluded that the evidence introduced by Petitioners in this case was not sufficient or persuasive to support a finding that the piling-supported dune walkover would reduce the depth, duration, or frequency of inundation or saturation in the lagoon; would increase the depth, duration, or frequency of inundation through changing the rate or method of discharge of water to the lagoon or by impounding water in the lagoon; or could have the effect of altering water levels in the lagoon. To the contrary, the ALJ found there was substantial testimony that the proposed dune walkover will not cause adverse water quantity impacts to receiving waters and adjacent lands. (RO ¶ 60).

Adverse flooding: Rule 62-330.301(1)(b)

The ALJ concluded that the evidence introduced by Petitioners in this case was not sufficient or persuasive to support a finding that the proposed dune walkover will cause adverse flooding to on-site or off-site property. (RO ¶ 61).

Adverse impacts to existing surface water storage and conveyance capabilities: Rule 62-330.301(1)(c)

The ALJ concluded that the evidence introduced by Petitioners in this case was not sufficient or persuasive to support a finding that the proposed dune walkover will cause adverse impacts to existing surface water storage and conveyance capabilities. (RO ¶ 62).

Adverse impacts to the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters: Rule 62-330.301(1)(d) and A.H. Section 10.2.2

The A.H. provides that "[i]n evaluating whether an applicant has provided reasonable assurances under these provisions, de minimis effects shall not be considered adverse for the purposes of this section." In accordance with the A.H., DEP provided information to the

FFWCC and solicited comments on the proposed dune walkover in its various configurations. The ALJ found that the Applicants met every listed substantive concern expressed by the FFWCC in its comments of August 27, 2015; July 20, 2016; and July 27, 2017. The proposed ERP incorporates all of the conditions requested by the FFWCC. (RO ¶ 63).

The A.H. section 10.2.2 also provides that "[t]he need for a wildlife survey will depend upon the likelihood that the site is used by listed species and the bald eagle, considering site characteristics and the range and habitat needs of such species, and whether the proposed activity will impact that use." In its August 27, 2015, comments, the FFWCC requested that the Applicants provide an assessment of anticipated impacts to wildlife. Thereafter, on December 2, 2015, Mr. Rood provided information to DEP explaining the densely vegetated nature of the proposed dune walkover location, and its lack of value to nesting shorebirds. He noted the general distance, i.e., 100 to 150 yards, from the terminus of the proposed dune walkover to the nearest shorebird nesting area and "roped off nesting areas." (RO ¶ 64).

The A.H. provides that "[t]he need for a wildlife survey will depend upon the likelihood that the site is used by listed species and the bald eagle, considering site characteristics and the range and habitat needs of such species." As a result of Mr. Rood's explanation of the characteristics of the Project location, on December 11, 2015, the FFWCC withdrew its request for the survey and wildlife assessment. (RO ¶ 65).

The ALJ concluded that the preponderance of the competent, substantial, and persuasive evidence demonstrates that there will be no adverse impacts to the value of functions provided to any species of concern provided by the lagoon and associated wetlands that will result from the construction and use of the proposed dune walkover. Shorebirds, whether or not they are protected species, will not be impacted by the Project. The ALJ found that there was no

evidence to support a finding that wading birds foraging in the lagoon, as depicted in photographs taken by Ms. Burns, would be affected in any way. (RO ¶ 66).

Water quality impacts: Rule 62-330.301(1)(e) and A.H. Section 10.2.4

An ERP applicant must provide reasonable assurance that a project will not adversely affect the quality of receiving waters such that State water quality standards will be violated. (RO ¶ 67).

DEP required turbidity control to address short-term water quality issues attendant with construction. Best management practices to minimize construction-related turbidity are required. The sand in the area is coarse, with a small percentage of sands and clays, further minimizing the potential for turbidity. The pilings are required to be wrapped to prevent any chemicals used to treat the pilings from leaching into the soil or water. The structure will be constructed outward from the boardwalk deck, thus, minimizing impacts to surrounding vegetation and surface waters. The ERP is conditioned on adherence to Best Management Practices to ensure that oils, greases, gasoline, or other pollutants are not released into the wetlands or surface waters. (RO ¶ 68).

The ALJ concluded that the preponderance of the competent, substantial, and persuasive evidence demonstrates that there will be no adverse impacts on water quality associated with the construction or use of the proposed dune walkover. The evidence introduced by Petitioners was not sufficient or persuasive to support a finding that the proposed dune walkover will cause adverse impacts to water quality. (RO ¶ 69).

Secondary impacts: Rule 62-330.301(1)(f) and A.H. Sections 10.1.1(f) and 10.2.7

An ERP applicant must provide reasonable assurance that the Project will not cause adverse secondary impacts. The secondary impact criterion consists of four parts as established in A.H. section 10.2.7(a) through (d). (RO ¶ 70).

The proposed dune walkover will not have any lighting so as to impact turtle nesting and will not use vehicles except as necessary to deliver building supplies. Other secondary impacts identified in A.H. section 10.2.7(a) are not applicable. (RO ¶ 71).

The ALJ concluded that the preponderance of the competent, substantial, and persuasive evidence in this proceeding established that the area in which the proposed dune walkover is to be constructed will not adversely impact the ecological value of uplands for any listed bird species of concern for nesting or foraging as set forth in A.H. section 10.2.7(b). The Project area is thickly vegetated, which is not conducive for use by shorebirds that frequent the LEICWA. The nearest documented shorebird presence is well removed from the dune walkover terminus. (RO ¶ 72).

The evidence established that the pedestrian traffic resulting from the use of the dune walkover will not disturb Wilson's Plovers, which is the only observed species that uses the "salt and pepper" vegetation between the dune walkover and the Gulf of Mexico. Any nests would, as are existing nests in the area, be marked. Wilson's Plovers are tolerant of pedestrian traffic as long as it does not directly encroach into their nesting area. (RO ¶ 73).

The suggestion that the Applicants' use of the proposed dune walkover will disrupt the habits of shorebirds observed near its terminus disregards the fact that the area is already used by the Applicants to access the beach. Furthermore, the beach itself, which is much nearer to observed bird sightings, is popular and frequently used, without restriction, by beachgoers other

than the Applicants. There was no evidence that such pedestrian access along the beach adversely affects shorebirds. (RO ¶ 74).

Pedestrian access is allowed directly through areas of the LEICWA that are more thickly populated with nests of shorebird species less tolerant of pedestrian traffic than the Wilson's Plovers. There was no evidence that such pedestrian access through the LEICWA adversely affects shorebirds. (RO ¶ 75).

The open, sandy area to the east of the Project area is extensively used for nesting by large colonies of various protected shorebird species. That area is directly bounded by single and multi-family residences and is a popular area for beach access. The ALJ found that there was no evidence that human presence near, and pedestrian access through, the areas used by colonies of shorebirds adversely affected those shorebirds. (RO ¶ 76).

The Applicants presently drag their Hobie sailboat and kayaks across the lagoon and through the dunes. The dune walkover will allow them to simply wheel or carry those vessels across the lagoon and dunes without further impact. The ALJ found that the evidence in this case does not support a finding that the existing pedestrian access will be increased by the dune walkover but, to the contrary, suggests that the walkover will allow access in a much less disruptive and destructive manner. (RO ¶ 77).

A.H. sections 10.2.7(c) and (d), governing, respectively, associated activities that have the potential to cause impacts to significant historical and archaeological resources and future project phases or activities, are not applicable to the proposed dune walkover. (RO ¶ 78).

The ALJ concluded that the preponderance of the competent, substantial, and persuasive evidence demonstrates that there will be no adverse secondary impacts associated with the construction or use of the proposed dune walkover. The evidence introduced by Petitioners was

not sufficient or persuasive to support a finding that the proposed dune walkover will cause adverse secondary impacts. (RO ¶ 79).

Adverse impacts to the maintenance of Minimum Flows and Levels: Rule 62-330.301(1)(g)

The ALJ concluded that the evidence introduced by Petitioners in this case was not sufficient or persuasive to support a finding that the proposed dune walkover will cause adverse impacts to the maintenance of surface or groundwater levels or surface water flows. (RO ¶ 80).

Adverse impacts to a Work of the District: Rule 62-330.301(1)(h)

The ALJ concluded that the evidence introduced by Petitioners in this case was not sufficient or persuasive to support a finding that the proposed dune walkover will cause adverse impacts to a Work of the District. (RO ¶ 81).

Capable of performing and functioning as proposed: Rule 62-330.301(1)(i)

The ALJ concluded that the evidence introduced by Petitioners in this case was not sufficient or persuasive to support a finding that the proposed dune walkover will not be capable of performing and functioning as proposed. (RO ¶ 82).

Conducted by a person with the financial, legal and administrative capability of ensuring that the activity will be undertaken in accordance with the terms and conditions of the permit: Rule 62-330.301(1)(j)

The ALJ concluded that the evidence introduced by Petitioners in this case was not sufficient or persuasive to support a finding that the proposed dune walkover will not be conducted by persons with the financial, legal, and administrative capability of ensuring that the proposed dune walkover will be constructed in accordance with the terms and conditions of the ERP. The legal ability to undertake the activities that are encompassed by the SSL Authorization, CCCL Permit, and CCCL Waiver are being decided herein, and their lack of finality does not constitute a failure to meet this ERP permitting criteria. (RO ¶ 83).

Comply with any applicable special basin or geographic area criteria: Rule 62-330.301(1)(k)

The ALJ concluded that the evidence introduced by Petitioners in this case was not sufficient or persuasive to support a finding that the proposed dune walkover will not comply with any applicable special basin or geographic area criteria. (RO ¶ 84).

Public Interest Test - Section 373.414(1), Florida Statutes, Rule 62-330.302(1)(a), and A.H. Section 10.2.3

Section 373.414(1) provides that an applicant for an ERP must provide reasonable assurance that the permitted activity will not cause violations of state water quality standards and that such activity is not contrary to the public interest. (RO ¶ 85).

As set forth in the discussion of rule 62-330.301(1)(e) and A.H. section 10.2.4 above, the Applicants demonstrated that the proposed dune walkover will not cause violations of state water quality standards. The ALJ concluded that the evidence introduced by Petitioners in this case was not sufficient or persuasive to support a finding that the proposed dune walkover will cause violations of state water quality standards. (RO ¶ 86).

The seven factors that constitute the public interest test are established in section 373.414(1)(a), Florida Statutes, reiterated in rule 62-330.302(1)(a), and explained in greater detail in A.H. section 10.2.3. As set forth previously, some of the criteria would appear to have no relevance to this case. However, since Petitioners failed to provide any substantive narrowing of the issues in the JPS, that ALJ found it necessary to go through each and every factor to ensure that some element of the ERP analysis required "pursuant to all applicable rules and statutes" does not go unaddressed. (RO ¶ 87).

Whether the activity will adversely affect the public health, safety, or welfare or the property of others: Section 373.414(1)(a)1.; Rule 62-330.302(1)(a)1.; A.H. Section 10.2.3.1

The evaluation of the factors for consideration under this element of the public interest test include environmental issues such as "mosquito control; proper disposal of solid, hazardous, domestic or industrial waste; aids to navigation; hurricane preparedness or cleanup; environmental remediation, enhancement or restoration; and similar environmentally related issues." The evaluation also includes impacts to shellfish harvesting areas; flooding or the alleviation of flooding on the property of others; and affects on the water table that could result in the drainage of off-site wetlands or other surface waters. (RO ¶ 88).

The ALJ concluded that the evidence introduced by Petitioners in this case was not sufficient or persuasive to support a finding that the proposed dune walkover will adversely affect the public health, safety, or welfare or the property of others. (RO ¶ 89).

Whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats: Section 373.414(1)(a)2.; Rule 62-330.302(1)(a)2.; A.H. Section 10.2.3.2

A.H. section 10.2.3.2 provides that the "fish and wildlife" element of the public interest test is to be evaluated as follows:

> The Agency's public interest review of that portion of a proposed activity in, on, or over wetlands and other surface waters for impacts to 'the conservation of fish and wildlife, including endangered or threatened species, or their habitats' is encompassed within the required review of the entire activity under section 10.2.2, above.

(RO ¶ 90).

As set forth herein, the ALJ concluded that the preponderance of the competent, substantial, and persuasive evidence demonstrates that the proposed dune walkover will not adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats. (RO ¶ 91).

Moreover, the ALJ concluded that the Petitioners did not prove by a preponderance of competent and substantial evidence that the Applicants failed to meet the standards set forth in section 373.414(1)(a)2.Florida Statutes, rule 62-330.302(1)(a)2., Florida Administrative Code, and A.H. section 10.2.3.3. (RO ¶ 92).

Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling: Section 373.414(1)(a)3.; Rule 62-330.302(1)(a)3.; A.H. Section 10.2.3.3

With regard to this element of the public interest test, A.H. section 10.2.3.3 provides, in pertinent part, that:

> In reviewing and balancing the criterion on navigation, erosion and shoaling in section 10.2.3(c), above, the Agency will evaluate whether the regulated activity located in, on or over wetlands or other surface waters will:
>
> (a) Significantly impede navigability or enhance navigability. The Agency will consider the current navigational uses of the surface waters and will not speculate on uses that may occur in the future. Applicants proposing to construct bridges or other traversing works must address adequate horizontal and vertical clearance for the type of watercraft currently navigating the surface waters . . . .
>
> (b) Cause or alleviate harmful erosion or shoaling . . . .
>
> (c) Significantly impact or enhance water flow . . . .

(RO ¶ 93).

The only evidence of any form of vessels using the lagoon was the Applicants' act of paddling or dragging the Hobie sailboat and kayaks across the lagoon to access the navigable waters of the Gulf of Mexico. Such does not constitute "current navigational uses of the surface waters." The ALJ concluded that the preponderance of the evidence in this case establishes that there is no "current" navigational use of the lagoon. No testimony or evidence was elicited that the lagoon supported any form of boating or other navigational use. No person owning property abutting the lagoon that might be affected by some restriction on their navigational rights objected to the proposed dune walkover. The ALJ concluded that the evidence introduced by

Petitioners in this case was not sufficient or persuasive to support a finding that the proposed dune walkover will significantly impede navigability. (RO ¶ 94).

Ms. Mills testified that "piling supported structures are used in dynamic systems all the time. Specifically, you know, because they don't really have an effect on the movement of sand." The ALJ found that her testimony, combined with that of the Applicants' expert witnesses regarding the nature of the area, was sufficient to establish that the proposed dune walkover will not cause harmful erosion or shoaling. Accordingly, the ALJ concluded that the evidence introduced by Petitioners in this case was not sufficient or persuasive to support a finding that the proposed dune walkover will cause erosion or shoaling. (RO ¶ 95).

The ALJ found that the evidence introduced by Petitioners in this case was not sufficient or persuasive to support a finding that the proposed dune walkover will significantly impact or enhance water flow. (RO ¶ 96).

The ALJ concluded that the Petitioners did not prove by a preponderance of competent and substantial evidence that the Applicants failed to meet the standards set forth in section 373.414(1)(a)3. Florida Statutes; rule 62-330.302(1)(a)3., Florida Administrative Code; and A.H. section 10.2.3.3. (RO ¶ 97).

Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity: Section 373.414(1)(a)4.; Rule 62-330.302(1)(a)4.; A.H. Section 10.2.3.4

The evaluation of the factors for consideration under this element of the public interest test include adverse effects to sport or commercial fisheries or marine productivity, including the elimination or degradation of fish nursery habitat, change in ambient water temperature, change in normal salinity regime, reduction in detrital export, change in nutrient levels, or other adverse effects on populations of native aquatic organisms. (RO ¶ 98).

The evidence introduced by Petitioners in this case was not sufficient or persuasive to support a finding that the proposed dune walkover will adversely affect sport or commercial fisheries or marine productivity. The public interest evaluation under these regulatory provisions also includes effects on "existing recreational uses of a wetland or other surface water," which could include impacts to "the current use of the waterway for boating." (RO ¶¶ 99-100).

Other than evidence that the Applicants had to paddle or push their shallow draft sailboat and kayaks across the lagoon to reach the Gulf, there was no evidence to establish that the lagoon has any recreational use. The DEP determined that it does not, based on the fact that the lagoon is not of a permanent depth to support navigation and was intermittently (at best) connected to the Gulf of Mexico. The ALJ found that Ms. Mills' testimony to that effect was persuasive, and consistent with that of Mr. Kroemer's testimony. (RO ¶ 101).

The standards applicable to impacts to recreational uses are directed to "existing" and "current" uses. There was no evidence of anyone currently using the lagoon for recreational boating. Mr. Rood indicated that he had never seen anyone boating in the lagoon. There was no evidence that anyone else along the lagoon even had a boat. Mr. Kroemer, when asked if his neighbors could use the dune walkover to portage their boats across the lagoon testified that "I'm not aware that they have boats." No property owners with homes along the lagoon objected to the proposed dune walkover. (RO ¶ 102).

The ALJ concluded that the evidence in this case establishes that the proposed dune walkover will not adversely affect fishing or recreational values, or marine productivity in the vicinity of the proposed Project. (RO ¶ 103).

Whether the activity will be of a temporary or permanent nature: Section 373.414(1)(a)5.; Rule 62-330.302(1)(a)5.; A.H. Section 10.2.3.5

The proposed dune walkover is intended to provide permanent access to the Gulf of Mexico, as opposed to being a temporary structure. This finding should not be conflated with whether the proposed dune walkover is an "expendable structure" for purposes of the CCCL Permit, as will be discussed herein. (RO ¶ 104).

Whether the activity will adversely affect or will enhance significant historical and archaeological resources: Section 373.414(1)(a)6.; Rule 62-330.302(1)(a)6.; A.H. Section 10.2.3.6

The ALJ found there was no evidence introduced by Petitioners in this case to support a finding that the proposed dune walkover will affect significant historical and archaeological resources in any manner. (RO ¶ 105).

The current condition and relative value of functions being performed by areas affected by the proposed activity: Section 373.414(1)(a)7.; Rule 62-330.302(1)(a)7.; A.H. Section 10.2.3.7

The ALJ concluded that the evidence introduced by Petitioners in this case was not sufficient or persuasive to support a finding that the proposed dune walkover will adversely affect the current condition and relative value of functions being performed by the waters of and wetlands surrounding the lagoon. (RO ¶ 106).

The evidence in this case was almost entirely directed to nesting and feeding habitat of shorebirds frequenting the LEICWA. The ALJ concluded that the preponderance of the evidence established that the areas affected by the proposed dune walkover are not conducive for nesting, feeding, or loafing by Snowy Plovers, American Oystercatchers, Black Skimmers, or Least Terns. The Applicants' Exhibit 6, which was relied upon by each of the parties, showed no observed sightings of those species near the lagoon or the smaller water feature. There was one observed sighting of a non-threatened Wilson's Plover near the edge of the smaller water feature,

though not directly affected by the proposed dune walkover, and no observed sightings of any of the identified species of concern near the lagoon or in the waters of either water body. Moreover, there was no evidence that the proposed dune walkover would affect the wading birds or shorebirds photographed by Ms. Burns. (RO ¶¶ 107-108).

The ALJ concluded that the Petitioners did not prove by a preponderance of competent and substantial evidence that the Applicants failed to meet the standards set forth in section 373.414(1)(a)7., Florida Statutes; rule 62-330.302(1)(a)7., Florida Administrative Code; and A.H. section 10.2.3.7. (RO ¶ 109).

Cumulative Impacts: Section 373.414(8); Rule 62-330.302(1)(b); A.H. Sections 10.1.1(g) and 10.2.8

A.H. section 10.2.8 provides, in pertinent part, that:

> The impact on wetlands and other surface waters shall be reviewed by evaluating the impacts to water quality as set forth in section 10.1.1(c), above, and by evaluating the impacts to functions identified in section 10.2.2, above. If an applicant proposes to mitigate these adverse impacts within the same drainage basin as the impacts, and if the mitigation fully offsets these impacts, then the Agency will consider the regulated activity to have no unacceptable cumulative impacts upon wetlands and other surface waters, and consequently, the condition for issuance in section 10.1.1(g) will be satisfied.

(RO ¶ 110).

Section 373.4136, Florida Statutes, establishes that the use of mitigation credits is sufficient to offset adverse impacts for an activity in the mitigation bank service area, and provides, in pertinent part, that:

> (6) The department or water management district shall establish a mitigation service area for each mitigation bank permit . . . . Except as provided herein, mitigation credits may be withdrawn and used only to offset adverse impacts in the mitigation service area. The boundaries of the mitigation service area shall depend upon the geographic area where the mitigation bank could reasonably be expected to offset adverse impacts . . . .

(a) In determining the boundaries of the mitigation service area, the department or the water management district shall consider . . . at a minimum, the extent to which the mitigation bank:

* * *

3. Will provide for the long-term viability of endangered or threatened species or species of special concern; [and]

* * *

5. Can reasonably be expected to offset specific types of wetland impacts within a specific geographic area. . . .

* * *

(c) Once a mitigation bank service area has been established by the department or a water management district for a mitigation bank, such service area shall be accepted by all water management districts, local governments, and the department.

(RO ¶ 111).

The Applicants have proposed mitigation in the form of the purchase of 0.01 saltwater forested mitigation bank credits and 0.01 saltwater herbaceous mitigation bank credits from the Pine Island Mitigation Bank. The proposed dune walkover is within the service area established for the Pine Island Mitigation Bank. The mitigation credits, which were initially calculated based on a six-foot-wide dune walkover, are more than sufficient to offset any adverse impacts of the proposed five-foot-wide dune walkover on the wetlands and surface waters in the Project area. (RO ¶ 112).

Ms. Mills testified that the proposed dune walkover would have "[n]o adverse cumulative impacts because the project would be doing mitigation, with mitigation bank credits within the surface area established for the mitigation bank." Her testimony established that the statutory offset criteria is applied when a project (and a mitigation bank such as the Pine Island Mitigation Bank) is on a barrier island which, because there is no "drainage" except to the Gulf of Mexico,

is not within a "drainage basin." The ALJ concluded that her testimony was persuasive, meets the statutory criteria in section 373.4136, and was accepted. (RO ¶ 113).

There are no existing permits or pending applications for similar dune walkovers in the area. Given the presence of the LEICWA to the west, applications for similar walkovers within its boundary are unlikely and, if made, would have to comply with critical wildlife area restrictions. (RO ¶ 114).

The evidence in this case establishes that the proposed dune walkover will not result in unacceptable cumulative impacts upon wetlands and other surface waters. Furthermore, the ALJ concluded that the Petitioners did not prove by a preponderance of competent and substantial evidence that the Applicants failed to meet the standards set forth in section 373.414(1)(a)7., Florida Statutes; rule 62-330.302(1)(a)7., Florida Administrative Code; and A.H. section 10.2.3.7. (RO ¶ 115).

Elimination or Reduction of Impacts: A.H. Section 10.2.1

A.H. section 10.2.1 provides, in pertinent part, that:

> The following factors are considered in determining whether an application will be approved by the Agency: the degree of impact to wetland and other surface water functions caused by a proposed activity; whether the impact to these functions can be mitigated; and the practicability of design modifications for the site that could eliminate or reduce impacts to these functions, including alignment alternatives for a proposed linear system.

