STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

JOHN S. DONOVAN, DAVID H. SHERRY, AND REBECCA R. SHERRY,	)	
Petitioners,	)	
and	)	**OGC CASE NO. 18-1463**
	)	**DOAH CASE NO. 19-1844**
THOMAS WILSON	)	
Intervenor,	)	
v.	)	
CITY OF DESTIN, FLORIDA AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
Respondents.	)	

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FINAL ORDER

An Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH) on October 14, 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. Petitioners, John S. Donovan, David H. Sherry, and Rebecca R. Sherry, and Intervenor Thomas Wilson (collectively the Petitioners, or individually, Mr. Donovan, Mr. Sherry, Ms. Sherry, or Mr. Wilson) timely filed joint exceptions on October 29, 2019. The Respondents, the City of Destin (City) and DEP, each filed Responses to the Petitioners' and Intervenor's joint exceptions, on November 8, 2019.

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

BACKGROUND

On February 26, 2015, the Department issued a Consolidated Joint Coastal Permit and Sovereign Submerged Lands Authorization, Permit No. 0288799-003-JC (Permit) to the City of Destin. The Permit authorized periodic maintenance dredging of the federally authorized East Pass and Destin Harbor navigation channels. Dredged material from the first maintenance dredging event was placed at a spoil site along Norriego Point. In accordance with the Permit, "[d]redged material from subsequent maintenance dredging activities will be placed in the swash zones of the beaches east and west of East Pass, as specified in the East Pass Inlet Management Plan."

On February 2, 2018, DEP issued a Notice to Proceed (NTP) to the City, which approved the second maintenance dredging of the East Pass navigation channel, with "placement of dredged material in the swash zone east of East Pass." The NTP did not include notice of rights language. The Petitioners received a copy of the NTP on October 1, 2018, and first filed a challenge on November 30, 2018.

On March 18, 2019, Petitioners filed an Amended Petition for Administrative Hearing. On April 9, 2019, the Amended Petition was referred to DOAH.

On June 17, 2019, the City moved to dismiss the Amended Petition on the ground that the placement of dredged spoil was an issue that could have been challenged at the time the Permit was issued, and the failure to do so at that time constituted a waiver of the right to challenge the location(s) at which spoil disposal was to occur. A hearing on the motion was held on July 2, 2019, and the ALJ denied the motion by order dated July 3, 2019.

On June 28, 2019, Thomas Wilson filed a Motion for Leave to Intervene, as a Petitioner in DOAH Case No. 19-3356, which involves a challenge to a DEP permit to the United States

Army Corps of Engineers (USCOE) for the dredging of East Pass. On that same date, Petitioners filed a Motion to Consolidate this case with DOAH Case No. 19-3356. On July 8, 2019, the ALJ granted the Motion for Leave to Intervene, but denied the Motion to Consolidate. For purposes of this Recommended Order, the term Petitioners shall include Intervenor, unless the context requires a separate identification.

The Permit under review was issued under the authority of both chapters 161 and 373, Florida Statutes. However, the disputed provisions involve standards under chapter 161. Therefore, the modified burden of proof established in section 120.569(2)(p), Florida Statutes, is not applicable, and the burden is with the City, as the applicant, to demonstrate that it met the criteria for issuance of the NTP.

DOAH held the final hearing from July 29 through 31, 2019. A five-volume transcript of the final hearing was filed with DOAH on August 19, 2019. The Petitioners, with the Intervenor, and DEP each filed proposed recommended orders on September 5, 2019. On September 5, 2019, the City filed a Motion for Attorney's Fees, Expenses and Costs, by which it seeks an award pursuant to sections 120.569(2)(e) and 120.595(1). The ALJ issued his RO on October 14, 2019.

On October 29, 2019, the Petitioners timely filed joint exceptions to the RO with the Department. On November 4, 2019, the City of Destin filed with the Department a Motion to Strike Petitioners' and Intervenor's Exception No. 2 to the RO, which was not considered by the Department.[1]

[1] As explained below in response to Petitioners' Exception No. 2, the Department has final order authority over an unadopted rule challenge under section 120.57(1)(e), Florida Statutes.

SUMMARY OF THE RECOMMENDED ORDER

In the RO, the ALJ recommended that the Department enter a final order approving the February 2, 2018, NTP for the maintenance dredging of East Pass as authorized pursuant to the Consolidated Environmental Resource Permit and Sovereign Lands Authorization and denying the City of Destin's Motion for Attorney's Fees, Expenses and Costs pursuant to section 120.595(1), Florida Statutes. (RO at pp. 44-45). In doing so, the ALJ found the evidence established that the beaches east of East Pass are adjacent eroding beaches and that the beaches to the west of East Pass are not. (RO ¶¶ 51-52, 88-89). Therefore, the ALJ concluded that the sand from the dredging of East Pass must be placed on the beaches east of East Pass and that the City is entitled to the NTP. (RO ¶¶ 53, 90-91). As to the City's Motion for Attorney's Fees, the ALJ found that the Petitioners did not participate in the proceeding for an improper purpose. (RO ¶ 99).

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. (2019); *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 Cty 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 Auth. 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 Cty*, 746 So. 2d 1194, 1197 (Fla. 1st DCA 1999); *Deep*

Lagoon Boat Club, Ltd. v. Sheridan, 784 So. 2d 1140 1141-142 (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. (2019). The agency, however, 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 Cty*, 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. (2019); *Barfield,* 805 So. 2d at 1012; *Fla. Public Employee Council, v. Daniels,* 646 So. 2d 813, 816 (Fla. 1st DCA 1994).

RULINGS ON PETITIONERS' AND INTERVENOR'S JOINT EXCEPTIONS

Petitioners' Exception No. 1 regarding Paragraphs 21, 84-85 and 88-90

The Petitioners take exception to findings of fact in paragraph 21 and conclusions of law in paragraphs 84, 85, and 88 through 90 of the RO, alleging that the ALJ misinterpreted section 161.142, Florida Statutes. The Petitioners take exception to the ALJ's legal conclusions in these paragraphs that the overriding interest of the state is that sand from maintenance dredging of navigation inlets is to be placed on adjacent eroding beaches. (RO ¶ 85).

The Petitioners contend that, while labeled a finding of fact, paragraph 21 of the RO is a conclusion of law; and take exception to the ALJ's interpretation of paragraph 161.142, Florida Statutes. The Department concludes that paragraph 21 of the RO is a mixed finding of fact and conclusion of law.

The Petitioners disagree with the ALJ's findings in paragraph 21 of the RO and seek to have the Department reweigh the evidence. However, the Department is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or

judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307.

Contrary to the Petitioners' allegations, the ALJ's findings in paragraph 21 of the RO are supported by competent substantial evidence in the Permit that authorized the NTP under challenge. (Joint Exhibit 1, Specific Condition No 9). *See also* RO ¶ 19.

The Petitioners also take exception to the ALJ's conclusion of law in paragraph 21 of the RO that section 161.142, Florida Statutes, "mandates that 'maintenance dredgings of beach-quality sand are placed on the adjacent eroding beaches,' and establishes the overriding policy of the state regarding disposition of sand from navigational channel maintenance dredging." RO ¶ 21, pp. 15-16. However, the ALJ quotes from section 161.142, Florida Statutes, which mandates that "beach-quality sand [be] placed on adjacent eroding beaches." § 161.142, Fla. Stat. (2019). The Department concurs with the ALJ's interpretation of section 161.142, Florida Statutes, and rejects the Petitioners' exception to paragraph 21 of the RO.

The Petitioners take exception to the ALJ's conclusions of law in paragraphs 84 and 85 of the RO. Paragraph 84 merely quotes relevant portions of section 161.142, Florida Statutes, without any comment. Consequently, the Petitioners' exception to paragraph 84 must be rejected. Paragraph 85 of the RO contains the ALJ's interpretation that under section 161.142, Florida Statutes, the overriding interest of the state is to ensure that "maintenance dredging of navigation inlets is to be placed on adjacent eroding beaches." RO ¶ 85. *See also* § 161.142, Fla. Stat. (2019). The Department concurs with the ALJ's interpretation of section 161.142, Florida Statutes, and rejects the Petitioners' exception to paragraphs 84 and 85 of the RO.

The Petitioners also take exception to paragraphs 88 through 90 of the RO, which read:

> 88. The evidence in this case established conclusively that the beaches east of East Pass are adjacent eroding beaches.

89. The evidence in this case established conclusively that the beaches west of East Pass are not adjacent eroding beaches.

90. To be compliant with section 161.142, sand from the dredging of East Pass must be placed on the beaches east of East Pass.

RO ¶¶ 88-90.

The Department concludes that paragraphs 88 and 89 are mixed findings of fact and conclusions of law. The Petitioners disagree with the ALJ's findings that the beaches east of East Pass are highly eroded and constitute "adjacent eroding beaches" to East Pass on which spoil from dredging East Pass must be placed in accordance with section 161.142, Florida Statutes. Consequently, the Petitioners seek to have the Department reweigh the evidence. However, the Department is not authorized to reweigh evidence presented at a DOAH final hearing. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623.

Contrary to the Petitioners' exceptions, the ALJ's mixed findings of fact and conclusions of law in paragraphs 88 through 90 of the RO are supported by competent substantial evidence. Matthew Trammel presented competent substantial evidence at the hearing that the beaches east of East Pass are critically eroded, and that the beaches west of East Pass are not critically eroded. (Trammel, T. Vol. 1, pp. 40-43). The Department concurs with the ALJ's interpretation of section 161.142, Florida Statutes; and thus, rejects the Petitioners exceptions to paragraphs 88 through 90 of the RO.

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

Petitioners' Exception No. 2 regarding Paragraphs 24-25 and 81-83

The Petitioners take exception to the findings of fact in paragraphs 24 and 25 (which they identify as conclusions of law) and the conclusions of law in paragraphs 81 through 83 of the RO alleging that the IMP for the East Pass Inlet is an unadopted rule.

Chapter 120, Florida Statutes, provides two avenues for pursing an argument that an agency is acting pursuant to an unadopted rule: Section 120.56, Florida Statutes, and Section 120.57(1)(e), Florida Statutes. *See Saunders v. Florida Dep't of Children & Families*, 185 So. 3d 1298, 1300-1301 (Fla. 1st DCA 2016). This proceeding is a consolidated challenge to DEP's NTP and allegations that the IMP for the East Pass Inlet is an unadopted rule as described in section 120.57(1)(e), Florida Statues. RO Statement of the Issues, p. 2. Section 120.57, Florida Statutes, authorizes an ALJ to consolidate an unadopted rule challenge with a challenge to another final agency action, as was done in this proceeding. *See* § 120.57(1)(d), Fla. Stat. (2019).