(RO ¶ 116).

A.H. section 10.2.1.1 provides, in pertinent part, that:

> The term 'modification' shall not be construed as including the alternative of not implementing the activity in some form, nor shall it be construed as requiring a project that is significantly different in type or function . . . .

(RO ¶ 117).

A.H. section 10.2.1.2 provides, in pertinent part, that:

> The Agency will not require the applicant to implement practicable design modifications to reduce or eliminate impacts when:
>
> * * *
>
> b. The applicant proposes mitigation that implements all or part of a plan that provides regional ecological value and that provides greater long term ecological value than the area of wetland or other surface water to be adversely affected.

(RO ¶ 118).

As set forth previously, the Applicants proposed mitigation in the form of the purchase of 0.01 saltwater forested mitigation bank credits and 0.01 saltwater herbaceous mitigation bank credits from the Pine Island Mitigation Bank. The Project area is within the service area established for the Pine Island Mitigation Bank. Ms. Mills testified that "any habitat can be used for nesting and denning, I think any impacts have been offset by the mitigation." The ALJ credited her testimony. The ALJ concluded that the evidence was also sufficient to establish that the mitigation was in an amount that offsets the impacts of the proposed dune walkover on the lagoon, provides regional ecological value, and provides greater long-term ecological value than the area of the lagoon affected. Based on the Findings of Fact set forth herein, and as supported by a preponderance of the persuasive evidence adduced at the hearing, the ALJ concluded that the Applicants were under no requirement to implement practicable design modifications to reduce or eliminate impacts from the proposed dune walkover. (RO ¶ 119).

Despite having no obligation to do so, the Applicants did implement practicable design modifications, resulting in a realignment of the dune walkover to eliminate any encroachment on the LEICWA, the reduction of the width of the Project from six feet to five feet, and the elimination of features that resulted in a much lower and unobtrusive structure. The Applicants

also agreed to permit conditions to implement construction methodologies to reduce impacts, and eliminate lighting that could affect adjacent habitats. (RO ¶ 120).

In addition to the foregoing, the ALJ found that Ms. Mills testified convincingly that the boardwalk in this area would serve to minimize unrestricted and unchanneled foot traffic, and direct traffic so that people are not "using other manners that aren't specifically defined causing more adverse impacts" through natural and sandy areas. (RO ¶ 121).

The ALJ concluded that the Petitioners did not prove by a preponderance of competent and substantial evidence that the Applicants failed to meet the standards set forth in A.H. sections 10.2.1 and 10.2.1.2. (RO ¶ 122).

Environmental Resource Permit - Ultimate Finding of Fact

The ALJ concluded that a preponderance of the competent, substantial evidence in this case establishes that the Applicants demonstrated their entitlement to the issuance of the ERP, meeting the standards established in section 373.414, Florida Statutes, rules 62-330.301 and 62-330.302, Florida Administrative Code, and the applicable sections of the A.H. The ALJ concluded that the Petitioners did not meet their burden of demonstrating that the ERP should not be issued. (RO ¶ 123).

SSL Authorization

The sovereignty lands at issue in this case are those that were under state ownership prior to the landward migration and attachment of the sandbar. *See* Fla. Admin. Code R. 18-21.003(61). The Applicants did not dispute that a SSL Authorization was appropriate. (RO ¶ 124).

The standards for issuance of an SSL Authorization, including a Letter of Consent Easement, are generally established in Rule 18-21.004, Florida Administrative Code.(RO ¶ 125).

Based on the entirety of the record of this proceeding, the ALJ concluded that the Applicants provided reasonable assurances that the proposed dune walkover meets the requirements for the SSL Authorization. (RO ¶ 126).

Rule 18-21.004(1)(a) - Contrary to the public interest

Rule 18-21.004(1)(a) provides that "activities on sovereignty lands must be not contrary to the public interest." (RO ¶ 127).

As established by DEP:

> Rule 18-21.004(1)(a) requires an applicant to demonstrate that an activity proposed to be conducted on sovereignty submerged lands will not be contrary to the public interest. . . . [T]o meet this standard, it is not necessary that the applicant show that the activity is affirmatively in the 'public interest,' as that term is defined in rule 18-21.003(51), Florida Administrative Code. Rather, it is sufficient that the applicant show that there are few, if any, 'demonstrable environmental, social, and economic costs' of the proposed activity.

Defenders of Crooked Lake, Inc. v. Krista Howard and Dep't of Envt'l Prot., DOAH Case No. 17-5328, FO at 26 (Fla. DOAH July 5, 2018; Fla. DEP Aug. 16, 2018). (RO ¶ 128).

The ALJ concluded that the Applicants have demonstrated, by a preponderance of the competent, substantial, and persuasive evidence in the record, that the proposed dune walkover will pose no demonstrable environmental or social costs. (RO ¶ 129).

The ALJ found that the suggestion that the construction of the proposed dune walkover will adversely affect the economic viability of the LEICWA or the Town is, under the facts of this case, simply implausible. The facts stipulated by the parties provide that "the beach and the ecotourism generated by the potential for birdwatching is important for the Town's economy." However, the ALJ concluded that the preponderance of the evidence demonstrates that the proposed dune walkover will have no effect on the use of the beach, shorebirds, or the LEICWA. (RO ¶ 130).

The fact that the proposed dune walkover is a private structure does not militate against its meeting the public interest test. As stated by Ms. Mills, "it's not contrary to the Board's public interest test because the Board has outlined through its rule a procedure for a private homeowner to get consent through an easement to use Sovereign Submerged Lands." The ALJ credited her testimony. (RO ¶ 131).

For the reasons set forth herein, the ALJ concluded that the Applicants met the provisions of the "public interest test" established in rule 18-21.004(1)(a), Florida Administrative Code. (RO ¶ 132).

Rule 18-21.004(2) - Resource management

Rule 18-21.004(2)(a) provides, in pertinent part, that:

> All sovereignty lands shall be considered single use lands and shall be managed primarily for the maintenance of essentially natural conditions, propagation of fish and wildlife, and traditional recreational uses such as fishing, boating, and swimming. Compatible secondary purposes and uses which will not detract from or interfere with the primary purpose may be allowed.
>
> (b) Activities which would result in significant adverse impacts to sovereignty lands and associated resources shall not be approved unless there is no reasonable alternative and adequate mitigation is proposed.
>
> * * *
>
> (i) Activities on sovereignty lands shall be designed to minimize or eliminate adverse impacts on fish and wildlife habitat, and other natural or cultural resources. Special attention and consideration shall be given to endangered and threatened species habitat.

(RO ¶ 133).

By providing a means of channeling and making the Applicants' existing access across sovereignty lands less disruptive and damaging to the lagoon, dunes, and bird species, the proposed dune walkover meets the principles that the sovereignty lands be maintained in their essentially natural conditions, and that they be conducive to the propagation of fish and wildlife.

The proposed dune walkover involves use of sovereignty lands to facilitate access to the waters of the Gulf of Mexico for traditional uses such as fishing, boating, and swimming. (RO ¶¶ 134-135).

The testimony of the Applicants was sufficient to demonstrate that there was no reasonable alternative to the proposed dune walkover, other than the more disruptive and destructive means of providing access to the Gulf of Mexico currently in use. The ALJ found that though a strong argument can be made that the proposed dune walkover has fewer impacts and is more protective of sovereignty lands than the Applicants' existing (and lawful) means of access, the Applicants provided sufficient mitigation as described herein. (RO ¶ 136).

The Project, by virtue of steps taken to minimize its footprint to the minimum necessary to allow access by wheelchair or mobility device, to remove handrails, and by construction methods, including construction from the decking, has been designed to minimize destruction of wetland vegetation on sovereignty lands. (RO ¶ 137).

The modifications to the Project, including the lowering of the dune walkover; elimination of handrails; the agreement to forego lighting; the steps taken to eliminate effects on water quality; and the termination of the dune walkover in a densely vegetated area not favored by shorebirds, have minimized adverse impacts on fish and wildlife habitat, including habitat for endangered and threatened species of shorebirds and marine turtles. (RO ¶ 138).

For the reasons set forth herein, the ALJ concluded that the Applicants met the provisions of the "resource management" provisions established in rule 18-21.004(2), Florida Administrative Code. (RO ¶ 139).

Rule 18-21.004(3) - Riparian rights

Rule 18-21.004(3), Florida Administrative Code, provides that activities undertaken on sovereignty lands be conducted so as not to unreasonably infringe upon traditional, common law riparian rights of upland property owners adjacent to sovereignty submerged lands. (RO ¶ 140).

Section 253.141, Florida Statutes, provides that "[t]he land to which the owner holds title must extend to the ordinary high watermark of the navigable water in order that riparian rights may attach." Neither the Applicants nor their neighbors hold title to the mean high water (MHW) mark of the Gulf of Mexico. (RO ¶¶ 141-142).

The MHW line, as of December 1, 2014, was at what is generally depicted as the shoreline of the Gulf of Mexico. The two more upland water features, i.e., the lagoon and the smaller body, both labeled as "Pond" on the 2014 mean high water survey, were well landward of the MHW. (RO ¶ 143).

The lagoon, which is normally isolated from the Gulf of Mexico, is not of a depth to be routinely navigable in fact, and frequently has so little water as to require that even kayaks be dragged across, is simply not a navigable water body. (RO ¶ 144).

Pursuant to section 253.141, Florida Statutes, neither the Applicants nor their neighbors currently have riparian rights to the lagoon or the smaller feature. (RO ¶ 145).

Even if it were to be determined that the Applicants' neighbors had riparian rights to the lagoon, any restriction or infringement on traditional rights of ingress, egress, boating, bathing, and fishing would not be "unreasonable." The evidence established that adjacent upland property owners did not have vessels that would be expected to use the lagoon. There was no suggestion that the ability to traverse the lagoon to access the navigable waters of the Gulf of Mexico, much as the Applicants do now, would be affected. The proposed dune walkover would

not restrict bathing or fishing, and the photographic and testimonial evidence established not only that such activities are not engaged in as a matter of fact, but that the shallow, isolated body of water is not conducive to such activities. Finally, in determining whether any restriction on riparian rights -- even if they existed -- was "unreasonable," it is not inconsequential that no property owners fronting the lagoon objected to or challenged the proposed Project. (RO ¶ 146).

The ALJ found that the evidence in this case established that the lagoon is not a navigable body of water. The MHW line is waterward of the lagoon, and the property lines of the Applicants and their neighbors do not extend to the MHW line. Thus, proximity to that water feature does not serve to confer "riparian" rights on them. Even if the adjacent upland property owners had riparian rights to the lagoon, under the facts of this case, any restriction on such rights created by the proposed dune walkover would not be "unreasonable." Finally, the mechanism for enforcing such rights would be with the adjacent upland owners, not Petitioners. (RO ¶ 147).

For the reasons set forth above, the ALJ concluded that the Applicants met the "riparian rights" provisions established in rule 18-21.004(3), Florida Administrative Code. (RO ¶ 148).

Rule 18-21.004(7) - General conditions

As established by a preponderance of the evidence, the ALJ found that the proposed dune walkover has been designed, and is subject to conditions as to its construction, that will avoid and minimize adverse impacts to sovereignty submerged lands and resources. Thus, the ALJ concluded that the Applicants met the standards for issuance of the SSL Authorization established in rule 18-21.004(7)(d), Florida Administrative Code. (RO ¶ 149).

As established by a preponderance of the evidence, the ALJ found that the proposed dune walkover has been designed, is subject to conditions as to its construction, and is intended for use

in a manner that will not adversely affect shorebirds or sea turtles. Thus, the ALJ concluded that the Applicants met the standards for issuance of the SSL Authorization established in rule 18-21.004(7)(e), Florida Administrative Code. (RO ¶ 150).

As established by a preponderance of the evidence, the ALJ found that the lagoon is not a navigable body of water. Furthermore, even if it were navigable, any restriction created by the proposed dune walkover will not be "unreasonable." Finally, if the adjacent upland owners holding such riparian rights believe such rights to have been infringed, despite their not having heretofore objected to the proposed Project, and a court of competent jurisdiction determines that riparian rights have been unlawfully affected, DEP has the authority to require that the SSL Authorization be modified in accordance with the court's decision. Thus, the ALJ concluded that the Applicants met the standards for issuance of the SSL Authorization established in rule 18-21.004(7)(f), Florida Administrative Code. (RO ¶ 151).

As established by a preponderance of the evidence, the ALJ concluded that the proposed dune walkover will not create a navigational hazard. Unlike the "public interest" navigational standards for obtaining an ERP, the "navigational hazard" standard for obtaining a SSL Authorization pursuant to rule 18-21.004(7), though not defined, includes such things as unsafe conditions adjacent to docks and boat slips. *Pirtle v. Voss and Dep't of Envtl. Prot.*, Case No. 13-0515 (Fla. DOAH Sep. 23, 2013; Fla. DEP Dec. 26, 2013). A mere inconvenience does not constitute the type of navigational hazard contemplated by the rule. *Woolshlager v. Rockman and Dep't of Envtl. Prot.*, Case No. 06-3296 (Fla. DOAH May 5, 2007; Fla. DEP June 22, 2007). Since there is no proven "navigation" in the lagoon – other than dragging or, when water levels allow, paddling small boats and kayaks across on the way to accessing the navigable waters of the Gulf of Mexico -- there is no navigational hazard created by the proposed dune walkover.

Thus, the ALJ concluded that the Applicants met the standards for issuance of the SSL Authorization established in rule 18-21.004(7)(g), Florida Administrative Code. (RO ¶ 152).

Finally, as established by a preponderance of the evidence, the ALJ concluded that the proposed dune walkover has been designed, is subject to conditions as to its construction, and is intended for the water dependent purpose of traversing the lagoon to allow access to the Gulf of Mexico. Thus, the ALJ concluded that the Applicants met the standards for issuance of the SSL Authorization established in rule 18-21.004(7)(i)., Florida Administrative Code. (RO ¶ 153).

SSL Authorization - Ultimate Finding of Fact

The ALJ concluded that a preponderance of the competent, substantial evidence in this case establishes that the Applicants demonstrated their entitlement to the issuance of the Letter of Consent Easement, meeting the standards established in chapter 253, Florida Statutes, and rule 18-21, Florida Administrative Code. (RO ¶ 154).

CCCL Permit

The ALJ found that DEP has established a CCCL on Little Estero Island. A CCCL permit is required before a person may conduct construction activities beyond that line. (RO ¶ 155).

Permitting Procedures

In the Joint Prehearing Stipulation, Petitioners asserted that "the applicable and relevant procedures for granting a coastal construction control line permit application were not appropriately followed." However, the ALJ concluded that the Petitioners failed to present competent, substantial, and persuasive evidence of any failure by DEP to follow its CCCL permitting procedures. Conversely, the ALJ concluded that DEP established that the project met

all of the applicable siting and design criteria, and that DEP complied with statutory and rule criteria and procedures for reviewing and issuing the CCCL Permit. (RO ¶ 156).

Petitioners have argued that the CCCL Permit should have been procedurally denied because the CCCL Waiver was timely challenged. DEP included special conditions requiring the Applicants to relinquish the CCCL Permit if the CCCL Waiver was denied. In addition, the CCCL Permit does not become final until a Notice to Proceed is issued, which is also conditioned on the CCCL Waiver becoming final. (RO ¶ 157).

The ALJ concluded that based on the fact that construction of the dune walkover cannot commence until all permits and authorizations are issued, there was no material error in procedure arising from DEP sequentially issuing the CCCL Waiver and the CCCL Permit, thus, allowing for their consolidation and litigation without unnecessary delay and duplication. (RO ¶ 158).

Permitting Standards

The ALJ concluded that the Applicants have provided reasonable assurances that the proposed dune walkover meets the requirements for a permit for construction seaward of the coastal construction control line established in section 161.053, Florida Statutes, and chapter 62B-33, Florida Administrative Code. (RO ¶ 159).

The ALJ found that the proposed dune walkover meets the requirements established by rule as a minor structure and was designed in accordance with DEP's Beach and Dune Walkover Guidelines. It is designed to be expendable. The size, height, and elimination of concrete anchors were proposed to minimize resistance to forces associated with high frequency storms, and to allow the dune walkover to break away when subjected to such forces. It meets every

condition proposed by the DEP and the FFWCC. Its minimal size and design is expected to have a minor impact on the beach and dune system. (RO ¶ 160).

The ALJ concluded that a preponderance of the evidence established that the proposed dune walkover will not cause a measurable interference with the natural functioning of the coastal system. (RO ¶ 161).

The ALJ also concluded that a preponderance of the evidence established that the Project, as a result of its size, profile, and location, will have no measurable affect on the existing shoreline change rate. (RO ¶ 162).

The ALJ concluded that a preponderance of the evidence further established that the proposed dune walkover is not reasonably expected to significantly interfere with the ability of the coastal system to recover from a coastal storm. (RO ¶ 163).

Moreover, the ALJ concluded that a preponderance of the evidence established that the Project would have no measurable effect of the topography or the vegetation of the area. As such, there is no evidence to suggest that the proposed dune walkover would render the dune system unstable or subject to catastrophic failure, or that the protective value of the dune system will be significantly lowered. To the contrary, by lessening pedestrian traffic through the dunes, and channeling traffic at its waterward point of termination, the proposed dune walkover will be protective of the dune system and the coastal system. In that regard, DEP generally encourages dune walkovers to protect the beach and dune system. (RO ¶ 164).

As a result of the elimination of lighting, of the restriction on construction during turtle nesting season, and of the Applicants' agreement to all conditions suggested by the FFWCC, the ALJ concluded that the evidence firmly established that the proposed dune walkover will not, by any reasonable measure, result in death or injury to marine turtles, and will result in no

significant habitat modification or degradation that kills or injures marine turtles by significantly impairing essential behavioral patterns, such as breeding, feeding, or sheltering. (RO ¶ 165).

The Project will not result in the removal or destruction of native vegetation. The evidence was sufficient to demonstrate that the Project will not destabilize the beach and dune system. The ALJ found that the greater weight of the evidence establishes that the dune walkover will provide greater protection of the beach and dune system than the Applicants' existing means of access across the lagoon and dunes. The ALJ concluded that the construction of the dune walkover will cause no significant adverse impact, as defined in rule 62B-33.002(26), Florida Administrative Code, to the beach and dune system due to increased erosion by wind or water. (RO ¶ 166).

The proposed dune walkover does not require any excavation. There will be no net excavation or removal of in situ sandy soils of the beach and dune system, and no net excavation of the in situ sandy soils seaward of the control line or 50-foot setback. (RO ¶ 167).

The proposed dune walkover does not include any water directing devices. The ALJ concluded that the preponderance of the competent substantial evidence established that the project will not direct discharges of water seaward in a manner that would result in significant adverse impacts. The evidence established that the proposed Project will result in no erosion-induced surface water runoff within the beach and dune system. (RO ¶ 168).

The evidence establishes that, as a general matter, piling-supported structures do not have an effect on the flow of water. However, in extreme events, water encountering an obstacle can cause the movement of sand around the obstacle. The expendability of a structure and its ability to break away prevents scour from occurring and is designed to minimize impacts. The ALJ concluded that the preponderance of the competent, substantial, and persuasive evidence

establishes that the Project will not increase scour so as to cause a significant adverse impact, and that any effect of the Project on the coastal processes of the area would be, at most, de minimis. (RO ¶ 169).

The design of the proposed dune walkover minimizes the amount of materials that might create debris in the event of a storm. The Applicants removed the handrails, decreased the width of the dune walkover from six feet to five feet, and eliminated pickets and non-structural members. The lowering of the dune walkover, and replacement of the stairs with a ramp that minimizes lift forces, have sufficiently reduced the potential for wind and waterborne missiles. The ALJ concluded that the suggestion that the dune walkover will, in the event of a high frequency storm, form destructive airborne missiles is simply not credible. (RO ¶ 170).

The proposed dune walkover is designed to break apart in the face of destructive storm forces. The ALJ concluded that if every piece of storm-generated debris was a sufficient basis upon which to deny a CCCL permit, then minor structures would be prohibited, since all minor structures are designed to be expendable and to break away in a high-frequency storm. The ALJ concluded that some degree of reason must be applied. The Applicants in this case demonstrated that the proposed dune walkover would not itself be such to create significant adverse impacts if subjected to the destructive forces of such a storm. (RO ¶ 171).

The ALJ concluded that the proposed dune walkover terminates more than 260 feet from the Gulf of Mexico and will not interfere with the public's right to laterally traverse the sandy beach of the Gulf of Mexico. (RO ¶ 172).

The ALJ concluded that the Project area is in a cycle of accretion, has historically accreted, is currently accreting at roughly 28 feet per year, and is expected to continue accreting. (RO ¶ 173).

The ALJ concluded that the suggestion that, within 15 years, the shoreline of the Gulf of Mexico waterward of the Applicants' properties will retreat, and that the proposed dune walkover would thence reach into the Gulf, blocking pedestrian access to the shoreline, was not supported by quantitative analyses, and was not sufficient to outweigh evidence to the contrary presented by the Applicants. The Applicants offered an assessment and report based on past and current conditions at the monument level, which included modeling and sediment budgets showing projected changes of the Project area, none of which support a finding that the shoreline will erode or retreat, or that the proposed dune walkover would be expected to interfere with public access to the shoreline. (RO ¶ 174).

As set forth previously herein, the ALJ concluded that the Project's proposed design, location, and construction methods provide reasonable assurance that there will be no adverse impact to marine turtles, or the coastal system. (RO ¶ 175).

The ALJ concluded that the Applicants provided sufficient evidence of ownership, in that they are the upland owners and the recipients of the SSL Authorization, being addressed concurrently herewith. (RO ¶ 176).

CCCL Permit - Ultimate Finding of Fact

The ALJ concluded that the preponderance of the competent, substantial evidence in this case establishes that the Applicants demonstrated their entitlement to the issuance of the CCCL Permit, meeting the standards established in chapter 161, Florida Statutes, and chapter 62B-33, Florida Administrative Code. (RO ¶ 177).

Final Order Granting Petition for CCCL Waiver

The CCCL Waiver at issue affects the timing requirements of the submission of ownership and land use approvals. The CCCL Waiver does not waive the submission of the

documents, or the requirement that the documents be provided prior to any construction of the proposed dune walkover. The ALJ concluded that a preponderance of the competent substantial evidence establishes that the underlying purpose of chapter 161, Florida Statutes, and rule 62B-33.008, Florida Administrative Code, will be met because construction cannot begin until the Applicants satisfy all substantive requirements for the CCCL Permit. (RO ¶ 178).

At the time the CCCL Petition for Waiver was requested, the Consolidated Permit was being litigated (DOAH Case Nos. 16-7148 and 16-7149), as was the Town's denial of the land use letter requested by the Applicants to comply with the CCCL Permit application requirement. Strict adherence to the requirement that the documents at issue be submitted at the time of the application would have required the Applicants to sequentially litigate issues related to the proposed dune walkover, increasing the time and expense of litigation on all involved. (RO ¶ 179).

The ALJ found that the Petitioners presented no evidence demonstrating how allowing the Applicants to submit the documents prior to being given a Notice to Proceed would adversely affect the Department's ability to carry out the objective of the underlying statutes, or their substantial interests in ensuring the legality of the proposed dune walkover. (RO ¶ 180).

The ALJ concluded that the timing requirement for evidence of ownership and local government approval was appropriately waived to allow for the efficient and cost-effective litigation of all issues related to the proposed dune walkover. To piecemeal the litigation would unnecessarily increase the time, cost, and administrative burden of litigation for no meaningful or substantive reason, and would provide the challengers with an unwarranted litigation advantage. (RO ¶ 181).

The CCCL Waiver affects no substantive or substantial interests of any party to this case. The CCCL Waiver final order neither lessens the necessary indicia of ownership and control required of the Applicants, nor affects the Town's ability to lawfully enforce its local zoning codes. The ALJ found that the waiver to the timing requirements allows for the substantive permitting requirements to be met, without frustrating the Applicants' right to a timely final decision on the Consolidated Permit and CCCL Permit. (RO ¶ 182).

The CCCL Final Order Granting Petition for Waivers does not allow for any construction to begin without Applicants first meeting both the ownership requirement and the local government zoning confirmation requirement. Therefore, the ALJ concluded that the CCCL Petition for Waivers is consistent with the purpose and intent of the governing statutes and rules and results in no injury to Petitioners' legitimate interests. (RO ¶ 183).

CCCL Final Order Granting Petition for Waivers - Ultimate Finding of Fact

The ALJ concluded that the preponderance of the competent, substantial evidence in this case establishes that the CCCL Waiver serves to avoid substantial hardship to the Applicants, and advance principles of fairness by maintaining a fair, equal, and cost-effective forum for litigation between the parties regarding the proposed dune walkover. As such, the ALJ concluded that the Applicants demonstrated their entitlement to issuance of the CCCL Final Order Granting Petition for Waivers, meeting the standards established in section 120.542, Florida Statutes. (RO ¶ 184).

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. (2018); *Charlotte County v. IMC Phosphates Co.*, 18 So. 3d 1079, 1082 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So. 2d 61, 62 (Fla. 1st DCA 2007). The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value or weight of the evidence. Rather, "competent substantial evidence" refers to the existence of some evidence as to each essential element and as to its admissibility under legal rules of evidence. *See e.g., Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm'n*, 671 So. 2d 287, 289 n.3 (Fla. 5th DCA 1996); *Nunez v. Nunez*, 29 So. 3d 1191, 1192 (Fla. 5th DCA 2010).

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

The ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. *See, e.g., Peace River/Manasota Reg'l Water Supply Authority v. IMC Phosphates Co.*, 18 So. 3d 1079, 1088 (Fla. 2d DCA 2009); *Collier Med. Ctr. v. State, Dep't of HRS*, 462 So. 2d 83, 85 (Fla. 1st DCA 1985); *Fla. Chapter of Sierra Club v. Orlando Utils. Comm'n*, 436 So. 2d 383, 389 (Fla. 5th DCA 1983). In addition, an agency has no authority to make independent or supplemental

findings of fact. *See, e.g., North Port, Fla. v. Consol. Minerals*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994); *Fla. Power & Light Co. v. Fla. Siting Bd.*, 693 So. 2d 1025, 1026-1027 (Fla. 1st DCA 1997).

Section 120.57(1)(l), Florida Statutes, authorizes an agency to reject or modify an ALJ's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." *See Barfield v. Dep't of Health*, 805 So. 2d 1008, 1012 (Fla. 1st DCA 2001); *L.B. Bryan & Co. v. Sch. Bd. of Broward County*, 746 So. 2d 1194, 1197 (Fla. 1st DCA 1999); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140 1141-42 (Fla. 2d DCA 2001). However, the agency should not label what is essentially an ultimate factual determination as a "conclusion of law" 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, 1225 (Fla. 1st DCA 2007). Furthermore, agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be the only reasonable interpretations. It is enough if such agency interpretations are "permissible" ones. *See, e.g., Suddath Van Lines, Inc. v. Dep't of Envtl. Prot.*, 668 So. 2d 209, 212 (Fla. 1st DCA 1996).

Agencies do not have jurisdiction, 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. (2018). However, the agency need not rule on an exception that "does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." *Id.*

A party that files no exceptions to certain findings of fact "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Envtl. Coal. of Fla., Inc. v. Broward County*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Med. Ctr., Inc. v. State of Fla., Agency for Health Care Admin.*, 847 So. 2d 540, 542 (Fla. 4th DCA 2003). However, an agency head reviewing a recommended order is free to modify or reject any erroneous conclusions of law over which the agency has substantive jurisdiction, even when exceptions are not filed. *See* § 120.57(1)(l), Fla. Stat. (2018); *Barfield,* 805 So. 2d at 1012; *Fla. Public Employee Council, v. Daniels,* 646 So. 2d 813, 816 (Fla. 1st DCA 1994).

RULINGS ON AUDUBON'S EXCEPTIONS

Audubon's Exception No. 1 regarding Paragraph (d) of the Recommendation Section

Audubon takes exception to paragraph (d) of the Recommendation Section of the RO, in which the ALJ recommends that the Department "d. issue a Notice to Proceed authorizing the Applicants to commence construction of the proposed dune walkover." (RO, p. 98). Audubon contends that paragraph (d) should be stricken, because CCCL Permit No. LE 1567 and the Final Order Granting Petition for Waivers from conditions of the CCCL permit, No. LE-1567V, specify that a Notice to Proceed authorizing the Applicants to commence construction cannot be

issued by the Department until the Applicants provide the Department with "[a] statement by the Town of Ft. Myers Beach that the project does not contravene local setback requirements or zoning codes." Specific Condition 21 of CCCL Permit No. LE-1567. The CCCL Permit requires that the terms of the CCCL Waiver be satisfied before issuance of the notice to proceed. In addition, the CCCL Waiver prohibits construction until the notice to proceed is issued. Upon reviewing the CCCL Permit, and the CCCL Waiver, the Department agrees with Audubon's conclusion. For the abovementioned reasons, Audubon's exception to paragraph (d) of the Recommendation Section of the RO is granted, and paragraph "d" is stricken.

Based on the foregoing reasons, Audubon's Exception No. 1 is accepted.

RULINGS ON THE APPLICANTS' EXCEPTIONS

The Applicants' Exception No. 1 regarding Paragraphs 124, 135, 142, 143, 145, and 147

The Applicants take exception to the findings of fact in paragraphs 124, 135, 142, 143, 145, and 147 (second and third sentences) of the RO, alleging that each paragraph contains statements that adjudicate title and boundary of real property, which is beyond the jurisdiction of both DOAH and the Department. *Miller v. Dep't of Business Reg.*, 504 So. 2d 1325, 1327 (Fla. 1st DCA 1987)(Circuit courts have exclusive jurisdiction to adjudicate all actions involving the title and boundaries of real property. Administrative agencies do not, by their nature, have jurisdiction to decide issues inherent in private property impacts.); *Hageman v. Carter*, 17 F.A.L.R. 3684, 3690 (Fla. Dep't. of Envtl. Prot. 1995)("The circuit courts of this state have exclusive jurisdiction over 'all actions involving titles of boundaries or right of possession of real property' *See* Art. V, Sec. 20(c)(3), Fla. Const.; Section 26.012(2)(g), Florida Statutes.").

The Applicants allege that on at least three occasions, the ALJ concluded that land ownership and title could not be adjudicated in this case. The Applicants note that the ALJ's

Order dated May 23, 2017, dened a motion to intervene by a third-party who alleged that he has "sole and superior title" to property identified as sovereign land within the Project area. In denying the motion to intervene, the ALJ held that "issues of title are exclusively within the jurisdiction of the circuit courts." The ALJ further noted that interest in title to land over which the Project will traverse is not the type or nature of interest designed to be protected by these proceedings, and "are not within the substantive jurisdiction of the Division of Administrative Hearings." Order Denying Motion for Intervention (DOAH May 23, 2017). Moreover, the Applicants noted that in response to their Joint Motion for Protective Order, Motion in Limine and Incorporated Memorandum of Law filed on May 26, 2017, the Petitioners advised the ALJ that "precise ownership of portions of the accreted beachfront are unresolved between DEP and the upland owner" and "title to these lands remains unclear." Respondents' Joint Motion for Protective Order, Motion in Limine and Incorporated Memorandum of Law (DOAH May 26, 2017). The Applicants pointed out to the ALJ that given this uncertainty, the Letter of Consent Easement was only being sought over the Project area to the extent of state ownership. *Id.*

Paragraph 124 of the RO:

Regarding paragraph 124 of the RO, the Applicants do not dispute the RO's statement that "[t]he Applicants did not dispute that a SSL Authorization was appropriate." (RO ¶ 124). In fact, the Applicants agree with this finding, stating that they had already stated in the record that they had agreed to obtain a SSL authorization in lieu of a dispute over land title. Respondents' Joint Motion for Protective Order, Motion in Limine and Incorporated Memorandum of Law (DOAH May 26, 2017). However, the Applicants filed an exception to the first sentence in paragraph 124 of the RO. They object to the ALJ's statement that "the sovereignty lands at issue in this case are those that were under state ownership prior to the landward migration and

attachment of the sandbar. *See* Fla. Admin. Code R. 18-21.003(61)," asserting that the statement is confusing and internally inconsistent. They note that "agreement to undergo administrative permitting processes is not the same as agreeing to the factual boundaries of the properties." Applicants' Exception No. 1, p. 7.

When challenging a finding of fact in a RO, the challenging party must allege that the finding is not supported by competent substantial evidence or that the proceeding did not comply with the essential requirements of the law. § 120.57(1)(l), Fla. Stat. (2018); *Charlotte County*, 18 So. 3d at 1087; *Wills*, 955 So. 2d at 62. The Applicant failed to allege either basis for challenging the findings of fact in paragraph 124 of the RO. Moreover, the Department does not find the sentence at issue to be confusing. Following the sentence at issue, the RO cites to rule 18-21.003(61), Florida Administrative Code, which contains the BOT's definition of "sovereignty submerged lands." The definition reads, in pertinent part, that " '[s]overeignty submerged lands' means those lands . . . to which the State of Florida acquired title on March 3, 1985, by virtue of statehood." This BOT definition implies that the ALJ was referring to the fact that sovereignty submerged lands are those lands that the State of Florida acquired title on March 3, 1985. The ALJ in paragraph 124 does not attempt to determine ownership to such lands or riparian boundaries, which are within the exclusive jurisdiction of the circuit courts. For the abovementioned reasons, the Applicants' exception to paragraph 124 of the RO is rejected.

Paragraph 135 of the RO:

Next, the Applicant's take exception to the findings of fact in paragraph 135 of the RO, alleging that no evidence was provided regarding ownership of the lands within the Project area. Paragraph 135 reads, in totality, that [t]he proposed dune walkover involves use of sovereignty lands to facilitate access to the waters of the Gulf of Mexico for traditional uses such as fishing,

boating, and swimming." The Applicant contends that "[p]aragraph 135 should be rejected as outside the scope of DEP's jurisdiction and not a matter that can properly be determined in this proceeding." Applicant's Exception No. 1, p. 9.

The Department concludes that paragraph 135 of the RO contains mixed findings of fact and conclusions of law. The Department concludes that neither DOAH nor the Department has jurisdiction to determine issues of title, which are exclusively within the jurisdiction of the circuit courts. As noted by the ALJ in his Order Denying Motion to Intervene dated May 23, 2017, interest in title to land over which the Project will traverse is not the type or nature of interest designed to be protected by these proceedings, and "are not within the substantive jurisdiction of the Division of Administrative Hearings." Order Denying Motion to Intervene (DOAH May 23, 2017); *Miller*, 504 So.2d at 1327. For the abovementioned reasons, the Applicants' exception to paragraph 135 is granted, and paragraph 135 of the RO is stricken.

Paragraph 142 of the RO:

The Applicants take exception to paragraph 142 of the RO, which reads, in totality, that "[n]either the Applicants nor their neighbors hold title to the mean high water ("MHW") mark of the Gulf of Mexico." RO ¶ 142. The Applicants object that paragraph 142 of the RO purports to establish the mean high waterline in the vicinity of the Project, and to adjudicate boundary of the Applicants' property, the state's property and the property of the Applicants' neighbors who were not even parties to these proceedings. The Applicants contend that neither DOAH nor the Department has jurisdiction to adjudicate title to or boundaries of real property; thus, they contend the paragraph should be rejected.

The Department concludes that paragraph 142 of the RO is actually a conclusion of law. Moreover, the Department agrees that neither DOAH nor the Department has jurisdiction to

adjudicate title to or boundaries of real property, which are exclusively within the jurisdiction of the circuit courts. *Miller*, 504 So.2d at 1327. For the abovementioned reasons, the Applicants' exception to paragraph 142 is granted, and paragraph 142 of the RO is stricken.

Paragraph 143 of the RO:

> The Applicants take exception to paragraph 143 of the RO, which reads as follows:
>
> The MHW line, as of December 1, 2014, was at what is generally depicted as the shoreline of the Gulf of Mexico. The two more upland water features, i.e., the lagoon and the smaller body, both labeled as 'Pond' on the 2014 mean high water survey, were well landward of the MHW.

RO ¶ 143. The Applicants contend that paragraph 143 of the RO "contain[s] statements that adjudicate title and boundary of real property, which is beyond the jurisdiction of either DOAH or the Department"; and thus, the paragraph should be stricken. Applicants Exception No. 1, pp. 4-5.

The Department concludes that paragraph 143 of the RO contains mixed findings of fact and conclusions of law. Moreover, the Department agrees that neither DOAH nor the Department has jurisdiction to adjudicate title to or boundaries of real property, which are exclusively within the jurisdiction of the circuit courts. *Miller*, 504 So.2d at 1327. For the abovementioned reasons, the Applicants' exception to paragraph 143 is granted, and paragraph 143 of the RO is stricken.

Paragraph 145 of the RO:

The Applicants take exception to paragraph 145 of the RO, which reads, in totality, that "[p]ursuant to section 253.141, neither the Applicants nor their neighbors currently have riparian rights to the lagoon or the smaller feature." RO ¶ 145. The Applicants object that paragraph 145 of the RO again purports to adjudicate title to real property, which is outside the jurisdiction of both DOAH and the Department. As a result, they contend the paragraph should be rejected.

The Department concludes that paragraph 145 of the RO contains mixed findings of fact and conclusions of law. Moreover, the Department agrees that neither DOAH nor the Department has jurisdiction to adjudicate title to or boundaries of real property, which are exclusively within the jurisdiction of the circuit courts. *Miller*, 504 So.2d at 1327. For the abovementioned reasons, the Applicants' exception to paragraph 145 is granted, and paragraph 145 of the RO is stricken.

Paragraph 147 of the RO:

The Applicants take exception to the second and third sentences in paragraph 147 of the RO, which read that "[t]he MHW line is waterward of the lagoon, and the property lines of the Applicants and their neighbors do not extend to the MHW line. Thus, proximity to that water feature does not serve to confer "riparian" rights on them." RO ¶ 147. The Applicants object that the second and third sentences of paragraph 147 of the RO establish the location of the mean high water line and adjudicate the location of the property lines of both the Applicants and properties of neighbors who did not even participate in this proceeding. As a result, they contend these two sentences should be rejected.

The Department concludes that paragraph 147 of the RO contains mixed findings of fact and conclusions of law. Moreover, the Department agrees that neither DOAH nor the Department has jurisdiction to adjudicate title to or boundaries of real property, which are exclusively within the jurisdiction of the circuit courts. *Miller*, 504 So.2d at 1327. For the abovementioned reasons, the Applicants' exception to paragraph 147 is granted, and the second and third sentences in paragraph 147 of the RO are stricken.

Based on the foregoing reasons, the Applicants' Exception No. 1, taking exception to paragraphs 124, 135, 142, 143, 145 and 147 of the RO, is denied in part, and granted in part, as set forth above.

The Applicants' Exception No. 2 regarding Paragraph 155

The Applicants take exception to the findings of fact in paragraph 155 of the RO, alleging that the paragraph contains a scrivener's error. Paragraph 155 of the RO states that "DEP has established a CCCL on Little Estero Island."

When challenging a finding of fact in a RO, the challenging party must allege that the finding is not supported by competent substantial evidence or that the proceeding did not comply with the essential requirements of the law. § 120.57(1)(l), Fla. Stat. (2018); *Charlotte County*, 18 So. 3d at 1087; *Wills*, 955 So. 2d at 62. The Applicants fail to allege either basis for challenging the findings of fact in paragraph 155 of the RO. Even if the Applicant had alleged that the findings in paragraph 155 were not supported by competent substantial evidence, their argument still would fail. The Applicant's findings of fact in paragraph 155 are supported by competent substantial evidence in the form of expert testimony. (McNeal, T. Vol. 2, p. 102; DEP Ex. 9, p. DEP-987). For the abovementioned reasons, the Applicants' exception to paragraph 155 of the RO is rejected.

Based on the foregoing reasons, the Applicants' Exception No. 2 is denied.

RULINGS ON DEP'S EXCEPTIONS

DEP's Exception No. 1 regarding Paragraph 141

DEP takes exception to the findings of fact in paragraph 141 of the RO, alleging that paragraph 141 is a mislabeled conclusion of law. Paragraph 141 of the RO reads, in totality, that "Section 253.141 provides that '[t]he land to which the owner holds title must extend to the

ordinary high watermark of the navigable water in order that riparian rights may attach.'" The Department agrees that paragraph 141 of the RO is a mislabeled conclusion of law. However, since it is a correct quotation of section 253.141, Florida Statutes, the Department accepts the quotation as a correct citation of law. For the abovementioned reasons, DEP's exception to paragraph 141 of the RO is rejected.

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

DEP's Exception No. 2 regarding Paragraph 143

DEP takes exception to the findings in paragraph 143 of the RO, which reads as follows:

> The MHW line, as of December 1, 2014, was at what is generally depicted as the shoreline of the Gulf of Mexico. The two more upland water features, i.e., the lagoon and the smaller body, both labeled as 'Pond' on the 2014 mean high water survey, were well landward of the MHW.

RO ¶ 143. DEP contends that the term "'mean high water line' is a term of legal significance relative to the issue of ownership of state lands, as it denotes the boundary between sovereign lands and private property." Moreover, DEP cites rule 18-21.003(38), Florida Administrative Code, which defines "mean high water line," in pertinent part, as follows:

> [T]he intersection of the local elevation of mean high water with the shore. Mean high water line along the shore of land immediately bordering on navigable waters is recognized and declared to be the boundary between the foreshore owned by the State of Florida in its sovereign capacity and the uplands subject to private ownership . . . .

Fla. Admin. Code R. 18-21.003(38)(2018).

DEP proceeds to provide a lengthy discussion regarding the facts of the case, alleging that the findings of fact in paragraph 143 of the RO are immaterial and irrelevant, and not based on evidence in the case. Without delving into the extensive evidentiary details in the case, the Department finds that paragraph 143 of the RO should be stricken for the initial reason inferred by DEP.

The Department concludes that paragraph 143 contains mixed findings of fact and conclusions of law, based on the RO's reference to a 2014 mean high water survey prepared by Charles DeGraff, whose deposition was admitted in evidence in lieu of live testimony. During Mr. DeGraff's deposition, the parties stipulated that to the extent Mr. DeGraff used the term "mean high water line" in his testimony, he was not making a statement regarding ownership, but merely explaining the lines on his surveys and sketches. Applicants' Ex. No. 73, SMI-TH-73-0031. However, paragraph 143 of the RO purports to establish the mean high waterline in the vicinity of the Project, including in relation to the lagoon and the "pond." As explained above, DEP contends that the term "mean high water line" is a legal term that delineates ownership of state lands, since it denotes the boundary between sovereign lands and private property. As fully articulated in other DEP exceptions to the RO, neither DOAH nor the Department has jurisdiction to adjudicate title to or boundaries of real property; thus, paragraph 143 should be rejected.

The Department concludes that paragraph 143 delineates ownership of state lands. Neither DOAH nor the Department has jurisdiction to adjudicate title to or boundaries of real property, which are exclusively within the jurisdiction of the circuit courts. *Miller*, 504 So.2d at 1327. For the abovementioned reasons, DEP's exception to paragraph 143 is granted, and paragraph 143 of the RO is stricken.

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

DEP's Exception No. 3 regarding Paragraph 142

DEP takes exception to the findings in paragraph 142 of the RO, which reads, in totality, that "[n]either the Applicants nor their neighbors hold title to the mean high water ("MHW") mark of the Gulf of Mexico." RO ¶ 142. DEP objects that paragraph 142 of the RO purports to

make a legal determination of who owns title over the lagoon. As previously discussed by DEP, neither DOAH nor the Department has jurisdiction to adjudicate title to or boundaries of real property; and therefore, paragraph 142 should be stricken. DEP Exception No. 3, p. 10.

The Department concludes that paragraph 142 of the RO is actually a conclusion of law. Moreover, the Department agrees that neither DOAH nor the Department has jurisdiction to adjudicate title to or boundaries of real property, which are exclusively within the jurisdiction of the circuit courts. *Miller*, 504 So.2d at 1327. For the abovementioned reasons, DEP's exception to paragraph 142 is granted, and paragraph 142 of the RO is stricken.

Based on the foregoing reasons, DEP's Exception No. 3 is approved.

DEP's Exception No. 4 regarding Paragraph 144

DEP takes exception to the findings of fact in paragraph 144 of the RO, alleging that the testimony in the hearing regarding whether the lagoon was a navigable water body was in the context of the ERP regulatory permit and not the SSL authorization. However, paragraph 144 of the RO is in the RO's section regarding SSL rule 18-21, Florida Administrative Code (Riparian Rights), and not the section regarding ERP permitting.

When challenging a finding of fact in a RO, the challenging party must allege that the finding is not supported by competent substantial evidence or that the proceeding did not comply with the essential requirements of the law. § 120.57(1)(l), Fla. Stat. (2018); *Charlotte County*, 18 So. 3d at 1087; *Wills*, 955 So. 2d at 62. DEP contends that the findings in paragraph 144 of the RO are not supported by competent substantial evidence. Contrary to DEP's exception, the findings of fact in paragraph 144 of the RO are supported by competent substantial evidence in the form of expert testimony. (Mills, T. Vol. 2, pp. 24-26). For the abovementioned reasons, DEP's exception to the findings of fact in paragraph 144 is rejected.

DEP also contends that the ALJ's statement that the lagoon is not navigable is a conclusion of law, based on incomplete evidence. DEP contends that the "determination of navigability for the purposes of determining title, is to be made as of 1845, the date Florida became a state. *Bd. Of Trustees of Internal Imp. Tr. Fund v. Florida Pub. Utilities Co.*, 599 2d 1356, 1357 (Fla. 1st DCA 1992)." DEP Exception No. 4, p. 11.