Section 120.57(1)(e), Florida Statutes, provides an agency with jurisdiction regarding an unadopted rule when the ALJ issues a RO containing an unadopted rule challenge with another final agency action. Section 120.57(1)(e)4. reads as follows:

> (1)(e)4. The recommendation and final orders in any proceedings shall be governed by paragraphs (k) and (l), except that the administrative law judge's determination regarding an unadopted rule under subparagraph 1. or subparagraph 2. shall not be rejected by the agency unless the agency first determines from a review of the complete record, and states with particularity in the order, that such determination is clearly erroneous or does not comply with essential requirements of law. In any proceeding for review under s. 120.68, if the court finds that the agency's rejection of the determination regarding the unadopted rule does not comport with this subparagraph, the agency action shall be set aside and the court shall award to the prevailing party the reasonable costs and a reasonable attorney fee for the initial proceeding and the proceeding for review.

§ 120.57(1)(e)4., Fla. Stat. (2019) (emphasis added). Based on the statutory language above, the Department has jurisdiction regarding an unadopted rule, and may reject the ALJ's determination

if the agency finds it to be "clearly erroneous or does not comply with essential requirements of law." Id.

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,* 805 So. 2d at 1012; *L.B. Bryan & Co.,* 746 So. 2d at 1197; *Deep Lagoon Boat Club, Ltd.,* 784 So. 2d at 1141-142. 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*, 952 So. 2d at 1225.

The Department concludes that paragraphs 24 and 25 are findings of fact and not conclusions of law. Findings of fact include "ultimate facts," sometimes termed mixed questions of law and fact, necessary to determine the issues in a case. *Costin v. Florida A & M University Bd. of Trustees*, 972 So. 2d 1084, 1086-1087 (Fla. 5th DCA 2008). Whether a given set of facts constitutes the violation of a rule or statute has been held to be a question of ultimate fact that an agency may not reject if it is supported by competent substantial evidence. *Pillsbury v. State, Dep't of Health & Rehabilitative Services*, 744 So. 2d 1040, 1042 (Fla. 2d DCA 1999).

The Petitioners disagree with the ALJ's findings and seek to have the Department reweigh the evidence. However, the Department is not authorized to reweigh evidence presented at a DOAH final hearing. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307.

The ALJ's findings in paragraph 24 of the RO are supported by competent substantial evidence in the form of expert testimony and the express language of the IMP for the East Pass Inlet, which was accepted into evidence as Joint Exhibit 4. (Clark, T. Vol. 3, pp. 295-96; Joint Exhibit 4).

The ALJ's findings in paragraph 25 of the RO are also supported by competent substantial evidence in the form of expert testimony and the express language of the IMP for the East Pass Inlet. (Clark, T. Vol. 3, p. 296; Joint Exhibit 4). In fact, part of the finding is a direct quote from Strategy 1 of the IMP for the East Pass Inlet. (Joint Exhibit 4, p. 2).

The Department does find that the last two sentences of paragraph 25 are conclusions of law regarding the Petitioners' allegations that the NTP relies on an unadopted rule. However, the Department concludes that the ALJ's conclusions in the last two sentences of paragraph 25 of the RO comply with the essential requirements of law and are not clearly erroneous pursuant to section 120.57(1)(e)4, Florida Statutes. Consequently, the Department does not reject the findings of fact or conclusions of law in paragraphs 24 and 25 of the RO.

The Petitioners also take exception to the conclusions of law in paragraphs 81 through 83 of the RO. The Department concludes that paragraphs 81 and 82 are findings of fact and not conclusions of law. Findings of fact include "ultimate facts," sometimes termed mixed questions of law and fact, necessary to determine the issues in a case. *Costin*, 972 So. 2d at 1086-87. Whether a given set of facts constitutes the violation of a rule or statute has been held to be a question of ultimate fact that an agency may not reject if it is supported by competent substantial evidence. *Pillsbury*, 744 So. 2d at 1042.

The Petitioners disagree with the ALJ's findings and seek to have the Department reweigh the evidence. However, the Department is not authorized to reweigh evidence presented at a DOAH final hearing. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307.

The ALJ's findings in paragraphs 81 and 82 of the RO are supported by competent substantial evidence in the form of expert testimony and the express language of the IMP for the East Pass Inlet, which was accepted into evidence as Joint Exhibit 4. (Clark, T. Vol. 3, pp. 283-

85, 326; Joint Exhibit 4). Specifically, the ALJ's conclusion that the IMP for the East Pass Inlet does not establish specific target quantities for placement to the east or west is an accurate reading of the IMP. (Clark, T. Vol. 3, p. 326; Joint Exhibit 4). Likewise, the ALJ's conclusion that placement sites and volume be based on data obtained from a monitoring protocol is an accurate reading of Strategies 1 and 2 of the IMP for the East Pass Inlet. (Clark, T. Vol. 3, p. 326; Joint Exhibit 4).

The Department does find that paragraph 83 of the RO contains conclusions of law regarding the Petitioners' allegations that the NTP relies on an unadopted rule. However, the Department concludes that the ALJ's conclusions in paragraph 83 of the RO comply with the essential requirements of law and are not clearly erroneous pursuant to section 120.57(1)(e)4, Florida Statutes. Consequently, the Department does not reject the conclusions of law in paragraph 83 of the RO.

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

Petitioners' Exception No. 3 regarding Paragraphs 29-34, 51-52 and 88-89

The Petitioners take exception to the findings of fact in paragraphs 29 through 34, and 51 through 52, and the conclusions of law in paragraphs 88 through 89 of the RO. The Petitioners contend that the ALJ should not have accepted the findings in paragraphs 29 through 34, and 51 through 52 that the shoreline east of East Pass is critically eroded and constitutes "adjacent eroding beaches" to East Pass. The Petitioners also contend that the ALJ should not have accepted the findings in paragraphs 29 through 34, and 51 through 52 that the shoreline west of East Pass is stable, if not accreting, and is not an "adjacent eroding beach" to East Pass. The Petitioners describe in detail alternative findings that they allege the ALJ should have made instead. However, the Department has no authority to make independent or supplemental

findings of fact to those made by the ALJ. *See, e.g., North Port, Fla.,*645 So. 2d at 487*; Fla. Power & Light Co.,* 693 So. 2d at 1026-1027.

The Petitioners disagree with the ALJ's findings that the beaches east of East Pass are highly eroded and constitute "adjacent eroding beaches" to East Pass, and that the beaches west of East Pass are stable or accreting, and thus not an "adjacent eroding beach" to East Pass. Consequently, the Petitioners seek to have the Department reweigh the evidence. However, the Department is not authorized to reweigh evidence presented at a DOAH final hearing. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623.

The Petitioners take exception to paragraphs 88 and 89 of the RO, which read, as follows:

> 88. The evidence in this case established conclusively that the beaches east of East Pass are adjacent eroding beaches.
> 89. The evidence in this case established conclusively that the beaches west of East Pass are not adjacent eroding beaches.

RO ¶¶ 88-89. The Department concludes that paragraphs 88 and 89 of the RO are mixed findings of fact and conclusions of law.

Contrary to the Petitioners' exceptions, the ALJ's findings of fact in paragraphs 29 through 34, 51 through 52, and 88 through 89 of the RO are supported by competent substantial evidence. Matthew Trammel presented competent substantial evidence at the hearing that the beaches east of East Pass are critically eroded, and that the beaches west of East Pass are stable, if not accreting. (Trammel, T. Vol. 1, pp. 40-43). The Department also concurs with the ALJ's interpretation of section 161.142, Florida Statutes. Therefore, the Department rejects the Petitioners exceptions to paragraphs 29 through 34, 51 through 52, and 88 through 89 of the RO.

Based on the foregoing reasons, the Petitioners' Exception No. 3 is denied.

Petitioners' Exception No. 4 regarding Paragraphs 28, 30, 32 and 51

The Petitioners take exception to the ALJ's use of the phrase "critically eroded" in the findings of fact in paragraphs 28, 30, 32, and 51 of the RO. The Petitioners allege that the ALJ's use of the phrase "critically eroded" arises from a definition in DEP's Beach Management Funding Assistance Program in chapter 62B-36, Florida Administrative Code, which they allege is irrelevant to this proceeding. The definition identified by the Petitioners in subsection 62B-36.002(5), Florida Administrative Code, defines a "critically eroded shoreline." However, the ALJ did not use the term "critically eroded shoreline" or reference chapter 62B-36 in paragraph 28, 30, 32, or 51 of the RO.

Moreover, 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. (2019); *Charlotte Cty*, 18 So. 3d at 1087; *Wills*, 955 So. 2d at 62. The Petitioners fail to allege either basis for challenging the findings of fact in paragraphs 28, 30, 32, and 51 of the RO. Even if the Petitioners had alleged that the findings in paragraphs 28, 30, 32, and 51 were not supported by competent substantial evidence, their argument still would fail. The ALJ's findings of fact in paragraphs 28, 30, 32, and 51 are supported by competent substantial evidence in the form of expert testimony and exhibits.

The Petitioners disagree with the ALJ's findings that the beaches east of East Pass are highly eroded and constitute East Pass' "adjacent eroding beaches," on which spoil from dredging East Pass must be placed in accordance with section 161.142, Florida Statutes. Consequently, the Petitioners seek to have the Department reweigh the evidence. However, the

Department is not authorized to reweigh evidence presented at a DOAH final hearing. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623.