The Department concludes that the ALJ in paragraph 144 of the RO merely made a finding of fact that the subject water is *currently* not navigable. *See* RO ¶ 25, and Mills, T. Vol. 2, pp. 24-26.

Based on the foregoing reasons, DEP's Exception No. 4 is rejected.

DEPs Exception No. 5 regarding Paragraph 145

DEP takes exception to paragraph 145 of the RO, which reads, in totality, that "[p]ursuant to section 253.141, neither the Applicants nor their neighbors currently have riparian rights to the lagoon or the smaller feature." RO ¶ 145. DEP objects that paragraph 145 of the RO purports to adjudicate title to real property, which is outside the jurisdiction of both DOAH and the Department. As a result, they contend the paragraph should be rejected.

The Department concludes that paragraph 145 of the RO contains mixed findings of fact and conclusions of law. Moreover, the Department agrees that neither DOAH nor the Department has jurisdiction to adjudicate title to or boundaries of real property, which are exclusively within the jurisdiction of the circuit courts. *Miller*, 504 So.2d at 1327. For the abovementioned reasons, the Applicants' exception to paragraph 145 is granted, and paragraph 145 of the RO is stricken.

DEP's Exception No. 6 regarding Paragraph 147

DEP takes exception to paragraph 147 of the RO, alleging that this paragraph should be rejected for the same reasons explained in their exceptions to paragraphs 142, 143, 144, and 145.

The Department concludes that paragraph 147 of the RO contains mixed findings of fact and conclusions of law; and grants DEP's exception in part and rejects it in part. The Department agrees with the Applicants analysis articulated above, in which they took exception only to the second and third sentences in paragraph 147 of the RO, which read that "[t]he MHW line is waterward of the lagoon, and the property lines of the Applicants and their neighbors do not extend to the MHW line. Thus, proximity to that water feature does not serve to confer 'riparian' rights on them." RO ¶ 147. The Applicants' objected that the second and third sentences of paragraph 147 of the RO establish the location of the mean high water line and adjudicate the location of the property lines of both the Applicants and properties of neighbors who did not even participate in this proceeding. As a result, they contend these two sentences should be rejected. The Department concludes that the remainder of paragraph 147 of the RO should not be rejected, because it is a conclusion of law or a finding of fact supported by competent substantial evidence in the form of expert testimony. (Mills, T. Vol. 1, pp. 24-26).

The Department concludes that paragraph 147 of the RO contains mixed findings of fact and conclusions of law. Moreover, the Department concludes that neither DOAH nor the Department has jurisdiction to adjudicate title to or boundaries of real property, which are exclusively within the jurisdiction of the circuit courts. *Miller*, 504 So.2d at 1327. For the abovementioned reasons, DEP's exception to paragraph 147 is granted in part and denied in part.

Based on the foregoing reasons, DEP's Exception No. 6 is accepted in part and rejected in part; and accordingly, the second and third sentences in paragraph 147 of the RO are stricken.

DEP's Exception No. 7 regarding Paragraph 219

DEP takes exception to the conclusion of law in paragraph 219 of the RO, alleging that the paragraph's reference to section 161.053(6)(b), Florida Statutes, is a scrivener's error. Upon reviewing section 161.053, Florida Statutes, the Department finds that it does not contain a section 161.053(6)(b); and thus, the reference to section 161.053(6)(b), Florida Statutes, must be a scrivener's error.

Paragraph 291 of the RO quotes section 161.053(6)(b), Florida Statutes, in pertinent part, to read that a "'Minor structure' means pile-supported, elevated dune and beach walkover structure. . . . It shall be a characteristic of minor structures that they are considered to be expendable under design wind, wave, and storm forces." DEP contends that the correct reference is to rule 62B-33.002(55)(b), Florida Administrative Code. However, while rule 62B-33.002(55)(b) does define "Minor Structures," the definition is not identical to the definition in paragraph 219 of the RO. Upon reviewing the statutes and rules applicable to the CCCL program, the Department finds that the citation intended by the ALJ was section 161.54(6)(b), Florida Statutes.

For the abovementioned reasons, DEP's exception to paragraph 219 is granted, in part and rejected in part. The Department agrees that the RO's reference in paragraph 219 to section 161.053(6)(b), Florida Statutes, is a scrivener's error; and thus, the Department accepts that portion of DEP's Exception No. 7. However, the Department rejects DEP's conclusion that the ALJ intended to cite to rule 62B-33.002(55)(b), Florida Administrative Code.

Based on the foregoing reasons, the Applicants' Exception No. 7 is accepted in part and denied in part. In addition, the scrivener's error in paragraph 291 of the RO is corrected to cite to Section 161.54(6)(b), Florida Statutes.

DEP's Exception No. 8 regarding Paragraph (d) of the Recommendation Section

DEP takes exception to paragraph "d" of the Recommendation Section of the RO, in which the ALJ recommends that the Department "d. issue a Notice to Proceed authorizing the Applicants to commence construction of the proposed dune walkover." (RO, p. 98). DEP contends that paragraph "d" should be stricken or reworded, because the CCCL Permit requires that the terms of the CCCL Waiver be satisfied before issuance of the notice to proceed. In addition, the Department notes that the CCCL Waiver prohibits construction until the notice to proceed is issued. Upon reviewing the CCCL Permit, and the CCCL Waiver, the Department agrees with DEP's conclusion. For the abovementioned reasons, DEP's exception to paragraph "d" of the Recommendation Section is granted.

Based on the foregoing reasons, DEP's Exception No. 8 is granted, and paragraph "d" of the Recommendation Section of the RO is stricken.

CONCLUSION

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

ORDERED that:

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

B. Consolidated Environmental Resource Permit No. 36-0320034-001 and Letter of Consent Easement to use Sovereign Submerged Lands No. 360239365 is APPROVED, subject to the general and specific conditions set forth therein;

C. Permit for Construction or Other Activities Pursuant to Section 161.053, Florida Statutes, No. LE-1567, is APPROVED, subject to the general and specific conditions set forth therein;

D. Final Order Granting Petition for Waivers, No. LE-1567V, is APPROVED, subject to the conditions set forth therein; and

E. The petitions for hearing filed by the Town of Fort Myers Beach in each of these consolidated cases are dismissed with prejudice for lack of standing, in accordance with the recommendations of the RO.

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 9th day of May, 2019, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

NOAH VALENSTEIN
Secretary

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

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

Deputy CLERK 5/9/19 DATE

CERTIFICATE OF SERVICE

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

Andrew J. Baumann, Esquire Amy Taylor Petrick, Esquire Telsula Christy Morgan, Esquire Seth Behn, Esquire Rachael B. Santana, Esquire Lewis, Longman and Walker, P.A. 515 North Flagler Drive, Suite 1500 West Palm Beach, Florida 33401 abaumann@llw-law.com apetrick@llw-law.com tmorgan@llw-law.com sbehn@llw-law.com rsantana@llw-law.com	Marianna Sarkisyan, Esquire Matthew J. Knoll, Esquire Department of Environmental Protection 3900 Commonwealth Blvd., MS 35 Tallahassee, Florida 32399-3000 Marianna.Sarkisyan@FloridaDEP.gov Matthew.Knoll@FloridaDEP.gov
Martha Collins, Esquire Collins Law Group 1110 North Florida Avenue Tampa, Florida 33602 mcollins@collins-lawgroup.com	Pamela Jo Hatley, Esquire Pamela Jo Hatley, P.A. 1110 North Florida Avenue Tampa, Florida 33602 pamela@pamelajohatley.com
John S. Turner, Esquire Peterson Law Group 2525 Estero Boulevard Fort Myers, Florida 33931 jtpetersonpa@gmail.com	William Ward, Esquire The William Ward Law Group, PLLC 606 Riviera Dunes Way Palmetto, Florida 34221 wwlg.william@gmail.com
and by U.S. Mail to: Allen Bills Marine, Inc. 3853 East River Drive Fort Myers, Florida 33916	 Texas Hold'Em, LLC 2817 Carriage Lane Carrollton, Texas 75006
Squeeze Me Inn, LLC 711 Franklin Trace Zionsville, Indiana 46077	

this 9th day of May, 2019.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

Stacey D. Cowley

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA AUDUBON SOCIETY, INC.,

Petitioner,

vs. Case No. 16-7148

TEXAS HOLD'EM, LLC; SQUEEZE ME INN, LLC; AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.
_____/

TOWN OF FORT MYERS BEACH, FLORIDA,

Petitioner,

vs. Case No. 16-7149

TEXAS HOLD'EM, LLC; SQUEEZE ME INN, LLC; AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.
_____/

FLORIDA AUDUBON SOCIETY, INC., AND TOWN OF FORT MYERS BEACH, FLORIDA,

Petitioner,

vs. Case Nos. 18-1451
18-2141

TEXAS HOLD'EM, LLC; SQUEEZE ME INN, LLC; AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.
_____/

Exhibit A

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on September 18 through 20, 2018, in Fort Myers, Florida, before E. Gary Early, a designated Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner Florida Audubon Society:

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For Petitioner Town of Fort Myers Beach, Florida:

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Telsula Christy Morgan, Esquire
Amy Taylor Petrick, Esquire
Rachael B. Santana, Esquire
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PRELIMINARY STATEMENT

These consolidated cases involve agency actions related to a "dune walkover"[1/] ("dune walkover" or "Project") proposed by the applicants, Texas Hold'Em, LLC, and Squeeze Me Inn, LLC (the "Applicants"). In order to construct the proposed dune walkover, the Applicants have filed: 1) an application for an Environmental Resource Permit ("ERP"); 2) an application for a letter of consent easement for the use of sovereignty submerged lands ("SSL Authorization"); 3) petitions for waivers from Florida Administrative Code Rule 62B-33.008(3)(c) and (d) to allow for completion and consideration of an application for a Coastal Construction Control Line ("CCCL") permit ("CCCL Waivers"); and 4) an application for a CCCL permit ("CCCL Permit").

On September 29, 2016, the Department of Environmental Protection (the "DEP"), in its own capacity, and in its capacity as staff to the Board of Trustees of the Internal Improvement Trust Fund ("BTIITF"), issued Consolidated Environmental Resource Permit No. 36-0320034-001 and Letter of Consent Easement to Use Sovereign Submerged Lands No. 360239365 (collectively the "Consolidated Permit") to the Applicants for the construction of a 1,491.5 square-foot beach boardwalk.

On November 4, 2016, Petitioners, Florida Audubon Society, Inc. ("Audubon"), and Town of Fort Myers Beach, Florida

("Town"), each filed an Amended Petition for Administrative Hearing challenging the Consolidated Permit. The Amended Petitions were transmitted to DOAH, assigned as Case Nos. 16-7148 and 16-7149, respectively, consolidated for hearing, and initially set to be heard on June 12 through 16, 2017.

The hearing on the Consolidated Permit cases was continued, and the cases placed in abeyance to allow for the associated CCCL Permit application to be processed by DEP. Procedural motions and their disposition are contained on the docket of Case Nos. 16-7148 and 16-7149.

On May 3, 2017, the Applicants amended their application to relocate the boardwalk outside of the established limits of the Little Estero Island Critical Wildlife Area ("LEICWA"). DEP reviewed the proposed changes and determined that the project, as amended, continued to meet the criteria for the issuance of the Consolidated Permit, and transmitted the revised Notice of Intent and Revised Draft Environmental Resources Permit and State Owned Submerged Lands Authorization to DOAH on May 10, 2017.

DEP has established a CCCL for Little Estero Island. A permit is required before any person may conduct construction activities seaward of the CCCL. On May 4, 2017, after having determined that the proposed dune walkover was, in whole or in

part, seaward of the CCCL, the Applicants applied for the CCCL Permit. On June 8, 2017, DEP issued a request for marine turtle impact review to the Florida Fish and Wildlife Conservation Commission ("FFWCC"). On July 27, 2017, FFWCC responded to the request with two recommended CCCL Permit conditions: that no construction occur during nesting season (May 1 through October 31); and that all vehicles be operated in accordance with FFWCC's Best Management Practices for Operating Vehicles on the Beach. Both conditions were accepted by the Applicants.

On August 11, 2017, the Applicants filed their Petition for Waiver of Rules 62B-33.008(3)(c) and (d), which was supplemented on October 3, 2017, and amended on November 9, 2017. The CCCL Waivers would have the effect of allowing the required evidence of ownership of the property encompassed by the CCCL Permit application, and the written evidence that the proposed dune walkover does not violate local setback requirements or zoning codes to be submitted after the issuance of the CCCL Permit, with a permit condition requiring submission of the information prior to DEP issuing a Notice to Proceed, which would authorize the Applicants to commence construction.

On September 29, 2017, the Applicants submitted revised construction and site plans for the proposed dune walkover that reduced its overall footprint from six to five feet across; lowered its height from three feet, ten inches to two feet, six

inches above the sand; replaced steps with a ramp; and removed the 3-foot handrails.

On February 7, 2018, DEP issued proposed Final Order Granting Petitions for Waivers, File No. LE-1567V, which granted the CCCL Waivers.

On March 2, 2018, Audubon and the Town each filed a Petition for Administrative Hearing challenging the CCCL Waivers. The Petitions were transmitted to DOAH, consolidated by the DOAH Clerk's office and assigned as Case No. 18-1451.

On March 30, 2018, DEP issued the proposed Permit for Construction or Other Activities Pursuant to Section 161.053, Florida Statutes, No. LE-1567, which authorized the construction of the dune walkover seaward of the CCCL.

On April 20, 2018, Audubon and the Town each filed a Petition for Administrative Hearing challenging the CCCL Permit. The Petitions were transmitted to DOAH, consolidated by DOAH Clerk's office and assigned as Case No. 18-2141.

On May 10, 2018, Case Nos. 16-7148, 16-7149, 18-1451, and 18-2141 were consolidated for hearing, and the final hearing on the consolidated cases was scheduled for September 18 through 21, 2018.

On June 28, 2018, DEP and the Applicants filed a Joint Notice of Revisions to Draft Environmental Resource Permit and State Owned Submerged Lands Authorization ("Joint Notice"),

which incorporated the September 29, 2017, modifications into the Consolidated Permit. Audubon and the Town each filed a Petition for Formal Administrative Hearing, which were accepted as their Second Amended Petitions to challenge the Consolidated Permit as modified by the Joint Notice.

In the period leading up to the final hearing, a number of motions were filed, disposition of which is reflected on the docket.

On September 11, 2018, the parties filed their Joint Prehearing Stipulation and an Amended Joint Prehearing Stipulation ("JPS"). The JPS contained 39 stipulations of fact and law, and eight stipulations of law, each of which is adopted and incorporated herein, if not specifically, then by reference. The list of stipulated facts provided a comprehensive listing of the various applications, submissions, amendments, petitions, and the like.

The statement of the issues of fact remaining for disposition provided by the parties did little to narrow the real issues in dispute. For example, Petitioners identified the issues of fact remaining for disposition as:

> 1. Whether the Applicants, Squeeze Me Inn, LLC and Texas Holdem, LLC are entitled to issuance of the challenged Environmental Resources Permit and authorization to use sovereignty submerged lands pursuant to all applicable rules and statutes.

2. Whether the Applicants, Squeeze Me Inn, LLC and Texas Holdem, LLC, are entitled to issuance of the challenged Permit for Construction or Other Activities Pursuant to Section 161.053, Florida Statutes, and all other CCCL applicable rules and statutes.

3. Whether the Applicants, Squeeze Me Inn LLC and Texas Holdem LLC, are entitled to issuance of the Final Order Granting Petition for Waivers, pursuant to all applicable rules and statutes.

Similarly, DEP identified the issues as:

1. Whether Petitioner Town of Fort Myers Beach, Florida has sufficient standing to challenge each of the three proposed agency actions.

2. Whether Petitioner Florida Audubon Society has sufficient standing to challenge each of the three proposed agency actions.

3. Whether the Applicants, Squeeze Me Inn, LLC and Texas Holdem, LLC are entitled to issuance of the challenged Environmental Resources Permit and authorization to use sovereignty submerged lands.

4. Whether the Applicants, Squeeze Me Inn, LLC and Texas Holdem, LLC, are entitled to issuance of the challenged Permit for Construction or Other Activities Pursuant to Section 161.053, Florida Statutes.

5. Whether the Applicants, Squeeze Me Inn LLC and Texas Holdem LLC, are entitled to issuance of the Final Order Granting Petition for Waivers.

The list provided by the Applicants provided greater detail and specificity as to the issues in dispute, but nonetheless served more as an expanded listing of the regulatory requirements than

a limitation. Having been provided with no limitation on the issues in dispute, the undersigned will attempt to address the permitting standards as comprehensively as possible.

The hearing convened on September 18, 2018, as scheduled.

The ERP under review, having been issued under the authority of chapter 373, Florida Statutes, that element of the hearing was subject to the modified burden of proof established in section 120.569(2)(p), Florida Statutes. The SSL Authorization was issued under the authority of chapter 253, Florida Statutes; the CCCL Permit under the authority of chapter 161, Florida Statutes; and the CCCL Waiver under the authority of section 120.542, Florida Statutes. Thus, the burden remained with the Applicants to demonstrate entitlement to those elements. The burden of proof provisions are discussed in the Conclusions of Law herein. In order to simplify the order of presentation, the Applicants and DEP presented their cases in full, with Petitioners' standing witnesses taken out of order for the witnesses' convenience.

Joint Exhibits 1 through 13, consisting of the Consolidated Permit file; the CCCL Permit file; the CCCL Waiver file; various surveys, sketches, and aerials related to the proposed dune walkover; the June 28 Revised Notice of Intent for the ERP/Consent and attached documents; and the resumes of DEP

witnesses Tony McNeal, Megan Mills, and Richard Malloy,[2/] were received in evidence by stipulation of the parties.

The Applicants called the following witnesses: Kurt Kroemer, managing member of Squeeze Me Inn, LLC; Edward Rood, managing member of Texas Hold'Em, LLC; Robert Case, P.E., who was tendered and accepted as an expert in civil engineering; Michael Dombrowski, P.E., who was tendered and accepted as an expert in coastal engineering; and Shane Johnson, who was tendered and accepted as an expert in zoology and ecology. Applicants' Exhibits 4 through 7, 9, 10, 13 through 23, 25, and 72 through 74 were received in evidence. Applicants' Exhibit 73 consisted of the deposition testimony of Charles DeGraff, an expert in surveying, who was more than 100 miles from the hearing location on the date of the hearing. His deposition was accepted pursuant to Florida Rule of Civil Procedure 1.330 and will be given the weight as though the deponent testified in person.

DEP called Megan Mills, its ERP program administrator; and Tony McNeal, P.E., its CCCL program administrator, and offered no exhibits beyond Joint Exhibits 1 through 13.

Audubon called Julie Brashears Wraithmell, its president; and Brad Cornell, both on the issue of standing. The Town called Roger Hernsteadt, its manager; Jason Green, its community development director; and Rae Burns, its environmental

technician, on the issue of standing. Petitioners jointly called Ms. Burns; Dr. Robert Young, who was tendered and accepted as an expert in coastal geology and coastal management; and Nancy Douglass, an employee of the FFWCC. Petitioners' Exhibits 1, 2, 7, 25, 33, 42 through 44, 47, 49, 62, 64, and 72 were received in evidence.

A three-volume Transcript of the final hearing was filed on November 6, 2018. The parties were allowed 20 days from the filing of the Transcript within which to file their proposed recommended orders. Petitioners moved for a further extension of time for filing their proposed recommended orders until December 10, 2018, which was granted. DEP moved to enlarge the page limit for the proposed recommended orders to 70 pages, which was also granted. All parties timely filed Proposed Recommended Orders, each of which has been considered in the preparation of this Recommended Order.

The law in effect at the time DEP takes final agency action on the applications being operative, references to statutes are to their current versions, unless otherwise noted. Lavernia v. Dep't of Prof'l Reg., 616 So. 2d 53 (Fla. 1st DCA 1993).

FINDINGS OF FACT

Based upon the demeanor and credibility of the witnesses, the stipulations of the parties, and the evidentiary record of this proceeding, the following Findings of Fact are made:

The Parties

1. Squeeze Me Inn, LLC, is a limited liability corporation incorporated in the State of Florida. Kurt Kroemer is its managing member. Squeeze Me Inn, LLC, owns a single-family home at 8170 Estero Boulevard in Fort Myers Beach, Florida, and pays taxes on the property. Mr. Kroemer purchased the property through Squeeze Me Inn, LLC, based on his enjoyment of the beach. He visits the property five times per year on average, and intends to retire there.

2. Texas Hold'Em, LLC, is a limited liability company incorporated in the State of Florida. Edward Rood is its managing member. Texas Hold'Em, LLC, owns a single-family home at 8150 Estero Boulevard in Fort Myers Beach, Florida, and pays taxes on the property. Mr. Rood uses the home four to five times per year. He enjoys visiting the Gulf of Mexico and the adjacent beach area behind his house.

3. DEP is an agency of the State of Florida, pursuant to section 20.255, Florida Statutes. DEP is the permitting authority in this proceeding and has issued the Consolidated Permit, the CCCL Waiver, and the CCCL Permit at issue in this proceeding to the Applicants.

4. DEP performs staff duties and functions on behalf of the BTIITF related to the review of applications for authorization to use sovereignty submerged lands necessary for

an activity regulated under chapter 373, part IV, for which DEP has permitting responsibility. § 253.002(1), Fla. Stat. DEP has been delegated the authority to take action, without any input from BTIITF, on applications for authorization to use sovereignty submerged lands necessary for an activity regulated under chapter 373, part IV, for which DEP has permitting responsibility. § 253.002(1), Fla. Stat.; Fla. Admin. Code R. 18-21.0051(2).

5. Audubon is an organization incorporated in the State of Florida. Audubon has roughly 20,000 members statewide, and 5,000 members in Southwest Florida, some of whom it contends are in the "direct vicinity" of the project. Audubon's mission statement is to protect birds and their habitat for the benefit of people and wildlife.

6. The Town is an incorporated municipality located on the west coast of Florida along the Gulf of Mexico. The proposed dune walkover is within the Town limits.

Standing[3/]

7. Audubon considers the LEICWA and its surrounding areas important, because it is "important to the birds." Audubon was involved in the process of establishing the LEICWA, and its members volunteer to help monitor and manage the LEICWA. The LEICWA is a renowned bird-watching site. Audubon members have assisted in "posting for nesting birds, as well as fielding

volunteers who are bird stewards. They chaperone the colony to protect it from disturbance, especially on busy beach going weekends." The interest in areas outside of the LEICWA is less apparent, though Audubon alleged that the areas around the LEICWA are important to the birds and, thus, Audubon's members, since "birds unfortunately don't recognize boundaries." In addition, Audubon alleged that the dune walkover would irreparably harm the lagoon and the coastal habitat seaward of it, which is important habitat for imperiled species that are critical for the enjoyment of Audubon's members.

8. Audubon's interest in contesting the CCCL and the Waiver is tied to the reasons for its ERP and SSL standing.

9. The Town's interest in the Consolidated Permit and the CCCL Permit was related to the importance of the Ft. Myers Beach beaches, including those in the LEICWA, to the Town's economy from ecotourism. The Town's interest in shorebirds is that they contribute to the Town's economy by "draw[ing] people to select to visit Fort Myers Beach versus other areas of the state." The Town spends money for beach maintenance to compete for tourism dollars, but does not track the number of visitors to the beach where the Project would be located.[4/]

10. The Town's interest in challenging the CCCL Waiver was that "it goes outside the normal process" and "creates confusion among applicants and the public." However, the CCCL Waiver

would have no effect on the Town's processing of development orders. In addition, the Town was concerned that the boardwalk, as a frangible structure, could cause damage to the property of nearby private individuals. The interest in that regard was not to the property or resources of the Town, but to "[o]ur residents and our property owners."

11. Both the Town and Audubon participate in a program that coordinates volunteer efforts to educate beachgoers on nesting birds in the general vicinity of the proposed dune walkover.

The Project Area

12. Little Estero Island is part of a barrier island system that has developed over decades through the gradual accretion of sand onto the shoreline.

13. The proposed dune walkover is proposed to be constructed on property just west of Big Carlos Pass, a maintained navigational channel that connects inland coastal waters to the Gulf of Mexico. Big Carlos Pass is a tidally dominated inlet, which results in a very dynamic shoreline in its immediate vicinity.

Creation and Fate of the "Lagoon" and Current Shoreline

14. Fort Myers Beach experiences offshore sediment transport that transfers sand along the shoreline from Estero Island towards Big Carlos Pass. In addition, movement of water

through Big Carlos Pass agitates and suspends sand, creating an "ebb shoal" at the Gulf side of the pass. Currents generated by wave action transport sand from the ebb shoal offshore along the shoreline on both sides of the pass. The sediment transport results in the development of shoals and swash bars offshore from the Project site. Those features are gradually pushed towards the shore, and eventually "weld" onto the shoreline.

15. Big Carlos Pass was recently (after the October 20, 2015, issuance of the authorizing permit) dredged to maintain, realign, and straighten the inlet channel. The dredged material, consisting of approximately 350,000 cubic yards of sand, was deposited along 4,500 linear feet just offshore to the west of the Project vicinity.

16. The process of accretion, and the "welding" of a shoreward-moving sandbar has resulted in the creation of an enclosed and shrinking body of water between the shoreline and the upland. What was previously the shoreline of the Gulf of Mexico is, for now, the landward shoreline of the "lagoon."

17. During significant storm events, the area can experience overwash, when storm-driven tides and waves overtop the existing Gulf shoreline, spilling into the lagoon. The overwash pushes sand into the lagoon, creating "fans" of sand and sediment, in a process by which the lagoon is continually filled in and narrowed. As established by Mr. Dombrowski, "what

we would anticipate over time is that you keep on getting this over-topping of sand that keeps on filling in on the back side of the lagoon which will eventually fill in with sand."

18. In addition to overwash, rain and stormwater can fill the lagoon, which can result in the creation of temporary drainage outlets. For example, the area was impacted by Tropical Storm Alberto on Memorial Day 2018. Ms. Burns visited the area after the storm, in June 2018, and observed more water in the lagoon and in surrounding areas, including the sandy areas within the LEICWA. By July 18, 2018, at which time the photographs that comprise Petitioners' Exhibit 7 were taken, the water levels in the lagoon were lower. During a visit nearer to the date of the hearing, there was less water in the lagoon due to diminished rainfall, and water no longer flowed through the remnants of the drainage channels. Thus, stormwater drainage, rather than tidal connection, is the most likely cause of the swashes observed in the series of photographs taken on July 18, 2018.

19. In order for the lagoon to be considered "tidal," there would have to be an established connection between the lagoon and the Gulf of Mexico to allow for the regular periodic exchange of waters through tidal ebbs and flows. Mr. DeGraff took a series of "water shots" of the levels in the lagoon and the Gulf of Mexico. Whereas water levels in the Gulf of Mexico

changed with the tides, the water levels in the lagoon remained constant, which supports that there is no connection between the two.

20. Overwash and storm events may temporarily open one-way connections and outfalls of water between the lagoon and the Gulf of Mexico as a result of accumulation of water in the back barrier environment. If enough water is pushed into the lagoon, it will find an exit, but the flow is "not back and forth again through a particular cut," as would be the case with an established and regular tidal connection.

21. The preponderance of the evidence demonstrates that the "lagoon" is not tidally connected to the Gulf of Mexico but is, rather, a feature that experiences no tidal ebb and flow and is, under normal conditions, disconnected from the Gulf of Mexico.

22. The "big picture" view of the process of shoaling, welding, filling, and narrowing of the "lagoon," and ultimate reestablishment of the previously existing shoreline is depicted in Petitioners' Exhibit 44, which images can be viewed as a fascinating and visually compelling time-lapse of the Petitioners' Exhibit 44 images at https://earthengine.google.com /timelapse/#v=26.40708,-81.89551,11.491,latLng&t=0.00.

23. The persistent narrowing of the temporary lagoon is well-depicted in Petitioners' Exhibit 43. That exhibit,

consisting of a series of aerial photographs, demonstrates convincingly the accretional nature of the area in front of the Applicants' property, and offers support for evidence that "over the last 50 plus years . . . and especially within the last ten to 15, is that this shoreline has been accreting." Competent, substantial evidence establishes that the accretional trend will naturally continue and may be further influenced by the deposition of dredged spoil from Big Carlos Pass, and supports the testimony of Mr. Dombrowski that the lagoon will naturally fill in with the cycle, at some future time, repeating itself.

24. In the area of the Project, the shoreline has been accreting at a rate of around 28 feet (or more) per year between 1999 and 2011. In the last 52 years, the shoreline to the east of the Project area has grown by more than 600 feet. To the west of the Project area, within the LEICWA, overwash events and alluvial fans associated with such events demonstrate the accretional nature of the shoreline.

25. Mr. Kroemer owns a Hobie Wave Runner sailboat, which requires about 12 inches of water, and two kayaks, which require two to three inches of water that he uses in the Gulf of Mexico. To access the Gulf, Mr. Kroemer paddles or pushes the boats - depending on the season - through the lagoon and then takes them over land to the Gulf. The water levels in the lagoon are not sufficient to allow for the sailboat to traverse year round.

26. The greater weight of the evidence supports a finding that the water area over which the dune walkover is proposed will, as a process of accretion, fill with sand creating an unimpeded pathway to the Gulf of Mexico, as was the case prior to the most recent accretionally welded sand bar. The suggestion that the shoreline will erode and ultimately become open water is not supported by the evidence.

Vegetation

27. The vegetative species in the vicinity of the proposed dune walkover and surrounding the lagoon include mangroves; shrubby plants, including bay cedar and marsh elder; and facultative grass species, such as hurricane grass. The Project area is becoming increasingly more vegetated, with plant communities pioneering at the ground cover level, followed by shrubs and small trees. The area is generally undergoing natural ecological succession.

28. The vegetation in the areas over which the proposed dune walkover is to be constructed, including the ground cover, is too thick to be conducive for shorebird nesting, which generally occurs in areas that are open, and sandy or shelly. The mangroves that fringe the lagoon range from five to seven feet in height, and the shrubby vegetation in the Project area can be up to four feet in height.

Wildlife

29. The beaches in the area are used by shorebirds and migratory birds for nesting, foraging, and loafing. Birds that have been observed in the general vicinity of the LEICWA include Snowy Plovers, Wilson's Plovers, American Oystercatchers, Black Skimmers, and Least Terns.

30. Snowy Plovers, American Oystercatchers, Black Skimmers, and Least Terns are designated by the FFWCC as threatened bird species. Those species are also identified by DEP as "Listed Wildlife Species that are Aquatic or Wetland Dependent and that Use Upland Habitats for Nesting or Denning" in A.H. Table 10.2.7-1, with Snowy Plovers and Least Terns listed as "State-designated Threatened," and American Oystercatchers and Black Skimmers listed as "State Species of Special Concern."

31. Wilson's Plovers are not a species listed as threatened, of special concern, or of any other protected classification by the FFWCC or DEP.

32. Snowy Plovers, American Oystercatchers, Black Skimmers, and Least Terns prefer clear, open sand for nesting. They lay their eggs on the sand or in shallow "scrapes" or depressions in the sand. The eggs generally match the substrate, and the coloration of the chicks allows them to blend in with the sand, providing a camouflaging defense against

predators. Those species are colony nesters, nesting in groups as a reproductive strategy.

33. Wilson's Plovers also prefer open sandy areas, but will occasionally nest in nearby sparsely vegetated areas, referred to by Mr. Johnson as "salt and pepper" coverage, which have pockets of open sand. Such areas exist waterward of the proposed terminus of the dune walkover. Wilson's Plovers are solitary nesters.

34. Shorebirds will typically not nest in areas with vegetative cover. Mangroves and other tall, woody species of plants create perching opportunities for crows and other avian predators, while ground-dwelling predators like snakes can move through vegetation and predate shorebird nests.

35. Applicants' Exhibits 6 and 9 depict the extent of shorebird utilization, including nesting, of habitat in the immediate Project vicinity based on a series of 2017 and 2018 site visits, historic aerial photographs, and FFWCC shorebird data. Applicants' Exhibit 6 provides a visual representation of the wide utilization of the open raked beach area east of the Project for nesting, with only scattered use of "salt and pepper" vegetated areas by non-threatened Wilson's Plovers. Applicants' Exhibits 6 and 9, in combination with Mr. Johnson's testimony and field notes, is found to be the most accurate and

representative depiction of the utilization of the Project area by shorebirds.

36. There have been shorebird sightings on the sandy shoreline waterward of the terminus of the proposed dune walkover. The closest recorded bird sighting to the Project area, involving a Wilson's Plover nest scrape and, subsequently, a nesting female at that location, was approximately 150 feet southwest of the waterward terminus of the dune walkover in an area of "salt and pepper" vegetation.

37. During his site visits in 2017, Mr. Johnson observed considerable pedestrian traffic along the shoreline waterward of the Project area. It was in this general area that he had noted the presence of Wilson's Plovers. He explained that Wilson's Plovers can tolerate pedestrian traffic as long as it does not "get right up on" their nests. When nesting areas are roped off, Wilson's Plovers can tolerate pedestrian traffic up to the protective barrier as long as it does not encroach into the protected area.

38. Sea turtles also have the potential to nest just above the high tide mark in the dunes waterward of the proposed dune walkover. A staked sea turtle nest west of the Project area was observed by Ms. Burns during her July 2018 visit to the area. Sea turtles do not typically nest in vegetated areas. Given both the distance to and vegetative cover at the waterward

terminus of the dune walkover, sea turtles would be unlikely to migrate to the Project area to excavate a nest.

39. There was no evidence that pedestrian access to the location at which Ms. Burns observed the staked sea turtle nest was restricted. Rather, the evidence establishes that pedestrian traffic is allowable and common along the shoreline. People walking along the shore could easily happen upon the staked area, just as Ms. Burns did, and just as Mr. Johnson did during his visits to the area. In that regard, the Applicants, even if they were to take a longer and more circuitous route to the shoreline, would not be restricted in walking along the shoreline in the vicinity of the nest. The preponderance of the evidence establishes that the proposed dune walkover will have no adverse effect on nesting sea turtles in the area.

The LEICWA

40. Property to the west of the proposed dune walkover has been designated by the State of Florida as the LEICWA. The LEICWA includes some vegetated land adjacent and parallel to the footprint of the proposed dune walkover. The proposed dune walkover is not within the boundary of the LEICWA.

41. At times, portions of the LEICWA are roped off by the FFWCC to demarcate shorebird nests and nesting colonies, and to channel pedestrian access through the LEICWA. There was no persuasive evidence that pedestrian traffic through the LEICWA

is disruptive to the birds using the LEICWA or to their nesting patterns.

42. Posted and roped-off areas are not intended to identify the geographic extent of the LEICWA, and are often not specific to shorebird nest sightings, but instead represent larger areas "to allow the birds to have more availability to choose where they're going to nest."

43. Roughly 300 feet east of the Project area and the LEICWA boundary (as scaled using Petitioner's Exhibit 6) is a large raked, sandy area which is maintained free of vegetation. A large number of shorebirds and shorebird nests have been documented on the open, sandy area. The open, sandy area is directly abutted to its north by homes and by what appear to be larger multi-family structures. In addition, the open area is "preferred by a lot of beach goers to have open sand to walk through instead of walking through vegetation. So it's been manipulated mechanically to be open." There was no evidence that the direct proximity of such residential structures, their inhabitants, and beachgoers have any disruptive affect on the large nesting colonies inhabiting that area.

44. A four-foot-high, three-foot-wide education kiosk placed by the FFWCC is located on the shore side of the LEICWA. A roughly seven-foot-high, 15-inch-wide sign, educating beachgoers about the LEICWA and of the needs of the birds that

frequent the area has been placed at the edge of the LEICWA. Neither of the signs incorporate any features designed to discourage their use as perches. Both of the signs provide an elevated and unobstructed vantage point into the LEICWA's primary nesting area. The signs, which are much greater in height and nearer to the LEICWA's preferred shorebird nesting habitat than the proposed dune walkover "can serve as perches" for predatory birds in the area. Although there was evidence that Petitioners' members and employees monitor the signs for evidence that they are being used as perches, there was no evidence to suggest what might happen if they were.

45. Although the dune walkover is not within the boundary of the LEICWA, Ms. Wraithmell testified that "[t]he birds unfortunately don't recognize boundaries." While birds may not recognize boundaries, regulators must. Standards that apply within a designated critical wildlife area do not apply outside of a critical wildlife area, even within feet of the boundary. That is why boundaries, including legal descriptions, are set. Since the proposed dune walkover is not within the boundary of the LEICWA, standards applicable within critical wildlife areas cannot be applied.

The Proposed Dune Walkover

46. The dune walkover is proposed as a 1,491.50 square-foot (298.3 feet in length by 5 feet in width) piling-supported

wooden walkway five feet in width. Its original six-foot width was reduced to five feet, which remains adequate to accommodate an anticipated need for the use of a wheelchair or mobility device by one of the Applicants. The steps at the waterward end of the proposed dune walkover were replaced with ramps, also for use by a wheelchair or similar device. The replacement of the initially proposed stairs with a ramp will also reduce "lift" forces in the event of a storm.

47. The dune walkover will serve to minimize foot traffic on the native dune vegetation, and will channel the foot traffic from its terminus to the shore of the Gulf of Mexico. As such, the dune walkover will have a beneficial effect on the native vegetation in its immediate area.

48. As originally proposed, the dune walkover was to have been three feet, ten inches above the ground surface, with three-foot-high handrails. In order to meet the concerns posed by others, particularly the FFWCC, the height was lowered to two feet, six inches above the ground surface, which is the maximum height for a structure to be built without handrails. The handrails were removed in their entirety, and the design does not contain any pickets or other "non-structural members." Thus, the proposed dune walkover is, at its highest point, two feet, six inches above the ground surface. Mangroves in the vicinity of the dune walkover are generally from five to seven

feet in height, and commonly occurring shrubby vegetation of four feet in height was observed in the area. Thus, the dune walkover is well below the elevation of the surrounding vegetation. The dune walkover, as currently proposed, has no value as a perch or vantage point for avian predators.

49. The posts that support the structure will be round, six inches in diameter, and installed five feet deep into the sand. The posts will not be encased in concrete, and will be wrapped to prevent leaching of any potentially toxic compounds into the environment. The walking surface of the dune walkover will be made of slatted decking, with a one-half inch space between each deck board. The proposed ERP indicated that gaps will allow sufficient light penetration to maintain the underlying vegetative habitat. There was no persuasive evidence to the contrary.

50. In its final configuration, the proposed dune walkover is fully compliant with, though substantially smaller and less intrusive than, the generally acceptable siting, design, and elevation provisions set forth in the DEP Beach and Dune Walkover Guidelines.

51. As originally proposed, the dune walkover would have crossed the LEICWA boundary, though in an area of minimal value to shorebird nesting or feeding. Nonetheless, in order to address the concerns expressed by others, including the FFWCC,

the Applicants modified the configuration of the proposed dune walkover so that it is now completely outside of the boundary of the LEICWA.

52. The construction plans do not require the use of vehicles, other than to deliver the material to the site. There will be no placement of fill. There will be no lighting, either in construction or in operation.

53. As mitigation for the minimal impacts associated with the crossing of the lagoon, and at DEP's direction, the Applicants purchased 0.01 saltwater forest and 0.1 saltwater herbaceous mitigation credits in the Pine Island Mitigation Bank, to offset for any remaining impacts not avoided through the design modifications. It was established, by a preponderance of the competent, substantial, and persuasive evidence adduced at the hearing, that the proposed mitigation was sufficient to offset any environmental impacts resulting from the proposed Project, even before its width was decreased from six feet to five feet.

54. The alterations to the proposed dune walkover as described herein were largely made to address the concerns expressed by the FFWCC in its comments of August 27, 2015; July 20, 2016; and July 27, 2017, and the proposed ERP and CCCL Permit incorporates all of the conditions requested by the

FFWCC. It was established that the Applicants have addressed and met the FFWCC's concerns regarding the proposed Project.

Environmental Resource Permit

55. The issuance or denial of an ERP is generally governed by section 373.414, chapter 62-330, and the Environmental Resource Permit Applicant's Handbook, Volume I ("A.H.").

56. Section 373.4131(1) requires DEP to adopt statewide environmental resource permitting rules. DEP has done so through the adoption of rules 62-330.301 and 62-330.302.

57. Under the burden of proof discussed in the Conclusions of Law herein, the Applicants met their burden of demonstrating that they met all applicable standards and were entitled to issuance of the ERP by entering the application and DEP's notice of intent of issue the ERP in evidence. Therefore, a finding that there was insufficient evidence introduced by Petitioners to rebut the prima facie case is sufficient to establish that the grounds for issuance have been met.

58. Based on the entirety of the record of this proceeding, the Applicants provided reasonable assurances that the proposed dune walkover meets the requirements for the ERP.

Rule 62-330.301(1)

59. Rule 62-330.301(1) provides that an applicant for an ERP must provide reasonable assurance that the permitted

activity will not cause adverse affects. The standards established by rule are further described in the A.H.

Water quantity impacts: Rule 62-330.301(1)(a) and A.H. Section 10.2.2.4

60. Piling supported structures do not typically impact a water body's depth or flow. The evidence introduced by Petitioners in this case was not sufficient or persuasive to support a finding that the piling-supported dune walkover would reduce the depth, duration, or frequency of inundation or saturation in the lagoon; would increase the depth, duration, or frequency of inundation through changing the rate or method of discharge of water to the lagoon or by impounding water in the lagoon; or could have the effect of altering water levels in the lagoon. To the contrary, there was substantial testimony, and it is found, that the proposed dune walkover will not cause adverse water quantity impacts to receiving waters and adjacent lands.

Adverse flooding: Rule 62-330.301(1)(b)

61. The evidence introduced by Petitioners in this case was not sufficient or persuasive to support a finding that the proposed dune walkover will cause adverse flooding to on-site or off-site property.

Adverse impacts to existing surface water storage and conveyance capabilities: Rule 62-330.301(1)(c)

62. The evidence introduced by Petitioners in this case was not sufficient or persuasive to support a finding that the proposed dune walkover will cause adverse impacts to existing surface water storage and conveyance capabilities.

Adverse impacts to the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters: Rule 62-330.301(1)(d) and A.H. Section 10.2.2

63. The A.H. provides that "[i]n evaluating whether an applicant has provided reasonable assurances under these provisions, de minimis effects shall not be considered adverse for the purposes of this section." In accordance with the A.H., DEP provided information to the FFWCC and solicited comments on the proposed dune walkover in its various configurations. The Applicants met every listed substantive concern expressed by the FFWCC in its comments of August 27, 2015; July 20, 2016; and July 27, 2017. The proposed ERP incorporates all of the conditions requested by the FFWCC.

64. The A.H. section 10.2.2 also provides that "[t]he need for a wildlife survey will depend upon the likelihood that the site is used by listed species and the bald eagle, considering site characteristics and the range and habitat needs of such species, and whether the proposed activity will impact that use." In its August 27, 2015, comments, the FFWCC requested

that the Applicants provide an assessment of anticipated impacts to wildlife. Thereafter, on December 2, 2015, Mr. Rood provided information to DEP explaining, accurately, the densely vegetated nature of the proposed dune walkover location, and its lack of value to nesting shorebirds. He correctly noted the general distance, i.e., 100 to 150 yards, from the terminus of the proposed dune walkover to the nearest shorebird nesting area and "roped off nesting areas."

65. The A.H. provides that "[t]he need for a wildlife survey will depend upon the likelihood that the site is used by listed species and the bald eagle, considering site characteristics and the range and habitat needs of such species." As a result of Mr. Rood's explanation of the characteristics of the Project location, on December 11, 2015, the FFWCC withdrew its request for the survey and wildlife assessment.

66. As set forth herein, the preponderance of the competent, substantial, and persuasive evidence demonstrates that there will be no adverse impacts to the value of functions provided to any species of concern provided by the lagoon and associated wetlands that will result from the construction and use of the proposed dune walkover. Shorebirds, whether or not they are protected species, will not be impacted by the Project. There was no evidence to support a finding that wading birds

foraging in the lagoon, as depicted in photographs taken by Ms. Burns, would be affected in any way.

Water quality impacts: Rule 62-330.301(1)(e) and A.H. Section 10.2.4

67. An ERP applicant must provide reasonable assurance that the project will not adversely affect the quality of receiving waters such that State water quality standards will be violated.

68. DEP required turbidity control to address short-term water quality issues attendant with construction. Best management practices to minimize construction-related turbidity are required. The sand in the area is coarse, with a small percentage of sands and clays, further minimizing the potential for turbidity. The pilings are required to be wrapped to prevent any chemicals used to treat the pilings from leaching into the soil or water. The structure will be constructed outward from the boardwalk deck, thus, minimizing impacts to surrounding vegetation and surface waters. The ERP is conditioned on adherence to Best Management Practices to ensure that oils, greases, gasoline, or other pollutants are not released into the wetlands or surface waters.

69. The preponderance of the competent, substantial, and persuasive evidence demonstrates that there will be no adverse impacts on water quality associated with the construction or use

of the proposed dune walkover. The evidence introduced by Petitioners was not sufficient or persuasive to support a finding that the proposed dune walkover will cause adverse impacts to water quality.

Secondary impacts: Rule 62-330.301(1)(f) and A.H. Sections 10.1.1(f) and 10.2.7

70. An ERP applicant must provide reasonable assurance that the Project will not cause adverse secondary impacts. The secondary impact criterion consists of four parts as established in A.H. section 10.2.7(a) through (d).

71. The proposed dune walkover will not have any lighting so as to impact turtle nesting, and will involve no vehicles except as necessary to deliver building supplies. Other secondary impacts identified in A.H. section 10.2.7(a) are not applicable.