Contrary to the Petitioners' exception, the ALJ's findings of fact in paragraphs 28, 30, 32, and 51 of the RO are supported by competent substantial evidence in the form of expert testimony and exhibits. Matthew Trammel presented competent substantial evidence at the hearing that the beaches east of East Pass are critically eroded, and that the beaches west of East Pass are not critically eroded. (Trammel, T. Vol. 1, pp. 40-43; Edwards, T. Vol. 4, pp. 478-498; Joint Ex. 4, pp. 6-7). These findings were also supported by competent substantial evidence, as summarized in paragraph 34 of the RO:

> 34. The data submitted by the City of DEP in support of the Request included monitoring data for the eastern beach placement areas from the West Destin Four-Year Post-construction Monitoring Report **[Joint Exhibit 5]** and earlier annual post-construction reports **[Destin Exhibits 11, 12, 14]** covering the period from October 2012 to July 2017, and additional data from the Holiday Isle Emergency Beach Fill Two-Year Post-construction Report **[DEP Exhibit 1]**. DEP was also provided with historical monitoring data from the area west of East Pass, including the Western Beach Monitoring Report, which covered 2006 to 2017 **[Joint Exhibits 5-6]**, and the Potential Borrow Area Impact Report **[Destin Exhibit 10]**, which included data from 1996 through 2012. DEP has also received recent profile data from April 2019. These reports, and the data contained within them, cumulatively provide more than 20 years of survey data, and demonstrate convincingly, that the shoreline to the west of East Pass has been stable or accreting, and the areas to the east are eroded.

RO at ¶ 34 (with exhibits added).

The ALJ's findings of fact in paragraphs 28, 30, 32, and 51 are also supported by competent substantial evidence in the form of the following expert testimony and exhibits: photographs of the eastern and western beaches (Destin Exhibits 17-19), the analysis in the City

of Destin's Request for Notice to Proceed (Joint Exhibit 7), and testimony by the City's and DEP's witnesses. (Trammel, T. Vol. 1, pp. 60-64, 72-89, and 93-115; Trudnak, T. Vol. 2, pp. 255-257; Clark, T. Vol. 3, pp. 296-302).

Based on the foregoing reasons, the Petitioners' Exception No. 4 is denied.

Petitioners' Exception No. 5 regarding Paragraphs 36-39 and 50

The Petitioners take exception to the findings of fact in paragraphs 36 through 39 and 50 of the RO. The Petitioners allege that the City did not meet the requirements of the Permit (which is final and not under challenge) with respect to the timeliness of the beach monitoring data required by the Physical Monitoring Plan (PMP).

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. (2019); *Charlotte Cty*, 18 So. 3d at 1087; *Wills*, 955 So. 2d at 62. The Petitioners fail to allege either basis for challenging the findings of fact in paragraphs 36 through 39 and 50 of the RO. Even if the Petitioners had alleged that these findings were not supported by competent substantial evidence, their argument still would fail, because paragraphs 36 through 38 and 50 of the RO are supported by competent substantial evidence.

The Petitioners disagree with the ALJ's findings and seek to have the Department reweigh the evidence. However, the Department is not authorized to reweigh evidence presented at a DOAH final hearing. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623.

Contrary to the Petitioners' exception, the ALJ's findings of fact in paragraphs 36 through 39 and 50 are supported by competent substantial evidence in the form of expert testimony and exhibits. (Clark, T. Vol. 3, pp. 296-98; Joint Exhibits 5-7; City of Destin Exhibits 8, 11, 12, 14; DEP Exhibit 1). Moreover, as noted by the ALJ in paragraph 37 of the RO, the Petitioners acknowledge in their Proposed Recommended Order (PRO) that the beach restoration monitoring report was timely when the Request for NTP was submitted to DEP. Petitioners' PRO ¶ 66, pp. 21-22.

These findings were also supported by competent substantial evidence, as summarized in paragraph 34 of the RO:

> 34. The data submitted by the City of DEP in support of the Request included monitoring data for the eastern beach placement areas from the West Destin Four-Year Post-construction Monitoring Report **[Joint Exhibit 5]** and earlier annual post-construction reports **[Destin Exhibits 11, 12, 14]** covering the period from October 2012 to July 2017, and additional data from the Holiday Isle Emergency Beach Fill Two-Year Post-construction Report **[DEP Exhibit 1]**. DEP was also provided with historical monitoring data from the area west of East Pass, including the Western Beach Monitoring Report, which covered 2006 to 2017 **[Joint Exhibits 5-6]**, and the Potential Borrow Area Impact Report **[Destin Exhibit 10]**, which included data from 1996 through 2012. DEP has also received recent profile data from April 2019. These reports, and the data contained within them, cumulatively provide more than 20 years of survey data, and demonstrate convincingly, that the shoreline to the west of East Pass has been stable or accreting, and the areas to the east are eroded.

RO at ¶ 34 (with exhibits added).

Moreover, paragraph 50 of the RO is the ALJ's ultimate factual conclusion that, based on the totality of the evidence presented at the final hearing, the "greater weight of the competent substantial evidence establishes that the City submitted physical monitoring data consistent with the requirements of Specific Condition 9" of the Permit that is final and not under challenge. RO ¶ 50, p. 26. As discussed above, the ALJ's findings of fact in paragraphs 36 through 39 regarding the data submitted in support of the NTP are supported by competent substantial

evidence. As such, the Department does not have the authority to modify or reject the ALJ's ultimate factual determination in paragraph 50 of the RO by interpreting the evidence or drawing inferences in a manner that is different from reasonable interpretations made and inferences drawn by the ALJ. *See, e.g., Heifetz,* 475 So. 2d at 1281.

Based on the foregoing reasons, the Petitioners' Exception No. 5 is denied.

Petitioners' Exception No. 6 regarding Paragraphs 11-12, and 13

The Petitioners take exception to findings of fact in paragraphs 11, 12, and 13 of the RO. The Petitioners allege that the weight of the evidence adduced at the final hearing is inconsistent with the ALJ's findings in paragraphs 11, 12, and 13 of the RO, which the Petitioners summarize as follows: there is "no predominate lateral current transporting sand in a westerly direction." (RO ¶ 13). The ALJ concluded paragraph 13 of the RO by stating "Evidence to the contrary was not persuasive."

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. (2019); *Charlotte Cty*, 18 So. 3d at 1087; *Wills*, 955 So. 2d at 62. The Petitioners fail to allege either basis for challenging the findings of fact in paragraphs 11 through 13 of the RO. Even if the Petitioners had alleged that the findings in paragraphs 11 through 13 were not supported by competent substantial evidence, their argument still would fail. The ALJ's findings of fact in paragraphs 11 through 13 are supported by competent substantial evidence in the form of expert testimony.

The Petitioners disagree with the ALJ's findings and seek to have the Department reweigh the evidence. However, the Department is not authorized to reweigh evidence presented at a DOAH final hearing. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If

there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623.

Contrary to the Petitioners' exception, the ALJ's findings of fact in paragraphs 11 through 13 are supported by competent substantial evidence in the form of expert testimony. (Trammel, T. Vol. 1, pp. 50, 93; Clark, T. Vol. 3, pp. 318-19; Trammel, T. Vol. 5, pp. 569-70, 572-73, 576, 581, 588-89; Joint Exhibit 4 and 9).

Moreover, the ALJ's decision in paragraph 11 of the RO that the City of Destin's PMP is not subject to challenge in this case, is an evidentiary ruling that is within the ALJ's exclusive jurisdiction. Evidentiary-related matters are within the province of the ALJ, as the "fact-finder" in administrative proceedings. *See e.g., Tedder v. Fla. Parole Comm'n,* 842 So. 2d 1022, 1025 (Fla. 1st DCA 2003); *Heifetz v. Dep't of Bus. Regulation*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985).

Based on the foregoing reasons, the Petitioners' Exception No. 6 is denied.

Petitioners' Exception No. 7 regarding Paragraph 4

The Petitioners take exception to findings of fact in paragraph 4 of the RO, alleging that "Petitioners' stated injuries are not just related to allegations that 'the lateral movement of sand from the East Pass areas of influence is from east to west,' nor are Petitioners allegations limited to impacts in front of their properties." Petitioners' Exception No. 7, pp. 18-20 (emphasis added).

The Petitioners are improperly requesting that the Department add additional findings of fact regarding their alleged injuries. However, an agency has no authority to make independent or supplemental findings of fact. *See, e.g., North Port, Fla.,*645 So. 2d at 487*; Fla. Power & Light Co.,* 693 So. 2d at 1026-1027.

The ALJ identified the Petitioners' stated injuries based on the testimony of the witnesses at the final hearing. The Department 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*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307; *Dunham*, 652 So. 2d at 896. 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 or additional findings. *See, e.g., Arand Constr. Co.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623.

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. (2019); *Charlotte Cty*, 18 So. 3d at 1087; *Wills*, 955 So. 2d at 62. The Petitioners fail to allege either basis for challenging the findings of fact in paragraph 4 of the RO. Even if the Petitioners had alleged that the findings in paragraph 4 were not supported by competent substantial evidence, their argument still would fail. Contrary to the Petitioners' exception, the ALJ's findings of fact in paragraph 4 are supported by competent substantial evidence in the form of expert testimony. (Walton, T. Vol. 4, pp. 510, 514; Donovan, T. Vol. 5, pp. 564, 566).

The competent substantial evidence in support of the ALJs findings of fact in paragraph 4 of the RO, can be summarized as follows: The Petitioners allege that "sand flows naturally from east to west," and any taking of sand from the East Pass Inlet and placing it to the east would deprive "their beaches" of their "natural sand supply" by cutting off what they believe is "the natural sand flow." (Walton, T. Vol. 4, pp. 510, 514; Donovan, T. Vol. 5, p. 564). The Petitioners are afraid that if this "natural sand supply" is cut off, the beaches that abut their properties will eventually erode. (Walton, T. Vol. 4, p. 510, Donovan, T. Vol. 5, p. 564). The

Petitioners commenced this proceeding not because of any immediate environmental injuries associated with the activities authorized by the NTP, but because they want to obtain the benefit of East Pass sand for the beaches abutting their properties. The Petitioners testified that their objective in bringing this litigation is to get 100 percent of the sand dredged from the pass to "go west" at all times. (Donovan, T. Vol. 5, p. 566).

Based on the foregoing reasons, the Petitioners' Exception No. 7 is denied.

Petitioners' Exception No. 8 regarding Paragraphs 41, 42 and 65

The Petitioners' take exception to findings of fact in paragraphs 41 and 42 of the RO, alleging that paragraphs 41 and 42 are really conclusions of law. Specifically, the Petitioners take exception to the ALJ's finding in paragraph 41 "that placing dredged material on the eastern side of East Pass would not result in erosion on the western side of East Pass." (RO ¶ 41). Upon reviewing paragraphs 41 and 42 of the RO, the Department concludes that the ALJ's statements are findings of fact and not conclusions of law.