72. The preponderance of the competent, substantial, and persuasive evidence in this proceeding established that the area in which the proposed dune walkover is to be constructed will not adversely impact the ecological value of uplands for any listed bird species of concern for nesting or foraging as set forth in A.H. section 10.2.7(b). The Project area is thickly vegetated which, as discussed previously, is not conducive for

use by shorebirds that frequent the LEICWA. The nearest documented shorebird presence is well removed from the dune walkover terminus.

73. The evidence established that the pedestrian traffic resulting from the use of the dune walkover will not disturb Wilson's Plovers, which is the only observed species that uses the "salt and pepper" vegetation between the dune walkover and the Gulf of Mexico. Any nests would, as are existing nests in the area, be marked. Wilson's Plovers are tolerant of pedestrian traffic as long as it does not directly encroach into their nesting area.

74. The suggestion that the Applicants' use of the proposed dune walkover will disrupt the habits of shorebirds observed near its terminus disregards the fact that the area is already used by the Applicants to access the beach. Furthermore, the beach itself, which is much nearer to observed bird sightings, is popular and frequently used, without restriction, by beachgoers other than the Applicants. There was no evidence that such pedestrian access along the beach adversely affects shorebirds.

75. Pedestrian access is allowed directly through areas of the LEICWA that are more thickly populated with nests of shorebird species less tolerant of pedestrian traffic than the

Wilson's Plovers. There was no evidence that such pedestrian access through the LEICWA adversely affects shorebirds.

76. As indicated previously, the open, sandy area to the east of the Project area is extensively used for nesting by large colonies of various protected shorebird species. That area is directly bounded by single and multi-family residences, and is a popular area for beach access. There was no evidence that human presence near, and pedestrian access through, the areas used by colonies of shorebirds adversely affected those shorebirds.

77. The Applicants presently drag their Hobie sailboat and kayaks across the lagoon and through the dunes. The dune walkover will allow them to simply wheel or carry those vessels across the lagoon and dunes without further impact. The evidence in this case does not support a finding that the existing pedestrian access will be increased by the dune walkover but, to the contrary, suggests that the walkover will allow access in a much less disruptive and destructive manner.

78. A.H. sections 10.2.7(c) and (d), governing, respectively, associated activities that have the potential to cause impacts to significant historical and archaeological resources and future project phases or activities, are not applicable to the proposed dune walkover.

79. The preponderance of the competent, substantial, and persuasive evidence demonstrates that there will be no adverse secondary impacts associated with the construction or use of the proposed dune walkover. The evidence introduced by Petitioners was not sufficient or persuasive to support a finding that the proposed dune walkover will cause adverse secondary impacts.

Adverse impacts to the maintenance of Minimum Flows and Levels: Rule 62-330.301(1)(g)

80. The evidence introduced by Petitioners in this case was not sufficient or persuasive to support a finding that the proposed dune walkover will cause adverse impacts to the maintenance of surface or groundwater levels or surface water flows.

Adverse impacts to a Work of the District: Rule 62-330.301(1)(h)

81. The evidence introduced by Petitioners in this case was not sufficient or persuasive to support a finding that the proposed dune walkover will cause adverse impacts to a Work of the District.

Capable of performing and functioning as proposed: Rule 62-330.301(1)(i)

82. The evidence introduced by Petitioners in this case was not sufficient or persuasive to support a finding that the proposed dune walkover will not be capable of performing and functioning as proposed.

Conducted by a person with the financial, legal and administrative capability of ensuring that the activity will be undertaken in accordance with the terms and conditions of the permit: Rule 62-330.301(1)(j)

83. The evidence introduced by Petitioners in this case was not sufficient or persuasive to support a finding that the proposed dune walkover will not be conducted by persons with the financial, legal, and administrative capability of ensuring that the proposed dune walkover will be constructed in accordance with the terms and conditions of the ERP. The legal ability to undertake the activities that are encompassed by the SSL Authorization, CCCL Permit, and CCCL Waivers are being decided herein, and their lack of finality does not constitute a failure to meet this ERP permitting criteria.

Comply with any applicable special basin or geographic area criteria: Rule 62-330.301(1)(k)

84. The evidence introduced by Petitioners in this case was not sufficient or persuasive to support a finding that the proposed dune walkover will not comply with any applicable special basin or geographic area criteria.

Public Interest Test - Section 373.414(1), Florida Statutes, Rule 62-330.302(1)(a), and A.H. Section 10.2.3

85. Section 373.414(1) provides that an applicant for an ERP must provide reasonable assurance that the permitted

activity will not cause violations of state water quality standards and that such activity is not contrary to the public interest.

86. As set forth in the discussion of rule 62-330.301(1)(e) and A.H. section 10.2.4 above, the Applicants demonstrated that the proposed dune walkover will not cause violations of state water quality standards. Furthermore, the evidence introduced by Petitioners in this case was not sufficient or persuasive to support a finding that the proposed dune walkover will cause violations of state water quality standards.

87. The seven factors that constitute the public interest test are established in section 373.414(1)(a), reiterated in rule 62-330.302(1)(a), and explained in greater detail in A.H. section 10.2.3. As set forth previously, some of the criteria would appear to have no relevance to this case. However, since Petitioners failed to provide any substantive narrowing of the issues in the JPS, it is necessary to go through each and every factor to ensure that some element of the ERP analysis required "pursuant to all applicable rules and statutes" does not go unaddressed.[5/]

Whether the activity will adversely affect the public health, safety, or welfare or the property of others: Section 373.414(1)(a)1.; Rule 62-330.302(1)(a)1.; A.H. Section 10.2.3.1

88. The evaluation of the factors for consideration under this element of the public interest test include environmental issues such as "mosquito control; proper disposal of solid, hazardous, domestic or industrial waste; aids to navigation; hurricane preparedness or cleanup; environmental remediation, enhancement or restoration; and similar environmentally related issues." The evaluation also includes impacts to shellfish harvesting areas; flooding or the alleviation of flooding on the property of others; and affects on the water table that could result in the drainage of off-site wetlands or other surface waters.

89. The evidence introduced by Petitioners in this case was not sufficient or persuasive to support a finding that the proposed dune walkover will adversely affect the public health, safety, or welfare or the property of others.

Whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats: Section 373.414(1)(a)2.; Rule 62-330.302(1)(a)2.; A.H. Section 10.2.3.2

90. A.H. section 10.2.3.2 provides that the "fish and wildlife" element of the public interest test is to be evaluated as follows:

> The Agency's public interest review of that portion of a proposed activity in, on, or over wetlands and other surface waters for impacts to "the conservation of fish and wildlife, including endangered or threatened species, or their habitats" is encompassed within the required review of the entire activity under section 10.2.2, above.

91. As set forth herein, the preponderance of the competent, substantial, and persuasive evidence demonstrates that the proposed dune walkover will not adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats.

92. Petitioners did not prove by a preponderance of competent and substantial evidence that the Applicants failed to meet the standards set forth in section 373.414(1)(a)2., rule 62-330.302(1)(a)2., and A.H. section 10.2.3.3.

> Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling: Section 373.414(1)(a)3.; Rule 62-330.302(1)(a)3.; A.H. Section 10.2.3.3

93. With regard to this element of the public interest test, A.H. section 10.2.3.3 provides, in pertinent part, that:

> In reviewing and balancing the criterion on navigation, erosion and shoaling in section 10.2.3(c), above, the Agency will evaluate whether the regulated activity located in, on or over wetlands or other surface waters will:
>
> (a) Significantly impede navigability or enhance navigability. The Agency will consider the current navigational uses of the surface waters and will not speculate on

> uses that may occur in the future. Applicants proposing to construct bridges or other traversing works must address adequate horizontal and vertical clearance for the type of watercraft currently navigating the surface waters . . . .
>
> (b) Cause or alleviate harmful erosion or shoaling . . . .
>
> (c) Significantly impact or enhance water flow . . . .

94. The only evidence of any form of vessels using the lagoon was the Applicants' act of paddling or dragging the Hobie sailboat and kayaks across the lagoon to access the navigable waters of the Gulf of Mexico. Such does not constitute "current navigational uses of the surface waters." The preponderance of the evidence in this case establishes that there is no "current" navigational use of the lagoon. No testimony or evidence was elicited that the lagoon supported any form of boating or other navigational use. No person owning property abutting the lagoon that might be affected by some restriction on their navigational rights objected to the proposed dune walkover. The evidence introduced by Petitioners in this case was not sufficient or persuasive to support a finding that the proposed dune walkover will significantly impede navigability.

95. Ms. Mills testified that "piling supported structures are used in dynamic systems all the time. Specifically you know, because they don't really have an effect on the movement

of sand." Her testimony is credited. Her testimony, combined with that of the Applicants' expert witnesses regarding the nature of the area, was sufficient to establish that the proposed dune walkover will not cause harmful erosion or shoaling. Furthermore, the evidence introduced by Petitioners in this case was not sufficient or persuasive to support a finding that the proposed dune walkover will cause erosion or shoaling.

96. The evidence introduced by Petitioners in this case was not sufficient or persuasive to support a finding that the proposed dune walkover will significantly impact or enhance water flow.

97. Petitioners did not prove by a preponderance of competent and substantial evidence that the Applicants failed to meet the standards set forth in section 373.414(1)(a)3.; rule 62-330.302(1)(a)3.; and A.H. section 10.2.3.3.

Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity: Section 373.414(1)(a)4.; Rule 62-330.302(1)(a)4.; A.H. Section 10.2.3.4

98. The evaluation of the factors for consideration under this element of the public interest test include adverse effects to sport or commercial fisheries or marine productivity, including the elimination or degradation of fish nursery habitat, change in ambient water temperature, change in normal

salinity regime, reduction in detrital export, change in nutrient levels, or other adverse effects on populations of native aquatic organisms.

99. The evidence introduced by Petitioners in this case was not sufficient or persuasive to support a finding that the proposed dune walkover will adversely affect sport or commercial fisheries or marine productivity.

100. The public interest evaluation under these regulatory provisions also includes effects on "existing recreational uses of a wetland or other surface water, which could include impacts to "the current use of the waterway for boating."

101. Other than evidence that the Applicants had to paddle or push their shallow draft sailboat and kayaks across the lagoon to reach the Gulf, there was no evidence to establish that the lagoon has any recreational use. The DEP determined that it does not, based on the fact that the lagoon is not of a permanent depth to support navigation and was intermittently (at best) connected to the Gulf of Mexico. Ms. Mills' testimony to that effect was persuasive, consistent with that of Mr. Kroemer, and is credited.

102. The standards applicable to impacts to recreational uses are directed to "existing" and "current" uses. There was no evidence of anyone currently using the lagoon for recreational boating. Mr. Rood indicated that he had never seen

anyone boating in the lagoon. There was no evidence that anyone else along the lagoon even had a boat. Mr. Kroemer, when asked if his neighbors could use the dune walkover to portage their boats across the lagoon testified that "I'm not aware that they have boats." No property owners with homes along the lagoon objected to the proposed dune walkover.

103. The evidence in this case establishes that the proposed dune walkover will not adversely affect fishing or recreational values, or marine productivity in the vicinity of the proposed Project.

Whether the activity will be of a temporary or permanent nature: Section 373.414(1)(a)5.; Rule 62-330.302(1)(a)5.; A.H. Section 10.2.3.5

104. The proposed dune walkover is intended to provide permanent access to the Gulf of Mexico, as opposed to being a temporary structure. This finding should not be conflated with whether the proposed dune walkover is an "expendable structure" for purposes of the CCCL Permit, as will be discussed herein.

Whether the activity will adversely affect or will enhance significant historical and archaeological resources: Section 373.414(1)(a)6.; Rule 62-330.302(1)(a)6.; A.H. Section 10.2.3.6

105. There was no evidence introduced by Petitioners in this case to support a finding that the proposed dune walkover will affect significant historical and archaeological resources in any manner.

The current condition and relative value of functions being performed by areas affected by the proposed activity: Section 373.414(1)(a)7.; Rule 62-330.302(1)(a)7.; A.H. Section 10.2.3.7

106. The evidence introduced by Petitioners in this case was not sufficient or persuasive to support a finding that the proposed dune walkover will adversely affect the current condition and relative value of functions being performed by the waters of and wetlands surrounding the lagoon.

107. The evidence in this case was almost entirely directed to nesting and feeding habitat of shorebirds frequenting the LEICWA. The preponderance of the evidence established that the areas affected by the proposed dune walkover are not conducive for nesting, feeding, or loafing by Snowy Plovers, American Oystercatchers, Black Skimmers, or Least Terns. The Applicants' Exhibit 6, which was relied upon by each of the parties, showed no observed sightings of those species near the lagoon or the smaller water feature. There was one observed sighting of a non-threatened Wilson's Plover near the edge of the smaller water feature, though not directly affected by the proposed dune walkover, and no observed sightings of any of the identified species of concern near the lagoon or in the waters of either water body.

108. There was no evidence that the proposed dune walkover would affect the wading birds or shorebirds photographed by Ms. Burns.

109. Petitioners did not prove by a preponderance of competent and substantial evidence that the Applicants failed to meet the standards set forth in section 373.414(1)(a)7.; rule 62-330.302(1)(a)7.; and A.H. section 10.2.3.7.

Cumulative Impacts: Section 373.414(8); Rule 62-330.302(1)(b); A.H. Sections 10.1.1(g) and 10.2.8

110. A.H. section 10.2.8 provides, in pertinent part, that:

> The impact on wetlands and other surface waters shall be reviewed by evaluating the impacts to water quality as set forth in section 10.1.1(c), above, and by evaluating the impacts to functions identified in section 10.2.2, above. If an applicant proposes to mitigate these adverse impacts within the same drainage basin as the impacts, and if the mitigation fully offsets these impacts, then the Agency will consider the regulated activity to have no unacceptable cumulative impacts upon wetlands and other surface waters, and consequently, the condition for issuance in section 10.1.1(g) will be satisfied.

111. Section 373.4136 establishes that the use of mitigation credits is sufficient to offset adverse impacts for an activity in the mitigation bank service area, and provides, in pertinent part, that:

> (6) The department or water management district shall establish a mitigation

> service area for each mitigation bank permit . . . . Except as provided herein, mitigation credits may be withdrawn and used only to offset adverse impacts in the mitigation service area. The boundaries of the mitigation service area shall depend upon the geographic area where the mitigation bank could reasonably be expected to offset adverse impacts . . . .
>
> (a) In determining the boundaries of the mitigation service area, the department or the water management district shall consider . . . at a minimum, the extent to which the mitigation bank:
>
> * * *
>
> 3. Will provide for the long-term viability of endangered or threatened species or species of special concern; [and]
>
> * * *
>
> 5. Can reasonably be expected to offset specific types of wetland impacts within a specific geographic area. . . .
>
> * * *
>
> (c) Once a mitigation bank service area has been established by the department or a water management district for a mitigation bank, such service area shall be accepted by all water management districts, local governments, and the department.

112. The Applicants have proposed mitigation in the form of the purchase of 0.01 saltwater forested mitigation bank credits and 0.01 saltwater herbaceous mitigation bank credits from the Pine Island Mitigation Bank. The proposed dune walkover is within the service area established for the Pine

Island Mitigation Bank. The mitigation credits, which were initially calculated based on a six-foot-wide dune walkover, are more than sufficient to offset any adverse impacts of the proposed five-foot-wide dune walkover on the wetlands and surface waters in the Project area.

113. Ms. Mills testified that the proposed dune walkover would have "[n]o adverse cumulative impacts because the project would be doing mitigation, with mitigation bank credits within the surface area established for the mitigation bank." Her testimony established that the statutory offset criteria is applied when a project (and a mitigation bank such as the Pine Island Mitigation Bank) is on a barrier island which, because there is no "drainage" except to the Gulf of Mexico, is not within a "drainage basin." Her testimony was persuasive, meets the statutory criteria in section 373.4136, and is accepted.

114. There are no existing permits or pending applications for similar dune walkovers in the area. Given the presence of the LEICWA to the west, applications for similar walkovers within its boundary are unlikely and, if made, would have to comply with critical wildlife area restrictions.

115. The evidence in this case establishes that the proposed dune walkover will not result in unacceptable cumulative impacts upon wetlands and other surface waters. Furthermore, Petitioners did not prove by a preponderance of

competent and substantial evidence that the Applicants failed to meet the standards set forth in section 373.414(1)(a)7.; rule 62-330.302(1)(a)7.; and A.H. section 10.2.3.7.

Elimination or Reduction of Impacts: A.H. Section 10.2.1

116. A.H. section 10.2.1 provides, in pertinent part, that:

> The following factors are considered in determining whether an application will be approved by the Agency: the degree of impact to wetland and other surface water functions caused by a proposed activity; whether the impact to these functions can be mitigated; and the practicability of design modifications for the site that could eliminate or reduce impacts to these functions, including alignment alternatives for a proposed linear system.

117. A.H. section 10.2.1.1 provides, in pertinent part, that:

> The term "modification" shall not be construed as including the alternative of not implementing the activity in some form, nor shall it be construed as requiring a project that is significantly different in type or function . . . .

118. A.H. section 10.2.1.2 provides, in pertinent part, that:

> The Agency will not require the applicant to implement practicable design modifications to reduce or eliminate impacts when:
>
> * * *

> b. The applicant proposes mitigation that implements all or part of a plan that provides regional ecological value and that provides greater long term ecological value than the area of wetland or other surface water to be adversely affected.

119. As set forth previously, the Applicants have proposed mitigation in the form of the purchase of 0.01 saltwater forested mitigation bank credits and 0.01 saltwater herbaceous mitigation bank credits from the Pine Island Mitigation Bank. The Project area is within the service area established for the Pine Island Mitigation Bank. Ms. Mills testified that "any habitat can be used for nesting and denning, I think any impacts have been offset by the mitigation." Her testimony is credited. The evidence was also sufficient to establish that the mitigation was in an amount that offsets the impacts of the proposed dune walkover on the lagoon, provides regional ecological value, and provides greater long-term ecological value than the area of the lagoon affected. Based on the Findings of Fact set forth herein, and as supported by a preponderance of the persuasive evidence adduced at the hearing, the Applicants were under no requirement to implement practicable design modifications to reduce or eliminate impacts from the proposed dune walkover.

120. Despite having no obligation to do so, the Applicants did implement practicable design modifications, resulting in a

realignment of the dune walkover to eliminate any encroachment on the LEICWA, the reduction of the width of the Project from six feet to five feet, and the elimination of features that resulted in a much lower and unobtrusive structure. The Applicants also agreed to permit conditions to implement construction methodologies to reduce impacts, and eliminate lighting that could affect adjacent habitats.

121. In addition to the foregoing, Ms. Mills testified convincingly that the boardwalk in this area would serve to minimize unrestricted and unchanneled foot traffic, and direct traffic so that people are not "using other manners that aren't specifically defined causing more adverse impacts" through natural and sandy areas. Her testimony is credited.

122. Petitioners did not prove by a preponderance of competent and substantial evidence that the Applicants failed to meet the standards set forth in A.H. sections 10.2.1 and 10.2.1.2.

Environmental Resource Permit - Ultimate Finding of Fact

123. A preponderance of the competent, substantial evidence in this case establishes that the Applicants demonstrated their entitlement to the issuance of the ERP, meeting the standards established in section 373.414, rules 62-330.301 and 62-330.302, and the applicable sections of the A.H.

Petitioners did not meet their burden of demonstrating that the ERP should not be issued.

SSL Authorization

124. The sovereignty lands at issue in this case are those that were under state ownership prior to the landward migration and attachment of the sandbar. See Fla. Admin. Code R. 18-21.003(61). The Applicants did not dispute that a SSL Authorization was appropriate.

125. The standards for issuance of an SSL Authorization, including a Letter of Consent Easement, are generally established in Florida Administrative Code Rule 18-21.004.

126. Based on the entirety of the record of this proceeding, the Applicants provided reasonable assurances that the proposed dune walkover meets the requirements for the SSL Authorization.

18-21.004(1)(a) - Contrary to the public interest

127. Rule 18-21.004(1)(a) provides that "activities on sovereignty lands must be not contrary to the public interest."

128. As established by the DEP:

> Rule 18-21.004(1)(a) requires an applicant to demonstrate that an activity proposed to be conducted on sovereignty submerged lands will not be contrary to the public interest. . . . [T]o meet this standard, it is not necessary that the applicant show that the activity is affirmatively in the "public interest, " as that term is defined in rule 18-21.003(51), Florida Administrative Code.

> Rather, it is sufficient that the applicant show that there are few, if any, "demonstrable environmental, social, and economic costs" of the proposed activity.

Defenders of Crooked Lake, Inc. v. Krista Howard and Dep't of Envt'l Prot., DOAH Case No. 17-5328, FO at 26 (Fla. DOAH July 5, 2018; Fla. DEP Aug. 16, 2018).

129. As set forth in detail previously herein, the Applicants have demonstrated, by a preponderance of the competent, substantial, and persuasive evidence in the record, that the proposed dune walkover will pose no demonstrable environmental or social costs.

130. The suggestion that the construction of the proposed dune walkover will adversely affect the economic viability of the LEICWA or the Town is, under the facts of this case, simply implausible. The facts stipulated by the parties provide that "the beach and the ecotourism generated by the potential for birdwatching is important for the Town's economy." However, the preponderance of the evidence demonstrates that the proposed dune walkover will have no effect on the use of the beach, shorebirds, or the LEICWA.

131. The fact that the proposed dune walkover is a private structure does not militate against its meeting the public interest test. As stated by Ms. Mills, "it's not contrary to the Board's public interest test because the Board has outlined

through its rule a procedure for a private homeowner to get consent through an easement to use Sovereign Submerged Lands." Her testimony is credited.

132. For the reasons set forth herein, the Applicants met the provisions of the "public interest test" established in rule 18-21.004(1)(a).

18-21.004(2) - Resource management

133. Rule 18-21.004(2)(a) provides, in pertinent part, that:

> All sovereignty lands shall be considered single use lands and shall be managed primarily for the maintenance of essentially natural conditions, propagation of fish and wildlife, and traditional recreational uses such as fishing, boating, and swimming. Compatible secondary purposes and uses which will not detract from or interfere with the primary purpose may be allowed.
>
> (b) Activities which would result in significant adverse impacts to sovereignty lands and associated resources shall not be approved unless there is no reasonable alternative and adequate mitigation is proposed.
>
> * * *
>
> (i) Activities on sovereignty lands shall be designed to minimize or eliminate adverse impacts on fish and wildlife habitat, and other natural or cultural resources. Special attention and consideration shall be given to endangered and threatened species habitat.

134. By providing a means of channeling and making the Applicants' existing access across sovereignty lands less disruptive and damaging to the lagoon, dunes, and bird species, the proposed dune walkover meets the principles that the sovereignty lands be maintained in their essentially natural conditions, and that they be conducive to the propagation of fish and wildlife.

135. The proposed dune walkover involves use of sovereignty lands to facilitate access to the waters of the Gulf of Mexico for traditional uses such as fishing, boating, and swimming.

136. The testimony of the Applicants was sufficient to demonstrate that there was no reasonable alternative to the proposed dune walkover, other than the more disruptive and destructive means of providing access to the Gulf of Mexico currently in use. Though a strong argument can be made that the proposed dune walkover has fewer impacts, and is more protective of sovereignty lands than the Applicants' existing (and lawful) means of access, sufficient mitigation was provided as described herein.

137. The Project, by virtue of steps taken to minimize its footprint to the minimum necessary to allow access by wheelchair or mobility device, to remove handrails, and by construction

methods, including construction from the decking, has been designed to minimize destruction of wetland vegetation on sovereignty lands.

138. The modifications to the Project, including the lowering of the dune walkover; elimination of handrails; the agreement to forego lighting; the steps taken to eliminate effects on water quality; and the termination of the dune walkover in a densely vegetated area not favored by shorebirds, have minimized adverse impacts on fish and wildlife habitat, including habitat for endangered and threatened species of shorebirds and marine turtles.

139. For the reasons set forth herein, the Applicants met the provisions of the "resource management" provisions established in rule 18-21.004(2).

18-21.004(3) - Riparian rights

140. Rule 18-21.004(3) provides that activities undertaken on sovereignty lands be conducted so as to not unreasonably infringe upon traditional, common law riparian rights of upland property owners adjacent to sovereignty submerged lands.

141. Section 253.141 provides that "[t]he land to which the owner holds title must extend to the ordinary high watermark of the navigable water in order that riparian rights may attach."

142. Neither the Applicants nor their neighbors hold title to the mean high water ("MHW") mark of the Gulf of Mexico.[6/]

143. The MHW line, as of December 1, 2014, was at what is generally depicted as the shoreline of the Gulf of Mexico. The two more upland water features, i.e., the lagoon and the smaller body, both labeled as "Pond" on the 2014 mean high water survey, were well landward of the MHW.

144. The lagoon, which is normally isolated from the Gulf of Mexico, is not of a depth to be routinely navigable in fact, and frequently has so little water as to require that even kayaks be dragged across, is simply not a navigable water body.

145. Pursuant to section 253.141, neither the Applicants nor their neighbors currently have riparian rights to the lagoon or the smaller feature.

146. Even if it were to be determined that the Applicants' neighbors had riparian rights to the lagoon, any restriction or infringement on traditional rights of ingress, egress, boating, bathing, and fishing would not be "unreasonable." The evidence established that adjacent upland property owners did not have vessels that would be expected to use the lagoon. There was no suggestion that the ability to traverse the lagoon to access the navigable waters of the Gulf of Mexico, much as the Applicants do now, would be affected. The proposed dune walkover would not restrict bathing or fishing, and the photographic and

testimonial evidence established not only that such activities are not engaged in as a matter of fact, but that the shallow, isolated body of water is not conducive to such activities. Finally, in determining whether any restriction on riparian rights -- even if they existed -- was "unreasonable," it is not inconsequential that no property owners fronting the lagoon objected to or challenged the proposed Project.

147. The evidence in this case established that the lagoon is not a navigable body of water. The MHW line is waterward of the lagoon, and the property lines of the Applicants and their neighbors do not extend to the MHW line. Thus, proximity to that water feature does not serve to confer "riparian" rights on them. Even if the adjacent upland property owners had riparian rights to the lagoon, under the facts of this case, any restriction on such rights created by the proposed dune walkover would not be "unreasonable." Finally, the mechanism for enforcing such rights would be with the adjacent upland owners, not Petitioners.

148. For the reasons set forth herein, the Applicants met the provisions of the "riparian rights" provisions established in rule 18-21.004(3).

18-21.004(7) - General conditions

149. As established by a preponderance of the evidence, and as previously set forth in the Findings of Fact herein, the

proposed dune walkover has been designed, and is subject to conditions as to its construction, that will avoid and minimize adverse impacts to sovereignty submerged lands and resources. Thus, the Applicants met the standards for issuance of the SSL Authorization established in rule 18-21.004(7)(d).

150. As established by a preponderance of the evidence, and as previously set forth in the Findings of Fact herein, the proposed dune walkover has been designed, is subject to conditions as to its construction, and is intended for use in a manner that will not adversely affect shorebirds or sea turtles. Thus, the Applicants met the standards for issuance of the SSL Authorization established in rule 18-21.004(7)(e).

151. As established by a preponderance of the evidence, and as previously set forth in the Findings of Fact herein, the lagoon is not a navigable body of water. Furthermore, even if it were navigable, any restriction created by the proposed dune walkover will not be "unreasonable." Finally, if the adjacent upland owners holding such riparian rights believe such rights to have been infringed, despite their not having heretofore objected to the proposed Project, and a court of competent jurisdiction determines that riparian rights have been unlawfully affected, the DEP has the authority to require that it be modified in accordance with the court's decision. Thus,

the Applicants met the standards for issuance of the SSL Authorization established in rule 18-21.004(7)(f).

152. As established by a preponderance of the evidence, and as previously set forth in the Findings of Fact herein, the proposed dune walkover will not create a navigational hazard. Unlike the "public interest" navigational standards for obtaining an ERP, the "navigational hazard" standard for obtaining a SSL Authorization pursuant to rule 18-21.004(7), though not defined, includes such things as unsafe conditions adjacent to docks and boat slips. Pirtle v. Voss and Dep't of Envtl. Prot., Case No. 13-0515 (Fla. DOAH Sep. 23, 2013; Fla. DEP Dec. 26, 2013). A mere inconvenience does not constitute the type of navigational hazard contemplated by the rule. Woolshlager v. Rockman and Dep't of Envtl. Prot., Case No. 06-3296 (Fla. DOAH May 5, 2007; Fla. DEP June 22, 2007). Since there is no proven "navigation" in the lagoon -- other than dragging or, when water levels allow, paddling small boats and kayaks across on the way to accessing the navigable waters of the Gulf of Mexico -- there is no navigational hazard created by the proposed dune walkover. Thus, the Applicants met the standards for issuance of the SSL Authorization established in rule 18-21.004(7)(g).

153. Finally, as established by a preponderance of the evidence, and as previously set forth in the Findings of Fact

herein, the proposed dune walkover has been designed, is subject to conditions as to its construction, and is intended for the water dependent purpose of traversing the lagoon to allow access to the Gulf of Mexico. Thus, the Applicants met the standards for issuance of the SSL Authorization established in rule 18-21.004(7)(i).

SSL Authorization - Ultimate Finding of Fact

154. A preponderance of the competent, substantial evidence in this case establishes that the Applicants demonstrated their entitlement to the issuance of the Letter of Consent Easement, meeting the standards established in chapter 253 and rule 18-21.

CCCL Permit

155. DEP has established a CCCL on Little Estero Island. A CCCL permit is required before a person may conduct construction activities beyond that line.

Permitting Procedures

156. In the Joint Prehearing Stipulation, Petitioners asserted that "the applicable and relevant procedures for granting a coastal construction control line permit application were not appropriately followed." However, Petitioners failed to present competent, substantial, and persuasive evidence of any failure by DEP to follow its CCCL permitting procedures. Conversely, DEP established that the project met all of the

applicable siting and design criteria, and that DEP complied with statutory and rule criteria and procedures for reviewing and issuing the CCCL Permit.

157. Petitioners have argued that the CCCL Permit should have been procedurally denied because the CCCL Waiver was timely challenged. DEP included special conditions requiring the Applicants to relinquish the CCCL Permit if the CCCL Waivers were denied. In addition, the CCCL Permit does not become final until a Notice to Proceed is issued, which is also conditioned on the CCCL Waivers becoming final.

158. Based on the fact that construction of the dune walkover cannot commence until all permits and authorizations are issued, there was no material error in procedure arising from DEP sequentially issuing the CCCL Waivers and the CCCL Permit, thus, allowing for their consolidation and litigation without unnecessary delay and duplication.

Permitting Standards

159. The Applicants have provided reasonable assurances that the proposed dune walkover meets the requirements for a permit for construction seaward of the coastal construction control line established in section 161.053, Florida Statutes, and Florida Administrative Code Chapter 62B-33.

160. The proposed dune walkover meets the requirements established by rule as a minor structure, and was designed in

accordance with DEP's Beach and Dune Walkover Guidelines. It is designed to be expendable. The size, height, and elimination of concrete anchors were proposed to minimize resistance to forces associated with high frequency storms, and to allow the dune walkover to break away when subjected to such forces. It meets every condition proposed by the DEP and the FFWCC. Its minimal size and design is expected to have a minor impact on the beach and dune system.

161. A preponderance of the evidence established that the proposed dune walkover will not cause a measurable interference with the natural functioning of the coastal system.

162. A preponderance of the evidence established that the Project, as a result of its size, profile, and location, will have no measurable affect on the existing shoreline change rate.

163. A preponderance of the evidence further established that the proposed dune walkover is not reasonably expected to significantly interfere with the ability of the coastal system to recover from a coastal storm.

164. A preponderance of the evidence established that the Project would have no measurable effect of the topography or the vegetation of the area. As such, there is no evidence to suggest that the proposed dune walkover would render the dune system unstable or subject to catastrophic failure, or that the protective value of the dune system will be significantly

lowered. To the contrary, by lessening pedestrian traffic through the dunes, and channeling traffic at its waterward point of termination, the proposed dune walkover will be protective of the dune system and the coastal system. In that regard, DEP generally encourages dune walkovers to protect the beach and dune system.

165. As a result of the elimination of lighting, of the restriction on construction during turtle nesting season, and of the Applicants' agreement to all conditions suggested by the FFWCC, the evidence firmly established that the proposed dune walkover will not, by any reasonable measure, result in death or injury to marine turtles, and will result in no significant habitat modification or degradation that kills or injures marine turtles by significantly impairing essential behavioral patterns, such as breeding, feeding, or sheltering.

166. The Project will not result in the removal or destruction of native vegetation. The evidence was sufficient to demonstrate that the Project will not destabilize the beach and dune system. As set forth herein, the greater weight of the evidence establishes that the dune walkover will provide greater protection of the beach and dune system than the Applicants' existing means of access across the lagoon and dunes. The construction of the dune walkover will cause no significant

adverse impact, as defined in rule 62B-33.002(26), to the beach and dune system due to increased erosion by wind or water.

167. The proposed dune walkover does not require any excavation. There will be no net excavation or removal of in situ sandy soils of the beach and dune system, and no net excavation of the in situ sandy soils seaward of the control line or 50-foot setback.

168. The proposed dune walkover does not include any water directing devices. The preponderance of the competent substantial evidence established that the project will not direct discharges of water seaward in a manner that would result in significant adverse impacts. The evidence established that the proposed Project will result in no erosion-induced surface water runoff within the beach and dune system.

169. The evidence establishes that, as a general matter, piling-supported structures do not have an effect on the flow of water. However, in extreme events, water encountering an obstacle can cause the movement of sand around the obstacle. The expendability of a structure and its ability to break away prevents scour from occurring and is designed to minimize impacts. The preponderance of the competent, substantial, and persuasive evidence establishes that the Project will not increase scour so as to cause a significant adverse impact, and

that any effect of the Project on the coastal processes of the area would be, at most, de minimis.

170. The design of the proposed dune walkover minimizes the amount of materials that might create debris in the event of a storm. The Applicants removed the handrails, decreased the width of the dune walkover from six feet to five feet, and eliminated pickets and non-structural members. The lowering of the dune walkover, and replacement of the stairs with a ramp that minimizes lift forces, have sufficiently reduced the potential for wind and waterborne missiles. The suggestion that the dune walkover will, in the event of a high frequency storm, form destructive airborne missiles is simply not credible.

171. Granted, the proposed dune walkover is designed to break apart in the face of destructive storm forces. If every piece of storm-generated debris was a sufficient basis upon which to deny a CCCL permit, then minor structures would be prohibited, since all minor structures are designed to be expendable and to break away in a high-frequency storm. Some degree of reason must be applied. The Applicants in this case demonstrated that the proposed dune walkover would not itself be such to create significant adverse impacts if subjected to the destructive forces of such a storm.

172. The proposed dune walkover terminates more than 260 feet from the Gulf of Mexico, and will not interfere with

the public's right to laterally traverse the sandy beach of the Gulf of Mexico.

173. The Project area is in a cycle of accretion, has historically accreted, is currently accreting at roughly 28 feet per year, and is expected to continue accreting.

174. The suggestion that, within 15 years, the shoreline of the Gulf of Mexico waterward of the Applicants' properties will retreat, and that the proposed dune walkover would thence reach into the Gulf, blocking pedestrian access to the shoreline, was not supported by quantitative analyses, and was not sufficient to outweigh evidence to the contrary presented by the Applicants. The Applicants offered an assessment and report based on past and current conditions at the monument level, which included modeling and sediment budgets showing projected changes of the Project area, none of which support a finding that the shoreline will erode or retreat, or that the proposed dune walkover would be expected to interfere with public access to the shoreline.

175. As set forth previously herein, the Project's proposed design, location, and construction methods provide reasonable assurance that there will be no adverse impact to marine turtles, or the coastal system.

176. The Applicants provided sufficient evidence of ownership, in that they are the upland owners and the recipients of the SSL Authorization, being addressed concurrently herewith.

CCCL Permit - Ultimate Finding of Fact

177. A preponderance of the competent, substantial evidence in this case establishes that the Applicants demonstrated their entitlement to the issuance of the CCCL Permit, meeting the standards established in chapter 161 and chapter 62B-33.

CCCL Waivers

178. The CCCL Waivers at issue affect the timing requirements of the submission of ownership and land use approvals. The CCCL Waivers do not waive the submission of the documents, or the requirement that the documents be provided prior to any construction of the proposed dune walkover. A preponderance of the competent substantial evidence establishes that the underlying purpose of chapter 161 and rule 62B-33.008, will be met because construction cannot begin until the Applicants satisfy all substantive requirements for the CCCL Permit.

179. At the time the CCCL Waivers were requested, the Consolidated Permit was being litigated (DOAH Case Nos. 16-7148 and 16-7149), as was the Town's denial of the land use letter requested by the Applicants to comply with the CCCL Permit

application requirement. Strict adherence to the requirement that the documents at issue be submitted at the time of the application would have required the Applicants to sequentially litigate issues related to the proposed dune walkover, increasing the time and expense of litigation on all involved.

180. Petitioners presented no evidence demonstrating how allowing the Applicants to submit the documents prior to being given a Notice to Proceed would adversely affect the Department's ability to carry out the objective of the underlying statutes, or their substantial interests in ensuring the legality of the proposed dune walkover.

181. The timing requirement for evidence of ownership and local government approval was appropriately waived to allow for the efficient and cost-effective litigation of all issues related to the proposed dune walkover. To piecemeal the litigation would unnecessarily increase the time, cost, and administrative burden of litigation for no meaningful or substantive reason, and would provide the challengers with an unwarranted litigation advantage.

182. The CCCL Waivers affect no substantive or substantial interests of any party to this case. They neither lessen the necessary indicia of ownership and control required of the Applicants, nor affect the Town's ability to lawfully enforce its local zoning codes. The waiver to the timing requirements

allows for the substantive permitting requirements to be met, without frustrating the Applicants' right to a timely final decision on the Consolidated Permit and CCCL Permit.

183. The CCCL Waiver does not allow for any construction to begin without Applicants first meeting both the ownership requirement and the local government zoning confirmation requirement. Therefore, the CCCL Waivers are consistent with the purpose and intent of the governing statutes and rules, and result in no injury to Petitioners' legitimate interests.

CCCL Waivers - Ultimate Finding of Fact

184. A preponderance of the competent, substantial evidence in this case establishes that the CCCL Waivers serve to avoid substantial hardship to the Applicants, and advance principles of fairness by maintaining a fair, equal, and cost-effective forum for litigation between the parties regarding the proposed dune walkover. As such, the Applicants demonstrated their entitlement to the issuance of the CCCL Waivers, meeting the standards established in section 120.542.

CONCLUSIONS OF LAW

Jurisdiction

185. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat.

Standing

186. Section 120.52(13) defines a "party," in pertinent part, as a person "whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party." Section 120.569(1) provides, in pertinent part, that "[t]he provisions of this section apply in all proceedings in which the substantial interests of a party are determined by an agency."

187. Standing under chapter 120 is guided by the two-pronged test established in the seminal case of Agrico Chemical Corporation v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981). In that case, the court held that:

> We believe that before one can be considered to have a substantial interest in the outcome of the proceeding, he must show 1) that he will suffer an injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury.

Id. at 482.

188. Agrico was not intended as a barrier to the participation in proceedings under chapter 120 by persons who are affected by the potential and foreseeable results of agency action. Rather, "[t]he intent of Agrico was to preclude parties from intervening in a proceeding where those parties'

substantial interests are totally unrelated to the issues that are to be resolved in the administrative proceedings." Mid-Chattahoochee River Users v. Fla. Dep't of Envtl. Prot., 948 So. 2d 794, 797 (Fla. 1st DCA 2006)(citing Gregory v. Indian River Cnty., 610 So. 2d 547, 554 (Fla. 1st DCA 1992)).

189. The standing requirement established by Agrico has been refined, and now stands for the proposition that standing to initiate an administrative proceeding is not dependent on proving that the proposed agency action would violate applicable law. Instead, standing requires proof that the petitioner has a substantial interest and that the interest reasonably could be affected by the proposed agency action. Whether the effect would constitute a violation of applicable law is a separate question.

> Standing is "a forward-looking concept" and "cannot 'disappear' based on the ultimate outcome of the proceeding." . . . When standing is challenged during an administrative hearing, the petitioner must offer proof of the elements of standing, and it is sufficient that the petitioner demonstrate by such proof that his substantial interests "could reasonably be affected by . . . [the] proposed activities."

Palm Beach Cnty. Envtl. Coal. v. Fla. Dep't of Envtl. Prot., 14 So. 3d 1076, 1078 (Fla. 4th DCA 2009) (citing Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co., 18 So. 3d 1079, 1083 (Fla. 2d DCA 2009); and Hamilton Cnty. Bd.

of Cnty. Comm'rs v. State, Dep't of Envtl. Reg., 587 So. 2d 1378 (Fla. 1st DCA 1991)); see also St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist., 54 So. 3d 1051, 1055 (Fla. 5th DCA 2011) ("Ultimately, the ALJ's conclusion adopted by the Governing Board that there was no proof of harm or that the harm would be offset went to the merits of the challenge, not to standing.").

190. Audubon alleged that it has standing since the activities proposed will have detrimental effects on the LEICWA, which it has been involved in since its creation, and which its members frequent, enjoy, and provide volunteer services.

191. Audubon's interest in threatened shorebird species that frequent the area would, as alleged, be adversely affected by the potential impacts of the dune walkover. Whether such impacts have been proven goes to the merits of this proceeding, and not to the bare issue of standing.

192. Audubon meets the second prong of the Agrico test, that is, this proceeding is designed to protect it and its members from potential adverse impacts on the public interest, including wildlife and threatened species, water quality and other alleged adverse effects caused by the proposed dune walkover, impacts that are reasonably within the ambit of chapters 373, 253, and 161, and the rules adopted thereunder.

193. The question for determination as to the first prong of the Agrico test is whether Audubon alleged injuries in fact of sufficient immediacy as a result of the proposed Project to entitle it to a section 120.57 hearing. "[T]he injury-in-fact standard is met by a showing that the petitioner has sustained actual or immediate threatened injury at the time the petition was filed, and '[t]he injury or threat of injury must be both real and immediate, not conjectural or hypothetical.'" S. Broward Hosp. Dist. v. Ag. for Health Care Admin., 141 So. 3d 678, 683 (Fla. 1st DCA 2014)(citing Vill. Park Mobile Home Ass'n v. Dep't of Bus. & Prof'l Reg., 506 So. 2d 426, 433 (Fla. 1st DCA 1987)).

194. Audubon has alleged standing as an association acting on behalf of the interests of its members. The evidence adduced at the hearing is sufficient to demonstrate its associational standing under Florida Home Builders Association v. Department of Labor and Employment Security, 412 So. 2d 351 (Fla. 1982), and its progeny.

195. As a result of the facts supporting standing, there is sufficient evidence to demonstrate that, if the adverse impacts of the proposed agency action were proven, Audubon would be adversely affected by final agency action consistent with that proposed.

196. Audubon has sufficiently alleged and offered proof of an "injury in fact which is of sufficient immediacy to entitle [it] to a section 120.57 hearing." Although Audubon's standing as to the CCCL Waiver is much more tenuous, since it has no substantive bearing on whether or when construction of the dune walkover might be allowed, it is sufficiently related to the CCCL Permit as to establish standing under a broad construction of the concept that is appropriate in this case.

197. Contrary to the environmental and natural resource issues identified by Audubon, the Town based its standing on the Town's economic dependency on tourism and ecotourism which could be disrupted by impact to the LEICWA, as well as its budget for maintenance of the beach and LEICWA. The Town's witnesses also indicated that the Town was affected by the Waiver because the DEP's proposed procedure for issuance of the CCCL Permit went "outside the normal process and could create confusion among applicants and the public," though no specific example of such was provided.

198. A municipality "must demonstrate that its substantial interests will be affected just as a natural person must." As such, the Town "must demonstrate that it will suffer an injury-in-fact which is of sufficient immediacy to entitle it to a hearing, and that the injury is within the 'zone of interest' which the proceeding is designed to protect." Furthermore, the

Town "must demonstrate that its interest exceeds the general interest of its citizens." Hamilton Cnty. v. TSI Southeast, Inc., Case No. 89-6824 (Fla. DOAH July 24, 1990; Fla. DER Sept. 7, 1990), aff'd, Hamilton Cnty. v. Dep't of Envtl. Reg., 587 So. 2d 1378 (Fla. 1st DCA 1991). The doctrine of *parens patriae* does not serve to confer standing on a municipality to participate in an environmentally based proceeding on behalf of its citizens. See Atlantic Civil, Inc. v. Fla. Power and Light Co. and Dep't of Envt'l Prot., Case No. 15-1746, FO at 25-26 (Fla. DOAH Feb. 15, 2016; Fla. DEP Apr. 21, 2016).

199. The Town did not demonstrate actual injury-in-fact or a real and immediate threat of direct injury to interests that are protected in this type of environmental permitting proceeding. Issues of economic dependency on tourism and ecotourism, and unquantified budgeting matters are not within the zone of interests to be protected in this proceeding. See Vill. of Key Biscayne v. Dep't of Envtl. Prot., 206 So. 3d 788, 791 (Fla. 3d DCA 2016); Mid-Chattahoochee River Users v. Dep't of Envtl. Prot., 948 So. 2d at 798; Agrico Chem. Co., 406 So. 2d at 482. Furthermore, issues of compliance with or confusion about the Town's zoning or land use procedures are not within the zone of interests protected by this type of proceeding. See, e.g., Council of Lower Keys v. Charley Toppino

& Sons, Inc., 429 So. 2d 67, 68 (Fla. 3d DCA 1983); Taylor v. Cedar Key Special Water and Sewerage Dist., 590 So. 2d 481 (Fla. 1st DCA 1991).

200. As a result of the foregoing, the Town has failed to demonstrate that it has standing to participate as a party to this proceeding based on the standards and precedent cited above.