The Petitioners improperly request that the Department reweigh the evidence presented at the final hearing. A reviewing agency may not reweigh the evidence presented at a DOAH final hearing. *See e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307 (An agency is not authorized to interpret the evidence to fit its desired ultimate conclusion). Evidentiary-related matters are within the province of the ALJ, as the "fact-finder" in administrative proceedings. *See e.g., Tedder,* 842 So. 2d at 1025; *Heifetz*, 475 So. 2d at 1281.

An 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 his decision. *See e.g., Peace River/Manasota Reg'l Water Supply Auth.*, 18 So. 3d at 1088; *Collier Med. Ctr.*, 462 So. 2d at

85; *Fla. Chapter of Sierra Club*, 436 So. 2d at 389. In addition, the Department is not authorized to label what is essentially an ultimate factual determination as a "conclusion of law" to modify or overturn what the Petitioners may view as unfavorable findings of fact. *See, e.g., Stokes*, 952 So. 2d at 1225.

Contrary to the Petitioners' exception, the ALJ's findings of fact in paragraphs 41 and 42 are supported by competent substantial record evidence, including testimony from the Petitioners' own expert, Dr. Walton. Dr. Walton described the western deposit site as being protected and having the effect of being sheltered from the overall sediment transport he stated existed, because it was in the "shadow" of the jetty at the western edge of the East Pass Inlet. This jetty is clearly visible on Joint Exhibit 11. As a result of that jetty, Dr. Walton testified the material at this location, west of the inlet, would stay in place because of the jetty's shadow effect. (Walton, T. Vol. 4, pp. 471-72, 473, 476-77). This shadow effect was corroborated by Destin's witness Mr. Trammell, who testified that material placed west of the jetty tends to stay in that area. (Trammell, T. Vol. 1, pp. 91-92). Mr. Trammell also testified that placing dredged material on the eastern side of East Pass would not result in erosion on the western side of East Pass. (Trammell, T. Vol. 1, pp. 91-92).

The Petitioners also take exception in the last paragraph of Exception No. 8 to the statement in paragraph 65 of the RO that states "Petitioners wholly failed to prove at the hearing that the NTP as issued would – or could – result in actual or immediate threatened injury to their property or their ability to use and enjoy the beaches west of East Pass." RO at 65. The Department concludes that paragraph 65 of the RO contains mixed statements of fact and law. The Petitioners base their exception to paragraph 65 of the RO "on the evidence adduced at hearing regarding the direction of longshore transport [of sand] at East Pass." (Petitioners'

Exception No. 8, p. 21). The Petitioners improperly request that the Department reweigh the evidence presented at the final hearing, which the Department is prohibited from doing for the reasons previously explained above. The last sentence in paragraph 65 of the RO is supported by the competent substantial evidence cited in the paragraph immediately above. Therefore, the Department must accept the ALJ's findings in the last sentence of paragraph 65 of the RO, because they are supported by competent substantial record evidence.

In paragraph 65 of the RO, the ALJ identified facts that questioned whether the Petitioners demonstrated at the DOAH hearing that they had standing to challenge the NTP. Specifically, the ALJ found:

> There was little or no competent, substantial, and persuasive evidence to support a finding that even a grain of sand deposited on the western disposal site would ever make its way to their property and, if it managed to do so, the journey would take years. Thus, despite their allegations, Petitioners wholly failed to prove at the hearing that the NTP as issued would – or could – result in actual or immediate threatened injury to their property or their ability to use and enjoy the beaches west of East Pass.

RO ¶ 65. Accordingly, the Petitioners standing to participate in this case should technically be denied at this stage of these proceedings under the *Agrico* rationale. *See Agrico Chem. Co. v. Dep't of Envtl Reg.*, 406 So. 2d 478, 481-82 (Fla. 2d DCA 1981).

Nevertheless, the DOAH record reflects that the ALJ afforded the Petitioners all the rights provided by the Administrative Procedures Act (APA) to a party claiming his substantial interests would be affected by the DEP action being challenged in this case. During the DOAH hearing, the Petitioners presented arguments, testimony, and documentary evidence in support of the merits of their claims. The Petitioners filed a Proposed Recommended Order and Exceptions to the RO; and, these Exceptions have been addressed on their merits in this Final Order.

Consequently, since the Petitioners' claims were litigated on their merits in the DOAH hearing and are addressed in this Final Order, the issue of their standing is essentially moot at this administrative stage of these proceedings. *See Hamilton Cty. Bd. of Cty. Comm'rs v. Dep't of Envtl. Reg.*, 587 So. 2d 1378, 1383 (Fla. 1st DCA 1991) (concluding that the issue of Hamilton County's standing to challenge a DER permitting action was moot on appellate review because the "issues were fully litigated in the proceedings below"); *Suncoast Waterkeeper, Inc., v. Long Bar Point, LLLP and Dep't of Envtl. Prot.,* DOAH Case Nos. 17-0795 and 17-0796 (Fla. DOAH March 6, 2018; DEP April 27, 2018) (concluding that the issue of Suncoast Waterkeeper's standing was moot, because its substantive claims had been litigated on their merits at the DOAH final hearing); *Okaloosa Cty. v. Dep't of Envtl. Reg.*, ER F.A.L.R. 1992: 032, p. 6 (Fla. DER 1992) (concluding that, from a practical standpoint, the issue of Okaloosa County's standing was moot, because the County's substantive claims had been litigated on their merits at the DOAH final hearing).[2]

Based on the foregoing reasons, the Petitioners' Exception No. 8 is denied.

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;

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[2] In paragraph 66 of the RO, the ALJ concluded that the Petitioners had standing "based on the broad grant of standing as established in *Palm Beach County Environmental Coalition* and further discussed in *Bluefield Ranch Mitigation Bank Trust*," and "on the policy that it is best to have cases heard on their merits when possible." RO ¶ 66.

B. Consolidated Environmental Resource Permit and Sovereign Submerged Lands Authorization No. 50-0126380-005-EI and State-owned Lease No. 0288799-003-JC are APPROVED, subject to the general and specific conditions set forth therein; and

C. The City of Destin's Motion for Attorney's Fees, Expenses and Costs pursuant to section 120.595(1), Florida Statutes, is DENIED.

JUDICIAL REVIEW

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

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

DONE AND ORDERED this 20th day of November, 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.

Shaleia Knsey
Deputy CLERK

11/20/19
DATE

CERTIFICATE OF SERVICE

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

D. Kent Safriet, Esq. Joseph A. Brown, Esq. Hopping Green & Sams 119 S. Monroe St., Suite 300 Tallahassee, FL 32301 kents@hgslaw.com josephb@hgslaw.com	Kenneth G. Oertel, Esq. Timothy J. Perry, Esq. Oertel, Fernandez, Bryant and Atkinson, P.A. PO Box 1110 Tallahassee, FL 32302 koertel@ohfc.com tperry@ohfc.com
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this 20th day of November, 2019.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOHN S. DONOVAN, DAVID H. SHERRY, AND REBECCA R. SHERRY,

Petitioners,

and

THOMAS WILSON,

Intervenor,

vs. Case No. 19-1844

CITY OF DESTIN, FLORIDA AND DEPARTMENT OF ENVIRONMENTAL PROTECTION

Respondents.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on July 29 through 31, 2019, in Tallahassee, Florida, before E. Gary Early, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioners David H. Sherry, Rebecca R. Sherry, and John S. Donovan:

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Joseph A. Brown, Esquire
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For Respondent City of Destin, Florida:

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STATEMENT OF THE ISSUES

The issues to be determined is whether the City of Destin ("City") has demonstrated its entitlement to place dredged material from the maintenance dredging of the East Pass ("East Pass" or "inlet") entrance channel conducted pursuant to the Consolidated Joint Coastal Permit and Sovereign Submerged Lands Authorization, Permit Number: 0288799-003-JC ("Permit"), in the swash zone east of East Pass in accordance with the Notice to Proceed ("NTP"); and whether the Inlet Management Plan referenced in the NTP is an unadopted rule as described in section 120.57(1)(e), Florida Statutes.

PRELIMINARY STATEMENT

On February 26, 2015, the Department of Environmental Protection ("DEP") issued the Permit to the City. The Permit authorized periodic maintenance dredging of the federally

authorized East Pass and Destin Harbor navigation channels. Dredged material from the first maintenance dredging event was placed at a spoil site along Norriego Point. In accordance with the Permit, "[d]redged material from subsequent maintenance dredging activities will be placed in the swash zones of the beaches east and west of East Pass, as specified in the East Pass Inlet Management Plan."

On February 2, 2018, DEP issued the NTP to the City, which approved the second maintenance dredging of the East Pass navigation channel, with "placement of dredged material in the swash zone east of East Pass." The NTP was not made subject to a notice of rights. Petitioners, David H. Sherry, Rebecca R. Sherry, and John S. Donovan (collectively, "Petitioners" or, individually, "Mr. Sherry," "Ms. Sherry," or "Mr. Donovan"), received a copy of the NTP on October 1, 2018, and first filed a challenge on November 30, 2018.

On March 18, 2019, Petitioners filed an Amended Petition for Administrative Hearing ("Amended Petition"). The disposition of the initial Petition for Administrative Hearing and the circumstances necessitating the filing of the Amended Petition were not explained.

On April 9, 2019, the Amended Petition was referred to the Division of Administrative Hearings and assigned to the

undersigned. The final hearing was scheduled for July 29 through 31, 2019.

On June 17, 2019, the City moved to dismiss the Amended Petition on the ground that the placement of dredged spoil was an issue that could have been challenged at the time the Permit was issued, and the failure to do so at that time constituted a waiver of the right to challenge the location(s) at which spoil disposal was to occur. A hearing on the motion was held on July 2, 2019, and the motion was denied by Order on July 3, 2019.

On June 28, 2019, a Motion for Leave to Intervene was filed by Thomas Wilson, the Petitioner in DOAH Case No. 19-3356, which involves a challenge to a DEP permit to the United States Army Corps of Engineers ("USCOE") for the dredging of East Pass. On that same date, Petitioners filed a Motion to Consolidate this case with DOAH Case No. 19-3356. On July 8, 2019, the Motion for Leave to Intervene was granted, and the Motion to Consolidate was denied. For purposes of this Recommended Order, the term "Petitioners" shall include Intervenor, unless the context requires a separate identification.