201. Respondents/Applicants, Texas Hold'Em, LLC, and Squeeze Me Inn, LLC, have standing as the applicants for the permits and authorizations at issue. Ft. Myers Real Estate Holdings, LLC v. Dep't of Bus. & Prof'l Reg., 53 So. 3d 1158, 1162 (Fla. 1st DCA 2011); Maverick Media Group v. Dep't of Transp., 791 So. 2d 491, 492-493 (Fla. 1st DCA 2001).

Nature of the Proceeding

202. This is a de novo proceeding, intended to formulate final agency action and not to review action taken earlier and preliminarily. Young v. Dep't of Cmty. Aff., 625 So. 2d 831, 833 (Fla. 1993); Hamilton Cnty. Bd. of Cnty. Comm'rs v. Dep't of Envtl. Reg., 587 So. 2d at 1387; McDonald v. Dep't of Banking & Fin., 346 So. 2d 569, 584 (Fla. 1st DCA 1977).

Burden and Standard of Proof

203. Section 120.569(2)(p) provides that:

> For any proceeding arising under chapter 373, chapter 378, or chapter 403, if a nonapplicant petitions as a third party to

> challenge an agency's issuance of a license, permit, or conceptual approval, the order of presentation in the proceeding is for the permit applicant to present a prima facie case demonstrating entitlement to the license, permit, or conceptual approval, followed by the agency. This demonstration may be made by entering into evidence the application and relevant material submitted to the agency in support of the application, and the agency's staff report or notice of intent to approve the permit, license, or conceptual approval. Subsequent to the presentation of the applicant's prima facie case and any direct evidence submitted by the agency, the petitioner initiating the action challenging the issuance of the permit, license, or conceptual approval has the burden of ultimate persuasion and has the burden of going forward to prove the case in opposition to the license, permit, or conceptual approval through the presentation of competent and substantial evidence.

204. The Applicants made their prima facie case of entitlement to the ERP by entering into evidence the complete application files and supporting documentation and the DEP's Consolidated Notice of Intent to Issue Environmental Resource Permit and Letter of Consent Easement to Use Sovereign Submerged Lands. In addition, the Applicants presented the testimony of expert witnesses in support of their application. With the Applicants having made their prima facie case, the burden of ultimate persuasion is on Petitioners to prove their case in opposition to the ERP by a preponderance of the competent and

substantial evidence, and thereby prove that the Applicants failed to provide reasonable assurance that the standards for issuance of the ERP were met.

205. The SSL Authorization is governed by chapter 253. The CCCL Permit is governed by chapter 161. The CCCL Waiver is subject to chapter 120. As such, none of those forms of regulatory approval constitute a "license, permit, or conceptual approval" under chapters 373, 378, or 403. Therefore, the modified burden of proof established in section 120.569(2)(p) does not apply to the SSL Authorization, the CCCL Permit, or the CCCL Waiver. Thus, the Applicants bear the burden of demonstrating, by a preponderance of the evidence, entitlement to those authorizations. Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778, 788 (Fla. 1st DCA 1981); Save Our Creeks, Inc. v. Fla. Fish & Wildlife Conser. Comm'n, Case No. 12-3427 (Fla. DOAH July 3, 2013; Fla. DEP Jan. 14, 2014).

206. The standard of proof is preponderance of the evidence. § 120.57(1)(j), Fla. Stat.

Reasonable Assurance Standard

207. Issuance of the proposed Consolidated Permit and CCCL Permit is dependent upon there being reasonable assurance that the activities authorized will meet applicable standards.

208. Reasonable assurance means "a substantial likelihood that the project will be successfully implemented."

Metro. Dade Cnty. v. Coscan Fla., Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992). Reasonable assurance does not require absolute guarantees that the applicable conditions for issuance of a permit have been satisfied. Furthermore, speculation or subjective beliefs are not sufficient to carry the burden of presenting contrary evidence or proving a lack of reasonable assurance necessary to demonstrate that a permit should not be issued. FINR II, Inc. v. CF Indus., Inc., Case No. 11-6495 (Fla. DOAH Apr. 30, 2012; Fla. DEP June 8, 2012).

ERP Permitting Standards

209. Section 373.414(1) provides, as pertinent to the issues in this proceeding, that:

> As part of an applicant's demonstration that an activity regulated under this part will not be harmful to the water resources or will not be inconsistent with the overall objectives of the district, . . . the department shall require the applicant to provide . . . reasonable assurance that such activity in, on, or over surface waters or wetlands, as delineated in s. 373.421(1), is not contrary to the public interest . . . .
>
> (a) In determining whether an activity, which is in, on, or over surface waters or wetlands, as delineated in s. 373.421(1), and is regulated under this part, is not contrary to the public interest . . . the department shall consider and balance the following criteria:
>
> 1. Whether the activity will adversely affect the public health, safety, or welfare or the property of others;

2. Whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;

3. Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;

4. Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;

5. Whether the activity will be of a temporary or permanent nature;

6. Whether the activity will adversely affect or will enhance significant historical and archaeological resources under the provisions of s. 267.061; and

7. The current condition and relative value of functions being performed by areas affected by the proposed activity.

210. Pursuant to its rulemaking authority, DEP adopted rules 62-330.301 and 62-330.302, which establishes the standards applicable to this proceeding.

211. Rule 62-330.301(1) provides, in pertinent part, that:

(1) To obtain an individual or conceptual approval permit, an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, removal, or abandonment of the projects regulated under this chapter:

(a) Will not cause adverse water quantity impacts to receiving waters and adjacent lands;

(b) Will not cause adverse flooding to on-site or off-site property;

(c) Will not cause adverse impacts to existing surface water storage and conveyance capabilities;

(d) Will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters;

(e) Will not adversely affect the quality of receiving waters such that the state water quality standards . . . will be violated;

(f) Will not cause adverse secondary impacts to the water resources . . . . ;

(g) Will not adversely impact the maintenance of surface or ground water levels or surface water flows established pursuant to section 373.042, F.S.;

(h) Will not cause adverse impacts to a Work of the District established pursuant to section 373.086, F.S.;

(i) Will be capable, based on generally accepted engineering and scientific principles, of performing and functioning as proposed;

(j) Will be conducted by a person with the financial, legal and administrative capability of ensuring that the activity will be undertaken in accordance with the terms and conditions of the permit, if issued; and

(k) Will comply with any applicable special basin or geographic area criteria . . . .

212. Rule 62-330.302(1) provides, in pertinent part, that:

(1) In addition to the conditions in rule 62-330.301, F.A.C., to obtain an individual or conceptual approval permit under this chapter, an applicant must provide

reasonable assurance that the construction, alteration, operation, maintenance, repair, removal, and abandonment of a project:

(a) Located in, on, or over wetlands or other surface waters will not be contrary to the public interest, . . . as determined by balancing the following criteria as set forth in sections 10.2.3 through 10.2.3.7 of Volume I:

1. Whether the activities will adversely affect the public health, safety, or welfare or the property of others;

2. Whether the activities will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;

3. Whether the activities will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;

4. Whether the activities will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;

5. Whether the activities will be of a temporary or permanent nature;

6. Whether the activities will adversely affect or will enhance significant historical and archaeological resources under the provisions of section 267.061, F.S.; and

7. The current condition and relative value of functions being performed by areas affected by the proposed activities.

(b) Will not cause unacceptable cumulative impacts upon wetlands and other surface waters as set forth in sections 10.2.8 through 10.2.8.2 of Volume I.

213. The A.H. has been adopted for use by DEP and the state's five water management districts. Fla. Admin. Code R. 62-330.010(4). The A.H. was developed "to help persons understand the rules, procedures, standards, and criteria that apply to the environmental resource permit (ERP) program under Part IV of Chapter 373 of the Florida Statutes (F.S.)." A.H. § 1.0.[7/]

ERP Conclusion

214. For the reasons set forth in the Findings of Fact herein, a preponderance of the competent, substantial evidence in this case establishes that the Applicants demonstrated their entitlement to the issuance of the ERP, meeting the standards established in the cited provisions of section 373.414, rules 62-330.301 and 62-330.302, and the A.H. Petitioners did not meet their burden of demonstrating that the ERP should not be issued.

SSL Authorization Standards

215. Pursuant to its rulemaking authority, the BTIITF adopted rule 18-21.004,[8/] which establishes the applicable standards for issuance of the SSL Authorization as follows:

> The following management policies, standards, and criteria shall be used in determining whether to approve, approve with conditions or modifications, or deny all requests for activities on sovereignty submerged lands, except activities associated with aquaculture. The management

policies, standards, criteria, and fees for aquacultural activities conducted on or over sovereignty submerged lands are provided in Rules 18-21.020 through 18-21.022, F.A.C.

(1) General Proprietary.

(a) For approval, all activities on sovereignty lands must be not contrary to the public interest . . . .

* * *

(2) Resource Management.

(a) All sovereignty lands shall be considered single use lands and shall be managed primarily for the maintenance of essentially natural conditions, propagation of fish and wildlife, and traditional recreational uses such as fishing, boating, and swimming. Compatible secondary purposes and uses which will not detract from or interfere with the primary purpose may be allowed.

* * *

(i) Activities on sovereignty lands shall be designed to minimize or eliminate adverse impacts on fish and wildlife habitat, and other natural or cultural resources. Special attention and consideration shall be given to endangered and threatened species habitat.

* * *

(3) Riparian Rights.

(a) None of the provisions of this rule shall be implemented in a manner that would unreasonably infringe upon the traditional, common law riparian rights, as defined in section 253.141, F.S., of upland property owners adjacent to sovereignty submerged lands.

* * *

(c) All structures and other activities must be designed and conducted in a manner that will not unreasonably restrict or infringe upon the riparian rights of adjacent upland riparian owners.

* * *

(7) General Conditions for Authorizations. All authorizations granted by rule . . . shall be subject to the general conditions as set forth in paragraphs (a) through (i) below . . . .

* * *

(d) Structures or activities shall be constructed and used to avoid or minimize adverse impacts to sovereignty submerged lands and resources.

(e) Construction, use, or operation of the structure or activity shall not adversely affect any species which is endangered, threatened or of special concern, as listed in rules 68A-27.003, 68A-27.004 and 68A-27.005, F.A.C.

(f) Structures or activities shall not unreasonably interfere with riparian rights. When a court of competent jurisdiction determines that riparian rights have been unlawfully affected, the structure or activity shall be modified in accordance with the court's decision.

(g) Structures or activities shall not create a navigational hazard.

* * *

(i) Structures or activities shall be constructed, operated, and maintained solely for water dependent purposes, or for non-

> water dependent activities authorized under paragraph 18-21.004(1)(g), F.A.C., or any other applicable law.

SSL Authorization Conclusion

216. As established in the Findings of Fact herein, a preponderance of the competent, substantial evidence in this case demonstrates that the Applicants' proposed dune walkover is not contrary to the public interest, and does not violate standards established in chapter 253 and chapter 18-21. The evidence presented by Petitioners was not sufficient to overcome the greater weight of the evidence received from the Applicants.

CCCL Standards

217. The CCCL is a line established pursuant to provisions of section 161.053, which defines that portion of the beach-dune system subject to severe fluctuations based on a 100-year storm event. Section 161.053 authorizes CCCL lines in order to protect beach-dune systems from "imprudent construction which can jeopardize the stability of the beach-dune system, accelerate erosion, provide inadequate protection to upland structures, endanger adjacent properties, or interfere with public beach access."

218. Pursuant to section 161.053(5)(b), DEP "may not issue a permit for any structure, other than a . . . minor structure, . . . which is proposed for a location that, based on the department's projections of erosion in the area, will be seaward

of the seasonal high water line within 30 years after the date of application for the permit."

219. Section 161.053(6)(b) provides, in pertinent part, that a "'Minor structure' means pile-supported, elevated dune and beach walkover structures . . . . It shall be a characteristic of minor structures that they are considered to be expendable under design wind, wave, and storm forces." As set forth in the Findings of Fact herein, the proposed dune walkover is a "minor structure."

220. The proposed CCCL Permit is not prohibited by section 161.053(5)(b).

221. Rule 62B-33.005(2) requires an applicant to provide DEP with "sufficient information pertaining to the proposed project to show that adverse and other impacts associated with the construction have been minimized and that the construction will not result in a significant adverse impact."

222. Rule 62B-33.002(26) provides, in pertinent part, that:

> "Impacts" are those effects, whether direct or indirect, short or long term, which are expected to occur as a result of construction and are defined as follows:
>
> (a) "Adverse Impacts" are impacts to the coastal system that may cause a measurable interference with the natural functioning of the coastal system.

> (b) "Significant Adverse Impacts" are adverse impacts of such magnitude that they may:
>
> 1. Alter the coastal system by:
>
> a. Measurably affecting the existing shoreline change rate,
>
> b. Significantly interfering with its ability to recover from a coastal storm,
>
> c. Disturbing topography or vegetation such that the dune system becomes unstable or suffers catastrophic failure or the protective value of the dune system is significantly lowered, or
>
> 2. Cause a take, as defined in section 379.2431(1), F.S., unless the take is incidental pursuant to section 379.2431(1)(h), F.S.

223. The Applicants have demonstrated, by a preponderance of the competent, substantial, and persuasive evidence that the proposed dune walkover will not result in any significant adverse impacts.

224. Rule 62B-33.005(4) requires DEP to issue a permit for construction which an applicant has shown to be clearly justified by demonstrating that all standards, guidelines, and other requirements of chapter 161, part I, Florida Statutes, and chapter 62B-33 have been met, including:

> (a) The construction will not result in removal or destruction of native vegetation which will either destabilize a frontal, primary, or significant dune or cause a

significant adverse impact to the beach and dune system due to increased erosion by wind or water;

(b) The construction will not result in removal or disturbance of in situ sandy soils of the beach and dune system to such a degree that a significant adverse impact to the beach and dune system would result from either reducing the existing ability of the system to resist erosion during a storm or lowering existing levels of storm protection to upland properties and structures;

(c) The construction will not direct discharges of water or other fluids in a seaward direction and in a manner that would result in significant adverse impacts. For the purposes of this rule section, construction shall be designed so as to minimize erosion induced surface water runoff within the beach and dune system and to prevent additional seaward or off-site discharges associated with a coastal storm event;

(d) The construction will not result in the net excavation of the in situ sandy soils seaward of the control line or 50-foot setback;

(e) The construction will not cause an increase in structure-induced scour of such magnitude during a storm that the structure-induced scour would result in a significant adverse impact;

(f) The construction will minimize the potential for wind and waterborne missiles during a storm;

(g) The activity will not interfere with public access, as defined in Section 161.021, F.S.; and

> (h) The construction will not cause a significant adverse impact to marine turtles, or the coastal system.

225. The evidence firmly established that the Project would result in de minimis -- if any -- impacts to the beach and dune system. Finally, the project has been revised multiple times to minimize impacts associated with construction.

CCCL Permit Conclusion

226. As established in the Findings of Fact herein, a preponderance of the competent, substantial evidence in this case demonstrates that the Applicants' proposed dune walkover complies with the standards established in chapter 161, part I, and chapter 62B-33. The evidence presented by Petitioners was not sufficient to overcome the greater weight of the evidence received from the Applicants.

CCCL Waivers

227. Rule 62B-33.008(1)(b) and (c)[9/] provides that any person applying for a permit for construction seaward of the CCCL shall provide the following information:

> (b) Sufficient evidence of ownership including the legal description of the property for which the permit is requested. . . . Other documents submitted as evidence of ownership will be reviewed by the staff and shall be rejected if found not to be sufficient . . . .
>
> (c) Written evidence, provided by the appropriate local governmental entity having jurisdiction over the activity, that the

> proposed activity, as submitted to the Department, does not contravene local setback requirements or zoning codes.

228. Rule 62B-33.002(2)[10/] defines "Applicant" to include "the owner of record, agent, leaseholder, or holder of any legal instrument which gives the holder legal authority to undertake the construction for which a permit is sought." A SSL Authorization is a sufficient interest in property to authorize issuance of a CCCL Permit.

229. Section 120.542 provides, in pertinent part, that:

> (1) Strict application of uniformly applicable rule requirements can lead to unreasonable, unfair, and unintended results in particular instances. The Legislature finds that it is appropriate in such cases to adopt a procedure for agencies to provide relief to persons subject to regulation. . . .
>
> (2) Variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, "substantial hardship" means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. For purposes of this section, "principles of fairness" are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

230. The Applicants cannot provide the information required by rule 62B-33.008(1)(b) and (c) due to the litigation challenging the SSL Authorization brought by Petitioners, and due to litigation regarding the determination by Petitioner, Town of Fort Myers Beach, that the proposed dune walkover does not comply with the Town's Land Development Code.

231. The Applicants demonstrated that the purpose of chapter 161, by ensuring that all approvals have been obtained before construction authorized by a CCCL Permit may be undertaken, will be achieved under the conditions imposed by the CCCL Waivers. The CCCL Waivers prohibit the commencement of construction of the proposed dune walkover until evidence is received by DEP of proof of ownership and that the Project will not contravene local zoning, and the DEP issues a Notice to Proceed. Thus, the CCCL Waivers authorize no specific activity, affecting only the timing of the submission of information.

232. Strict application of the ownership and local government approval requirements in this instance would work a hardship and violate principles of fairness by allowing an active challenger to a permitted activity to prevent substantive, efficient, timely, and cost-effective disposition of the applicant's permit application and, through unnecessary delay and sequential litigation, provide an unwarranted litigation advantage to one party over the other.

233. As indicated, the various approvals at issue in this case were consolidated for purposes of fairness and efficiency. Requiring sequential litigation is substantially prejudicial to the Applicants, creating a substantial hardship, and places too great an advantage with Petitioners, thus violating principles of fairness.

CCCL Waivers Conclusion

234. As established in the Findings of Fact herein, a preponderance of the competent, substantial evidence in this case demonstrates that the issuance of the CCCL Waivers of the timing requirements of rule 62B-33.008(1)(b) and (c) protect the Applicants from a substantial hardship, limit an unfair and unwarranted advantage being provided to Petitioners, and meet the standards established in section 120.542.

Conclusion

235. Audubon alleged sufficient facts that, if proven, would establish that it will suffer an injury in fact as a result of the construction of the proposed dune walkover which is of sufficient immediacy to entitle it to a section 120.57 hearing and that its substantial injury is of a type or nature which the proceeding is designed to protect. Audubon, thus, has standing to maintain this proceeding.

236. The Town failed to allege that its substantial injury, which was limited to economic effects of the proposed

dune walkover on the Town and its budget, is of a type or nature which the proceeding is designed to protect. As a result, the Town does not have standing to maintain this proceeding.

237. Applying the standards of reasonable assurance to the Findings of Fact in this case, it is concluded that Petitioners did not meet their burden of ultimate persuasion that the proposed dune walkover, as permitted, will not meet all standards applicable to the ERP.

238. Applying the standards of reasonable assurance to the Findings of Fact in this case, it is concluded that the Applicants met their burden of demonstrating, by a preponderance of the evidence, the proposed dune walkover, as permitted, meets all standards applicable to the SSL Authorization.

239. Applying the standards of reasonable assurance to the Findings of Fact in this case, it is concluded that the Applicants met their burden of demonstrating, by a preponderance of the evidence, the proposed dune walkover, as permitted, meets all standards applicable to the CCCL Permit.

240. Applying the standards of reasonable assurance to the Findings of Fact in this case, it is concluded that the Applicants met their burden of demonstrating, by a preponderance of the evidence, that they met the standards applicable to the CCCL Waivers.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Environmental Protection;

a. enter a final order approving the Consolidated Environmental Resource Permit No. 36-0320034-001 and Letter of Consent Easement to Use Sovereign Submerged Lands No. 360239365, subject to the general and specific conditions set forth therein;

b. enter a final order approving the Permit for Construction or Other Activities Pursuant to Section 161.053, Florida Statutes, No. LE-1567, subject to the general and specific conditions set forth therein;

c. enter a final order approving the Final Order Granting Petitions for Waivers, File No. LE-1567V;

d. issue a Notice to Proceed authorizing the Applicants to commence construction of the proposed dune walkover; and

e. dismiss the petitions for hearing filed by the Town of Fort Myers Beach in each of these consolidated cases.

DONE AND ENTERED this 20th day of March, 2019, in Tallahassee, Leon County, Florida.

E. GARY EARLY
Administrative Law Judge
Division of Administrative Hearings
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1230 Apalachee Parkway
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of March, 2019.

ENDNOTES

[1/] The structure at issue has been referred to variously as a beach boardwalk, a dune walkover, an access walkway, etc. However, the ERP, SSL Authorization, CCCL Waiver, and CCCL Permit all pertain to the same structure.

[2/] Mr. Malloy was listed by DEP as a rebuttal witness, and ultimately did not testify.

[3/] The Applicants challenge Audubon and the Town's standing only as to the CCCL Waiver. DEP challenges Audubon and the Town's standing as to each of the permits and approvals at issue.

[4/] The Town also identified its ownership and interest in its stormwater management system, and indicated that it "would not like to see that all get flooded and/or further damaged due to any change in the current paradigm." Impacts to the Town's stormwater management system was not pled, was not identified in the JPS, and was not argued in the Town's post-hearing submittal.

[5/] Section 373.414(1)(a) requires that DEP "shall consider and balance" seven factors, one of which includes adverse effects on navigation. An adverse impact for one of the seven factors does

not necessarily require a determination that the Project is contrary to the public interest. Rather, all of the seven factors must be collectively considered to determine whether, on balance, a proposed project satisfies the public interest test. 1800 Atlantic Developers v. Dep't of Envtl. Reg., 552 So. 2d 946, 953, 957 (Fla. 1st DCA 1989); Last Stand, Inc. v. Fury Mgmt., Inc. and Dep't of Envtl. Prot., Case No. 12-2574 (Fla. DOAH Dec. 31, 2012; Fla. DEP Feb. 7, 2013)("Section 373.414(1)(a) directs the Department to consider and balance the following [seven] criteria.").

[6/] Properly, ordinary high water ("OHW") refers to non-tidal fresh water and mean high water ("MHW") refers to tidal marine water. As a general matter, the terms OHW and MHW are frequently used interchangeably. See, e.g. Broward Cnty. v. S. Fla. Water Mgmt. Dist. and Dep't of Envtl. Reg., DOAH Case No. 80-1048 (Fla. DOAH Oct. 13, 1982, Endnote 13; Fla. DER Jan. 20, 1983.).

[7/] The A.H. has been adopted by reference and is, therefore, a "rule" in and of itself.

[8/] Rule 18-21.004 is not cited in the JPS or in either of Petitioners' proposed recommended orders, thus leaving it to the imagination of the undersigned to decipher from the combined 140 pages of proposed findings and conclusions whether that seemingly important rule is even at issue.

[9/] Rule 62B-33.008(3)(c) and (d) was renumbered, without substantive change, to rule 62B-33.008(1)(b) and (c), effective November 28, 2018. Since the rules in effect at the time of final action on a permit are applicable, the current rule numbers will be used.

[10/] Rule 62B-33.002(4) was renumbered, without substantive change, to rule 62B-33.002(2), effective November 28, 2018.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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