On June 18, 2019, the parties filed their Amended Joint Pre-hearing Stipulation ("JPS"). The JPS contained nine stipulations of fact, each of which is adopted and incorporated

herein. The JPS also identified disputed issues of fact and law remaining for disposition as follows:

Issues of fact which remain to be litigated

a. Whether Petitioners and Intervenor have standing to challenge the [NTP];

b. Whether Petitioners timely challenged the [NTP];

c. Whether the NTP authorizing the placement of all fill from the Dredge event is "supported by the latest physical monitoring data over a minimum of five years in accordance with the adopted East Pass Inlet Management Implementation Plan (July 24, 2013);

d. Whether all the physical monitoring relied upon to issue the NTP was conducted in accordance with the underlying permit and approved physical monitoring plan dated August, 2014;

e. Whether the physical monitoring data provides reasonable assurances for the Department to issue the [NTP]; and

f. Whether the [NTP], which authorizes the City to deposit material dredged from East Pass within the swash zone on beaches solely to the east of East Pass, constitutes final agency action.

Issues of law which remain for determination

a. Whether the East Pass Inlet Management Implementation Plan (July 24, 2013) is an unadopted rule;

b. If the East Pass Inlet Management Implementation Plan (July 24, 2013) is an unadopted rule, whether the NTP can be issued;

c. Whether the City has demonstrated entitlement to the NTP through competent substantial evidence;

d. Whether the Petitioners and Intervenor have sufficient standing to participate in this proceeding; and

e. Whether the Petitioners' administrative challenge is timely.

The final hearing was convened on July 29, 2019, as scheduled.

The Permit under review was issued under the authority of both chapters 161 and 373, Florida Statutes. However, the disputed provisions involve standards under chapter 161. Therefore, the modified burden of proof established in section 120.569(2)(p), Florida Statutes, is not applicable, and the burden is with the City, as the applicant, to demonstrate that it met the criteria for issuance of the NTP.

At the final hearing, Joint Exhibits 3 through 12 and 16 through 18 were received in evidence.

The City called the following witnesses: Matthew Trammell, P.E., who was accepted as an expert in the field of coastal engineering; and Michael Trudnak, P.E., who was also accepted as an expert in the field of coastal engineering. City Exhibits 10 through 12, 14, 15, 17 through 19, and 27 were received in evidence.

DEP called the following witnesses: Ralph Clark, P.E., who was accepted as an expert in the fields of coastal engineering, beach and inlet management, hydrographic surveying, photo-interpretation, hurricane impacts, and coastal construction regulation; and Greg Garis, it's Program Administrator for the

Beaches, Inlets, and Ports Program. DEP Exhibits 1 and 20 were received in evidence.

Petitioners called the following witnesses: Dr. Todd Walton, who was accepted as an expert in the field of coastal engineering; Dr. Lainie Edwards, Deputy Director of DEP's Division of Water Resource Management; David Sherry; Rebecca Sherry; and John Donovan. Petitioners' Exhibits 3, 5, 8, 12, and 26 (photographs on pages 8 through 10 only) were received in evidence.

A five-volume Transcript of the final hearing was filed on August 19, 2019. An extension to file proposed recommended orders was filed by Petitioners on August 22, 2019, and granted over Respondents' objection on August 23, 2019. Since the extension was not by consent, the undersigned expressed that the extension would not be considered to be a waiver of applicable timeframes. All parties filed a proposed recommended order ("PRO") on September 5, 2019, each of which has been considered in the preparation of this Recommended Order.

On September 5, 2019, the City filed a Motion for Attorney's Fees, Expenses and Costs, by which it seeks an award pursuant to sections 120.569(2)(e) and 120.595(1). Petitioners filed their response on September 12, 2019. The Motion is addressed at the conclusion of this Recommended Order.

The law in effect at the time DEP takes final agency action on the application 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. Petitioners, David H. Sherry and Rebecca R. Sherry, own Unit 511 at the Surf Dweller Condominium, 554 Coral Court, Fort Walton Beach, Florida. The Surf Dweller Condominium, which is on Santa Rosa Island in the unincorporated community of Okaloosa Island,[1/] fronts the Gulf of Mexico, and straddles DEP Reference Monument R-7, which is between three and four miles west of DEP Virtual Monument V-611, and is between five and six miles west of the west side of East Pass. The Sherrys use the beach at their condominium on a daily basis for fishing, crabbing, swimming, walking, running, and general recreation. They also walk or run from Monument R-7 along the beaches to East Pass, and occasionally drive to and use the beaches on the east side of East Pass.

2. Petitioner, John S. Donovan, owns Units 131 and 132 at the El Matador Condominium, 909 Santa Rosa Boulevard, Fort

Walton Beach, Florida. The El Matador Condominium is on Okaloosa Island, fronts the Gulf of Mexico, and is approximately five miles west of Monument V-611, and is more than six miles west of the west side of East Pass. Mr. Donovan generally walks the beaches west of his condominium, but does occasionally walk along the beach to Monument V-607, which is the location of a seawall constructed by the Air Force on sovereign submerged lands to protect an Air Force tracking facility.

3. Intervenor, Thomas Wilson, resides at 856 Edgewood Drive, Charleston, West Virginia, and owns a secondary residence at 1530 Miracle Strip Parkway, No. 101-B, Fort Walton Beach, Florida, in the vicinity of Monument R-14. Mr. Wilson uses and enjoys the gulf-front beaches between his property on Okaloosa Island and East Pass.

4. Petitioners' stated injuries are related to the allegation that the lateral movement of sand from the East Pass areas of influence is from east to west. Placing dredged material in the eastern disposal site would allegedly deprive the beaches in front of their property -- beaches that are miles from the nearest area of influence or spoil disposal site -- of their natural sand supply by cutting off what they allege to be the natural sand flow, causing the beaches in front of their properties to eventually erode. Petitioners alleged no immediate environmental injuries associated with the NTP.

Petitioners' stated objective in this case is to have any sand dredged from East Past to be placed on the western disposal areas at all times.

5. The City is the applicant for the Permit and the NTP, and abuts the east side of East Pass.

6. 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 NTP at issue in this proceeding to the City.

7. The NTP was issued on February 2, 2018, without notice of rights language regarding the right to request a hearing or time limits for doing so. Petitioners received a copy of the NTP on October 1, 2018, and filed a challenge more than 14 days later, on November 30, 2018.

East Pass

8. Prior to 1928, the connection from Choctawhatchee Bay to the Gulf of Mexico flowed through what is now Old Pass Lagoon. After a storm in 1928, a high-tide breach of the shoreline near the current location of East Pass was formed. In 1929, a record rain event caused waters to rise in Choctawhatchee Bay. Residents of the area dug a relief channel at roughly the present location of East Pass. The waters releasing through the more hydraulically efficient flow path from Choctawhatchee Bay established a channel, which quickly

enlarged to become the prominent inlet to the Gulf of Mexico. The permanent channel, now known as East Pass, is the only navigable passage from Choctawhatchee Bay and the Intercoastal Waterway to the Gulf of Mexico between Panama City, Florida, and Pensacola, Florida.

9. East Pass separates the gulf-fronting beaches of the City to its east from the beaches owned by the United States as part of Eglin Air Force Base to the west. The entrance to East Pass is protected by two boulder-mount jetties: a 3,860 foot-long jetty on the west side of the inlet and a 1,210 foot-long jetty on the east side of the inlet.

10. East Pass is an ebb tide dominated inlet, with a sizable amount of sediment moving in and out. When outgoing tidal flow moves though the constriction formed by the jetties, flow velocities are accelerated. When the water, and any entrained sediment, passes the jetties, flow tends to spread out to the east, west, and south, and naturally loses velocity. When the outgoing tidal waters reach a critical velocity where they can no longer carry the sand, the sand drops out of suspension, which forms the ebb shoal. Essentially, the ebb shoal is a large, semi-circular sandbar extending from the mouth of East Pass that was created by the ebb tide carrying sediments south.

11. East Pass is a highly dynamic inlet system. There are processes spurred by the configuration and location of East Pass, tides, waves, and storms that have resulted in currents running to the east and west that change on a frequent basis. The Physical Monitoring Plan ("PMP"), which is part of the Permit, and thus, not subject to challenge in this case, established, for the period of 1996 through 2007, "a trend of west to east longshore transport, resulting in net gain immediately west of [East Pass] and a significant loss of sand along Holiday Isle east of [East Pass]."

12. The PMP further established that a "drift nodal point" existed at East Pass. Longshore transport at uniform coastal locations is generally in one direction. However, when there are wave events coming from varying angles, and where beach contours are not parallel and uniform, or even linear, it is common for transport reversals to occur. The point at which those reversals occur is referred to as a nodal point. That point can be where east and west transport converges, or where it diverges. The shoreline in the vicinity of East Pass has exhibited "quite a few" nodal points over the past decade, resulting in frequent drift reversals and sand transport to the east and the west.

13. The evidence as to the existence and effect of the East Pass drift nodal point, and its affect on the lateral

transport of sand in the area, including the East Pass areas of influence, was substantiated by testimony and other evidence introduced at the final hearing. The testimony and evidence that there is no consistent direction of lateral sand transport in the vicinity of East Pass, and no predominant lateral current transporting sand in a westerly direction, is accepted. Evidence to the contrary was not persuasive.

14. East Pass includes a federal navigation channel. The federal navigation channel requires routine maintenance to prevent it from shoaling. On an average, East Pass is dredged in two-year intervals. The last time that East Pass was dredged was in December of 2013. It has now shoaled with sand and become very hazardous for marine traffic. In December of 2018, the City declared a state of emergency relating to the navigational hazards caused by the accumulation of sand in the navigation channel.

The Permit

15. On February 26, 2015, DEP issued the Permit, which authorized the City to perform "periodic maintenance dredging of the federally authorized East Pass and Destin Harbor and navigation channels." The Permit will expire on February 26, 2030. Notice of the issuance of this Permit was published in the Destin Log, a newspaper of general circulation, on December 24, 2014. No challenge to the issuance of the Permit was filed.

16. As it pertains to the issues in this proceeding, the Permit provides that "Dredged material from . . . maintenance dredging activities will be placed in the swash zones of the beaches east and west of East Pass, as specified in the East Pass Inlet Management Plan."

17. The specific beach spoil placement sites are, as relevant to this proceeding, located "west of East Pass . . . between [DEP] reference monuments V-611 and V-622; and on 2 beach sites situated east of East Pass . . . from R-17 to R-20.5 and from R-23.5 to R-25.5." Those areas correspond to what have been identified as the "areas of influence," which are the beach areas east and west of East Pass that are affected by tidal forces generated by the inlet. The specified beach spoil placement sites, being conditions of the unchallenged Permit, are not subject to challenge in this case.

18. The Permit establishes the criteria by which specific work is to be authorized. Specific Condition 5 provides, in pertinent part, that:

> 5. No work shall be conducted under this permit until the Permittee has received a written notice to proceed from the Department for each event. At least 30 days prior to the requested date of issuance of the notice to proceed, the Permittee shall submit a written request for a Notice to Proceed along with the following items for review and approval by the Department:
>
> * * *

> f. Prior to the second dredging event authorized under this permit, and each subsequent event, the Physical Monitoring Data, as specified in Specific Condition 9, shall be submitted to select the appropriate placement locations.

19. Specific Condition 9 provides that:

> Following the initial placement of material on Norriego Point, fill site selection shall be supported by the latest physical monitoring data over a minimum of five years in accordance with the adopted East Pass Inlet Management Implementation Plan (July 24, 2013). All physical monitoring shall be conducted in accordance to the Approved physical monitoring plan dated August, 2014. A notice to proceed for specific projects shall be withheld pending concurrence by the Department that the data support the proposed placement location.

20. The purpose of Specific Condition 9 is to identify, using supporting monitoring data from the eastern and western areas of influence, the "adjacent eroding beach" most in need of sand from the inlet.

21. The requirement that physical monitoring data be used to determine which of the beach spoil placement sites identified in the Permit's Project Description will receive the spoil from any particular periodic dredging event was to implement section 161.142, Florida Statutes. That section mandates that "maintenance dredgings of beach-quality sand are placed on the adjacent eroding beaches," and establishes the overriding policy

of the state regarding disposition of sand from navigational channel maintenance dredging.

East Pass Inlet Management Implementation Plan

22. The East Pass Inlet Management Implementation Plan ("East Pass IMP") was adopted by Final Order of DEP on July 30, 2013.[2/] The East Pass IMP was not adopted through the rulemaking procedures proscribed by chapter 120, Florida Statutes, or DEP rules. Despite a comprehensive Notice of Rights advising persons whose substantial interests could be affected of the means by which the East Pass IMP could be challenged, it was not.

23. There are 44 maintained inlets in Florida. About half have individual inlet management plans. The East Pass IMP is not applicable to any inlet other than East Pass.

24. The East Pass IMP does not require that any quantity of dredged material from the dredging of East Pass be placed at any particular location other than as established in the Permit. Rather, the disposal site is to be determined on a case-by-case basis based on the best monitoring data available for the beaches in the area of influence of East Pass.

25. The critical element of the IMP, and that in keeping with the statutory requirement that sand be placed on "adjacent eroding beaches" is the "strategy" that "the recent erosion of adjacent beaches observed over a minimum of five years shall

define the placement need in terms of location and volume." The East Pass IMP, being applicable only to East Pass, is not of "general applicability." Furthermore, the East Pass IMP does not implement, interpret, or prescribe law or policy.

The Notice to Proceed

26. On January 30, 2018, the City filed its Request for Notice to Proceed ("Request"). The Request addressed the criteria in Specific Conditions 5 and 9 of the Permit.

27. Upon review, DEP determined the conditions of the Permit were satisfied and issued the NTP on February 2, 2018.

28. The analysis of data submitted as part of the Request was designed to show areas of erosion and accretion within the eastern and western areas of influence in order to identify "critically eroded beaches."

29. The shoreline of Santa Rosa Island to the west of East Pass has historically been stable. To be sure, as is the case with any shoreline, there will be some areas of erosion and some areas of accretion. After Hurricanes Ivan and Opal, areas of Santa Rosa Island experienced erosion. DEP declared the shoreline to be critically eroded after the 2004-2005 hurricane seasons, which prompted Okaloosa County to commission a study to monitor the health of the Monuments R-1 through R-16 beach segment, a segment that includes Petitioners' residences. Despite the fact that no post-storm beach restoration occurred

in the area, the beach recovered naturally and gained sand following the post-storm recovery. In addition, Santa Rosa Island is known for "beach cusps," which are crenulate[3/] shapes along the shoreline. Depending on the season and storm conditions, those beach cusps can have a localized erosive effect on the beach, but those tend to be seasonal. They do not negate what the evidence shows to be the overall stable to accretional conditions of the beaches west of East Pass from Monument V-622 to Petitioners' residences.

30. Mr. Trammell offered testimony, including a discussion of photographic evidence, demonstrating the beaches west of East Pass have large dunes; multiple dune lines; tall, and thick vegetated dunes indicating established dune growth; pioneering vegetation indicating active, healthy dune growth and accretion; partially buried signs indicating dune advance; and broad and expansive beaches. Those features are indicative of a stable and accretional shoreline. Mr. Trammell's testimony as to the western spoil disposal site was convincing and is accepted. At present, the Santa Rosa Island shoreline is not deemed by DEP to be "critically eroded."

31. The photographic evidence supports the data collected over time for the beaches west of East Pass, and the testimony offered at the final hearing, which collectively establishes, by a preponderance of the evidence, that the beaches to the west of

East Pass are stable and accretional, are not subject to erosion caused by East Pass, and are not “adjacent eroding beaches” as that term is used in section 161.142.

32. The shoreline east of East Pass, including the eastern area of influence and the proposed dredge material disposal sites at Monuments R-17 to R-20.5 and R-23.5 to R-25, except for the area immediately abutting the eastern jetty, is highly erosional. Mr. Trammell offered testimony, including a discussion of photographic evidence, demonstrating the beaches east of East Pass exhibit the following signs of significant and ongoing erosion: extensive dune erosion; exposed sea oat roots; reduced beach elevation; reduced beach width; crenulate bays; newly built dune walkovers that replaced old walkovers claimed by erosion; dune walkovers in close proximity to the shoreline indicating that the shoreline had receded to the walkover; and beach scarping at the shoreline indicating active erosion. Mr. Trammell’s testimony as to the eastern spoil disposal sites was convincing and is accepted. The eastern areas of influence are currently designated to be “critically eroded” by DEP, a designation maintained for more than 10 years.

33. The photographic evidence supports the data collected over time for the beaches east of East Pass, and the testimony offered at the final hearing, which collectively establishes, by a preponderance of the evidence, that the beaches to the east of

East Pass are critically eroded, a condition that is influenced by East Pass and or its navigational channel, and are “adjacent eroding beaches” as that term is used in section 161.142.

Data in Support of the NTP

34. The data submitted by the City to DEP in support of the Request included monitoring data for the eastern beach placement areas from the West Destin Four-Year Post-construction Monitoring Report and earlier annual post-construction reports covering the period from October 2012 to July 2017, and additional data from the Holiday Isle Emergency Beach Fill Two-Year Post-construction Report. DEP was also provided with historical monitoring data for the area west of East Pass, including the Western Beach Monitoring Report, which covered 2006 to 2017, and the Potential Borrow Area Impact Report, which included data from 1996 through 2012. DEP has also received recent profile data from April 2019. These reports, and the data contained within them, cumulatively provide more than 20 years of survey date, and demonstrate convincingly that the shoreline to the west of East Pass has been stable or accreting, and the areas to the east are eroded.

35. The data submitted in support of the Request was sufficient to meet Specific Condition 9 that fill site selection be supported by the latest physical monitoring data over a minimum of five years in accordance with the East Pass IMP.

36. Petitioners argue that the City failed to comply with the PMP, which requires, among other things, that the analysis of the dredged material disposal area include "preconstruction survey data and the most recent survey conducted at least five years prior." The PMP establishes that "[p]reconstruction surveys shall be conducted no more than 90 days before construction commences. A prior beach monitoring survey of the beach and offshore may be submitted for the pre-construction survey if consistent with the other requirements" of the PMP. The City submitted a prior beach monitoring survey of the beach and offshore that is consistent with the PMP.

37. Petitioners argue that the City violated a temporal limitation which provides that the City "may submit a prior beach restoration monitoring report for the west or east beach areas (Walton-Destin or Western Destin Beach Restoration Project) if the monitoring data is collected within 1 year of the proposed maintenance dredging event and if consistent with the other requirements of this condition." Petitioners acknowledge in their PRO that the beach restoration monitoring report was timely when the Request for NTP was submitted. The information contained therein was sufficient to support the notice of proposed action on the NTP.

38. The otherwise compliant data is no longer within one year of the proposed dredge. In that regard, the litigation in

this case, initiated by Petitioners, has been ongoing for almost one year. Work authorized by the NTP cannot go forward when subject to challenge. If the PMP, which is not a rule, is unreasonably read so as not to account for delay caused by litigation, such delay becomes a tool for use by, and a reward for, a person dissatisfied with DEP's outcome. In this case, the NTP was lawfully issued pursuant to compliant data, surveys, and analysis. As with any permit or license subject to a third-party challenge, the terms of the NTP are tolled pending Petitioners' litigation, and do not become a ground for denial of the otherwise compliant Request. See § 120.60(1), Fla. Stat. ("An application for a license must be approved or denied within 90 days after receipt of a completed application unless a shorter period of time for agency action is provided by law. The 90-day time period is tolled by the initiation of a proceeding under ss. 120.569 and 120.57. Any application for a license which is not approved or denied . . . within 45 days after a recommended order is submitted to the agency and the parties, . . . is considered approved unless the recommended order recommends that the agency deny the license.").[4/]

39. Furthermore, DEP has now received recent profile data from April 2019. The evidence establishes that the data provided to DEP as part of the Request includes the latest physical monitoring data over a period of greater than five

years, and that the data collection met the standards for conducting physical monitoring.

Fill Site Selection

40. The NTP authorized "placement of dredged material in the swash zone east of East Pass." In accordance with the Permit, that authorized area extends eastward from R-17 to R-20.5 and from R-23.5 to R-25.5, in Holiday Isle.

41. The evidence is persuasive that placing dredged material on the eastern side of East Pass would not result in erosion on the western side of East Pass.

42. Dredged material placed in the western beach placement area, and in the "shadow" of the western jetty, will tend to remain in that area. It would take a very long time, if at all, for that material to migrate further to the west. However, dredged material placed to the east of East Pass would, if the lateral shoreline drift is east to west as asserted by Petitioners (though not supported by a preponderance of the evidence as set forth in paragraphs 11 through 13), be introduced into the ebb shoal and likely move faster to the west as opposed to it being placed directly at the base of the west jetty. As such, placement of the dredged material on the eastern beach placement areas would, more likely than not, accomplish the beach effect objectives set forth in the Petition.

The Eglin AFB Beach Restoration Project

43. Petitioners relied heavily on photographs taken in 2010 and 2019 from roughly the same location in the vicinity of Monuments V-607 to V-608 to demonstrate that the beaches of Santa Rosa Island are eroding. The area depicted is outside of the area of influence of East Pass, and outside of the western beach placement area under the Permit. Those photographs depict a wide expanse of beach in 2010, with a seawall well upland from the shore in 2010. Then, in 2019, a photograph depicting the same stretch was offered that showed the same seawall, now at or below the water line. The photographs were, ostensibly, designed to depict naturally occurring erosion in the area.

44. Mr. Clark testified that the seawall and boulder mound structure depicted in both photographs protect an Air Force mission-critical tracking facility. The seawall was originally constructed in 1979 after Hurricane Frederick, was constructed at that time to extend into the water, and was maintained in that configuration through the 1990s. One could not walk around the original seawall. Rather, for most of its history, passage around the seaward side of the seawall could only be accomplished by swimming or wading.

45. The original seawall was damaged by Hurricane Opal, and destroyed by Hurricanes Ivan and Dennis in 2004 and 2005. The Air Force, needing to reconstruct the wall, applied for and

received a joint coastal construction permit, allowing the structure to be constructed on sovereign submerged land below the line of mean high water. The seawall was rebuilt and, as stated by Mr. Clark, "it was in the water."

46. In 2010, the Air Force performed the small Eglin Air Force Base Beach Restoration Project, which placed artificial fill in front of the seawall, thereby creating a temporary beach. That beach fill project was "a one-shot deal," did not involve any subsequent maintenance, and is now essentially gone, as was expected. Mr. Clark was neither surprised nor concerned with the fact that the area returned to what he described as its natural state, with the seawall below mean high water.

47. The 2019 photograph was presented as evidence of erosion caused by East Pass. That was not the case. Rather, the 2010 photograph was evidence of an artificial and singular event, and the 2019 photograph depicts the natural state of the shoreline. Rather than depicting erosion, the 2019 photograph depicts a return to the stable shoreline that exists all along Santa Rosa Island to the west of East Pass.

48. The photographs of the site of the 2010 Eglin Air Force Base Beach Restoration Project do not support a finding that the beaches of Santa Rosa Island are anything but stable, if not accretional, nor do they support a finding that the beaches of Santa Rosa Island are eroding.

Ultimate Factual Conclusion

49. Specific Condition 9 of the Permit requires the location of the spoil disposal be supported by the latest physical monitoring data over a minimum of five years in accordance with the East Pass IMP and the PMP.

50. The greater weight of the competent substantial evidence establishes that the City submitted physical monitoring data consistent with the requirements of Specific Condition 9.

51. The greater weight of the competent substantial evidence establishes that the eastern areas of influence of East Pass, including the beach disposal areas at R-17 to R-20.5 and R-23.5 to R-25.5, are critically eroded, a condition influenced if not caused by the East Pass, and constitute East Pass's "adjacent eroding beaches." Evidence to the contrary was not persuasive.

52. The greater weight of the competent substantial evidence establishes that the western areas of influence of East Pass, including the beach disposal areas at Monuments V-611 to V-622, are stable, if not accreting, and are not East Pass's "adjacent eroding beaches." Evidence to the contrary was not persuasive.

53. The greater weight of the competent substantial evidence establishes that the City met the standards for the NTP as proposed for issuance by DEP on February 2, 2018. Evidence

to the contrary was not persuasive. Thus, the NTP should be issued.

CONCLUSIONS OF LAW

Jurisdiction

54. 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

55. 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."

56. 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. (emphasis added).

Id. at 482.

57. 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)).

58. 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.").

59. "Under the first prong of Agrico, the 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, 681 (Fla. 1st DCA 2014) (citing Vill. Park Mobile Homes

Ass'n v. Dep't of Bus. Reg., 506 So. 2d 426, 433 (Fla. 1st DCA 1987)).

60. Petitioners alleged standing based on the effect that the disruption in the lateral flow of sand along the shoreline would have on the beaches in front of their property. In Bluefield Ranch Mitigation Bank Trust v. South Florida Water Management District, 263 So. 3d 125 (Fla. 4th DCA 2018), the court held that the petitioners established their standing based on the following analysis:

> The petitioning parties included the Town of Palm Beach, which owned Phipps Ocean Park within 1000 feet of the condominium and alleged that the Park would suffer damage if the landscaping activity continued, and Dave Darwin, who owned a property within 1000 feet of the condominium and alleged that his property would be damaged by the continued disruption of the dune system. We found that both of these petitioners had a substantial interest in challenging the agency's determination because
>
> > the statute and administrative proceedings are designed to protect the entire beach/dune system of the state of Florida, and [the petitioners] allege that [the landscaping activities] will harm the dune system in the area of [the condominium's] property. Therefore [the petitioners] have made sufficient allegations to meet the test of standing under Agrico and are entitled to a hearing to present evidence to support their allegations of standing.

Id. at 131 (citing Town of Palm Beach v. State Department of Natural Resources, 577 So. 2d 1383, 1388 (Fla. 4th DCA 1991)).

61. The individual petitioners in Town of Palm Beach who alleged, as do the Petitioners here, that their properties would be substantially affected were within 1,000 feet of the challenged activity.

62. The allegations of conditions that might lead to erosive conditions along the shoreline west of East Pass meet the second prong of the Agrico test, that is, this proceeding is designed to protect against erosion, impacts that are the subject of chapter 161, and the rules adopted thereunder.

63. The question for determination as to the first prong of the Agrico test is whether Petitioners have alleged injuries in fact of sufficient immediacy as a result of the NTP to entitle them 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, 681 (Fla. 1st DCA 2014) (citing Vill. Park Mobile Home Ass'n v. Dep't of Bus. Reg., 506 So. 2d at 433).

64. Petitioners have alleged that the proposed placement of dredged material in the swash zone to the east of East Pass could result in adverse erosional impacts. For purposes of standing, the allegations must be accepted as true. S. Broward

Hosp. Dist. v. Ag. for Health Care Admin., 141 So. 3d at 681. The allegations are sufficient to meet the standard of an "injury in fact which is of sufficient immediacy to entitle them to a section 120.57 hearing."

65. Despite their allegations, Petitioners, who reside miles away from the area of influence of East Pass, completely failed to prove that they will suffer any injury to their property, or any injury to their ability to enjoy the beaches between their homes and East Pass. There was little or no competent, substantial, and persuasive evidence to support a finding that even a grain of sand deposited on the western disposal site would ever make its way to their property and, if it managed to do so, the journey would take years. Thus, despite their allegations, Petitioners wholly failed to prove at the hearing that the NTP as issued would -- or could -- result in actual or immediate threatened injury to their property or their ability to use and enjoy the beaches west of East Pass.

66. Based on what is perceived to be a broad grant of standing as established in Palm Beach County Environmental Coalition and further discussed in Bluefield Ranch Mitigation Bank Trust, and on the policy that it is best to have cases heard on their merits when possible, the undersigned is willing to accept the tenuous and ultimately unsupported thread that constitutes Petitioners' standing in this case.

67. The City has standing as the applicant for the NTP. 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).

Timeliness of Petition

68. Petitioners filed their Petition for Formal Administrative Hearing more than 14 days from their receipt of the NTP. The NTP was issued without a notice of rights to advise substantially affected persons of their right to a hearing. The notice was insufficient to inform Petitioners of their right to request a hearing, and the time limits for doing so, and is, therefore, inadequate to "trigger" the commencement of the administrative process. See Gardner v. Sch. Bd., 73 So. 3d 314, 315 (Fla. 2d DCA 2011); Henry v. State, Dep't of Admin., Div. of Ret., 431 So. 2d 677, 680 (Fla. 1st DCA 1983). Furthermore, section 120.569(1) provides, in pertinent part, that:

> The provisions of this section apply in all proceedings in which the substantial interests of a party are determined by an agency . . . . Each notice shall inform the recipient of any administrative hearing or judicial review that is available under this section, s. 120.57, or s. 120.68; shall indicate the procedure which must be followed to obtain the hearing or judicial review; and shall state the time limits which apply.

Based on the lack of notice in the NTP, the Petition for Formal Administrative Hearing was timely.

Nature of the Proceeding

69. 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

70. The City bears the burden of demonstrating, by a preponderance of the evidence, entitlement to the NTP. 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).

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

Reasonable Assurance Standard

72. Issuance of the NTP is dependent upon there being reasonable assurance that the activities authorized will meet applicable standards.

73. 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).

The East Pass Inlet Management Implementation Plan as an Unadopted Rule

74. Section 120.52(16) defines a rule as:

> each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of any agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule.

75. An "unadopted rule" is defined as an agency statement that meets the definition of the term rule, but that has not been adopted pursuant to the requirements of section 120.54. § 120.52(20), Fla. Stat.

76. Agencies must adopt, as rules, those statements meeting the definition of a rule. As set forth in section 120.54(1):

> (1)(a) Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable.

77. When a person is substantially affected by agency action, section 120.57(1)(e) provides, in pertinent part, that:

> 1. An agency or an administrative law judge may not base agency action that determines the substantial interests of a party on an unadopted rule . . . .
>
> 2. In a matter initiated as a result of agency action proposing to determine the substantial interests of a party, the party's timely petition for hearing may challenge the proposed agency action based on . . . an alleged unadopted rule.

78. Petitioner has the burden of demonstrating that the East Pass IMP meets the definition of a rule, and that the agency has not adopted the statement by rulemaking procedures. Sw. Fla. Water Mgmt. Dist. v. Charlotte Cnty., 774 So. 2d 903, 908 (Fla. 2d DCA 2001); see also Ag. for Pers. with Disab. v. C.B., 130 So. 3d 713, 717 (Fla. 1st DCA 2013).

79. The standard of proof is by a preponderance of the evidence. § 120.56(1)(e), Fla. Stat.

80. An agency statement is "generally applicable" if it is intended by its own effect "to create rights, or to require compliance, or otherwise have the direct and consistent effect of law." Coventry First, LLC v. Off. of Ins. Reg., 38 So. 3d 200 (Fla. 1st DCA 2010) (quoting McDonald v. Dep't of Banking & Fin., 346 So. 2d 569, 581 (Fla. 1st DCA 1977)). Furthermore:

> "[a]n agency statement that either requires compliance, creates certain rights while adversely affecting others, or otherwise has the direct and consistent effect of law, is a rule." When deciding whether a challenged action constitutes a rule, a court analyzes the action's general applicability, requirement of compliance, or direct and consistent effect of law.

Fla. Dep't of Fin. Servs. v. Cap. Collateral Reg'l Counsel-Middle Region, 969 So. 2d 527, 530 (Fla. 1st DCA 2007) (citations omitted); see also State Bd. of Admin. v. Huberty, 46 So. 3d 1144, 1147 (Fla. 1st DCA 2010).

81. The East Pass IMP is limited to its use in but one of the 44 improved inlets in the state of Florida. There was no evidence that DEP requires that an inlet management plan be developed for each of those 44 inlets, or whether comparable management standards and criteria are replicated in any other inlet management plan.

82. The East Pass IMP does not establish specific standards of general applicability with regard to target quantities for placement either to the east or west of East

Pass. Rather, the East Pass IMP establishes that the placement sites and quantities for dredged fill be determined on a case-by-case basis, based on a case specific analysis of data for beaches east and west of East Pass. Thus, there is no evidence that the East Pass IMP has the direct and consistent effect of law.

83. The "statement of general applicability" in this case is that dredged material be placed on "adjacent eroding beaches." That standard is statutory. There was no proof sufficient to establish that the IMP was intended to, or did, set enforceable standards for the implementation of section 161.142. Therefore, Petitioners failed to demonstrate that the East Pass IMP is an agency statement of "general applicability."[5/]

Standards

84. Section 161.142 provides, in pertinent part, that DEP shall ensure that:

> [T]he Legislature finds it is in the public interest to replicate the natural drift of sand which is interrupted or altered by inlets to be replaced and for each level of government to undertake all reasonable efforts to maximize inlet sand bypassing to ensure that beach-quality sand is placed on adjacent eroding beaches . . . . Therefore, in furtherance of this declaration of public policy and the Legislature's intent to redirect and recommit the state's comprehensive beach management efforts to

> address the beach erosion caused by inlets, the department shall ensure that:
>
> (1) All construction and maintenance dredgings of beach-quality sand are placed on the adjacent eroding beaches unless, if placed elsewhere, an equivalent quality and quantity of sand from an alternate location is placed on the adjacent eroding beaches.
>
> (2) On an average annual basis, a quantity of beach-quality sand is placed on the adjacent eroding beaches which is equal to the natural net annual longshore sediment transport. The department shall, with the assistance of university-based or other contractual resources that it may employ or call upon, maintain a current estimate of such quantities of sand for purposes of prioritizing, planning, and permitting.

85. What is evident from section 161.142 is that the overriding -- if not exclusive -- interest of the state is that sand from maintenance dredging of navigation inlets is to be placed on adjacent eroding beaches.

Entitlement to the Notice to Proceed

86. A "Notice to Proceed" is the notification from DEP authorizing a permitted activity to commence. Fla. Admin. Code Rules 62B-49.002(10) and 62B-41.002(32).

87. This proceeding is limited to determining whether, as established in the Permit, the "physical monitoring data over a minimum of five years in accordance with the adopted East Pass Inlet Management Implementation Plan (July 24, 2013)" was

sufficient to support the fill site selection for the issuance of the NTP.

88. The evidence in this case established conclusively that the beaches east of East Pass are adjacent eroding beaches.

89. The evidence in this case is equally conclusive that the beaches west of East Pass are not adjacent eroding beaches.

90. To be compliant with section 161.142, sand from the dredging of East Pass must be placed on the beaches east of East Pass.

91. As established in the Findings of Fact, the City provided reasonable assurances that the fill site selection complied with the applicable standards applied by DEP, in particular, Specific Conditions 5 and 9. Further, the City has provided reasonable assurances that it is entitled to the NTP.

ATTORNEYS' FEES

92. The City has moved for an award of attorneys' fees, expenses and costs pursuant to sections 120.569(2)(e) and 120.595(1).

93. An objective standard is used to determine improper purpose for the purpose of imposing sanctions on a party or attorney under section 120.569(2), and its predecessor statutes. See, e.g., Friends of Nassau Cnty., Inc. v. Nassau Cnty., 752 So. 2d 42, 50-51 (Fla. 1st DCA 2000). While no appellate decision has explicitly extended the objective standard to

section 120.595(1), a number of DOAH cases have applied the standard to cases arising from 120.595(1). See, e.g., G.E.L. Corp. v. Orange City and Dep't of Envtl Prot., DOAH Case No. 01-4132 (DOAH July 24, 2006); Palm Beach Polo Holdings, Inc. v. Acme Imp. Dist., DOAH Case No. 03-2469 (DOAH Mar. 25, 2004; SFWMD May 14, 2004)(holding that the objective standard should be applied to claims arising under section 120.595(1)).

Section 120.569(2)(e)

94. Section 120.569(2)(e) provides that:

> (e) All pleadings, motions, or other papers filed in the proceeding must be signed by the party, the party's attorney, or the party's qualified representative. The signature constitutes a certificate that the person has read the pleading, motion, or other paper and that, based upon reasonable inquiry, it is not interposed for any improper purposes, such as to harass or to cause unnecessary delay, or for frivolous purpose or needless increase in the cost of litigation. If a pleading, motion, or other paper is signed in violation of these requirements, the presiding officer shall impose upon the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

95. Section 120.569(2)(e) authorizes the imposition of a sanction, which may include reasonable attorney's fees and expenses, if a determination is made that a party filed a paper

in a proceeding for an improper purpose, such as to harass or to cause unnecessary delay, or for frivolous purpose or needless increase in the cost of litigation. DOAH has jurisdiction to resolve that issue by separate final order. See, e.g., Procacci Comm. Realty, Inc. v. Dep't of HRS, 690 So. 2d 603, 606 (Fla. 1st DCA 1997). Therefore, jurisdiction is reserved to consider that request through a separate final order, provided the City renews its Motion within 30 days of DEP's entry of the final order in this case.

Section 120.595

96. Section 120.595 provides, in pertinent part, that:

> (1) CHALLENGES TO AGENCY ACTION PURSUANT TO SECTION 120.57(1).—
>
> * * *
>
> (b) The final order in a proceeding pursuant to s. 120.57(1) shall award reasonable costs and a reasonable attorney's fee to the prevailing party only where the nonprevailing adverse party has been determined by the administrative law judge to have participated in the proceeding for an improper purpose.
>
> (c) In proceedings pursuant to s. 120.57(1), and upon motion, the administrative law judge shall determine whether any party participated in the proceeding for an improper purpose as defined by this subsection. In making such determination, the administrative law judge shall consider whether the nonprevailing adverse party has participated in two or more other such proceedings involving the same prevailing party and the same project

> as an adverse party and in which such two or more proceedings the nonprevailing adverse party did not establish either the factual or legal merits of its position, and shall consider whether the factual or legal position asserted in the instant proceeding would have been cognizable in the previous proceedings. In such event, it shall be rebuttably presumed that the nonprevailing adverse party participated in the pending proceeding for an improper purpose.
>
> (d) In any proceeding in which the administrative law judge determines that a party participated in the proceeding for an improper purpose, the recommended order shall so designate and shall determine the award of costs and attorney's fees.
>
> (e) For the purpose of this subsection:
>
> 1. "Improper purpose" means participation in a proceeding pursuant to s. 120.57(1) primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of litigation, licensing, or securing the approval of an activity.

97. A frivolous claim is not merely one that is likely to be unsuccessful. Rather, it must be so clearly devoid of merit that there is little, if any, prospect of success. French v. Dep't of Child. & Fams., 920 So. 2d 671, 679 (Fla. 5th DCA 2006). "[A] finding of improper purpose could not stand 'if a reasonably clear legal justification can be shown for the filing of the paper.'" Procacci Commer. Realty v. Dep't of HRS, 690 So. 2d 603, 608, n.4 (Fla. 1st DCA 1997)(quoting

Mercedes Lighting & Electrical Supply v. State, Dep't of Gen. Servs., 560 So. 2d 272, 277 (Fla. 1st DCA 1990)).

98. Although Petitioners did not prevail, they presented testimony and evidence in support of the issues raised in their Amended Petition and Motion for Leave to Intervene, including expert testimony.

99. Based upon a full review and consideration of the record in this proceeding, the undersigned finds that the facts of this case, and the application of the law as asserted by Petitioners, were not made for an improper purpose, i.e., primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of litigation, licensing, or securing the approval of an activity, under section 120.595(1). Furthermore, there was no evidence to suggest that Petitioners participated in two or more proceedings involving the City or DEP and the same project as an adverse party.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Environmental Protection enter a final order:

1. Approving the February 2, 2018, Notice to Proceed for the maintenance dredging of East Pass as authorized pursuant to Consolidated Environmental Resource Permit and Sovereign

Submerged Lands Authorization No. 50-0126380-005-EI and State-owned Lease No. 0288799-003-JC, subject to the general and specific conditions set forth therein; and

2. Denying the City of Destin's Motion for Attorney's Fees, Expenses and Costs pursuant to section 120.595(1).

DONE AND ENTERED this 14th day of October, 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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(850) 488-9675
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of October, 2019.

ENDNOTES

[1/] Okaloosa Island is the name of the unincorporated community, while Santa Rosa Island is the name of the island.

[2/] Although the Final Order was signed on July 24, 2013, it was not filed with and acknowledged by the agency clerk until July 30, 2013. See § 120.52(7), Fla. Stat.

[3/] "Having an irregularly wavy or serrate outline." Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/crenulate.

[4/] The obvious source of unnecessary confusion arising from the PMP is its failure to specifically account for litigation

delays, likely due to DEP's belief that an NTP is not "agency action" entitling one to a hearing. The confusion could be avoided by specifically incorporating terms consistent with section 120.60 into the PMP's timeframes.

[5/] Petitioners' reliance on Town of Hillsboro Beach v. City of Boca Raton, DOAH Case No. 17-2201 (Fla. DOAH Dec. 11, 2017; DEP Jan. 30, 2018) as establishing that an IMP is an unadopted rule is rejected since, as noted in the DEP Final Order at page 16, "the legal issues raised in paragraphs 64-70 (relating to the IMP as an unadopted rule) are not before the ALJ for consideration, because no party filed an unadopted rule challenge in the case, nor was the issue raised by the Petition or the Joint Prehearing Stipulation."

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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.