STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

THOMAS WILSON,	)	
	)	
Petitioner,	)	
	)	
and	)	
	)	
DAVID H. SHERRY, REBECCA R. SHERRY, AND JOHN S. DONOVAN,	)	**OGC CASE NO. 19-1175** **DOAH CASE NO. 19-3356**
	)	
Intervenors,	)	
	)	
v.	)	
	)	
U.S. ARMY CORPS OF ENGINEERS AND FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
	)	
Respondents,	)	
	)	
and	)	
	)	
CITY OF DESTIN AND OKALOOSA COUNTY, FLORIDA,	)	
	)	
Intervenors.	)	
_____/		

FINAL ORDER

An Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH) on February 20, 2020, 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. Petitioner Thomas Wilson, and Intervenors, David H. Sherry, Rebecca R. Sherry, and John S. Donovan (collectively the Petitioners, or individually, Mr. Wilson, Mr. Sherry, Mrs. Sherry, or Mr. Donovan) timely filed

joint exceptions on March 6, 2020. DEP and the Intervenor City of Destin (City) each timely filed responses on March 16, 2020, to the Petitioners' and Intervenors' joint exceptions.

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

BACKGROUND

On October 28, 2009, DEP issued Permit No. 0288799-001-JC (Permit) to the U.S. Army Corps of Engineers (Corps) to maintenance dredge the East Pass Navigation Channel and the Old Pass Lagoon Channel, and to rehabilitate the eastern and western jetties. On November 14, 2016, DEP issued a Permit Modification to the Corps (Permit Modification No. 0288799-006-JN). The Permit Modification did not change the authorization or requirements for dredging, but allowed dredged material to be placed on "the Gulf front beaches on the eastern and western sides of East Pass."

On November 16, 2018, Mr. Donovan, Mr. Sherry and Mrs. Sherry filed a Petition for Administrative Hearing challenging the Permit Modification issued to the Corps, which was referred to DOAH and assigned DOAH Case No. 19-1915. On June 19, 2019, the ALJ entered an Order Granting Motion in Limine, Relinquishing Jurisdiction, and Closing File, in which the assigned ALJ found the challenge was not timely filed. On July 16, 2019, DEP entered a Final Order in DOAH Case No. 19-1915, dismissing the challenge with prejudice, which was not appealed.

On June 5, 2019, Mr. Wilson filed a Petition for Formal Administrative Hearing challenging the Permit Modification issued to the Corp. The Petition was assigned as DOAH Case No. 19-3356 and is substantively identical to that filed in DOAH Case No. 19-1915. On June 28, 2019, Mr. Donovan, Mr. Sherry and Mrs. Sherry filed a motion to intervene in Case No.

19-3356. On August 20, 2019, the City of Destin moved to intervene in this case (Case No. 19-3356). On September 10, 2019, Okaloosa County, Florida (Okaloosa County) moved to intervene. All parties were granted intervention.

On August 21, 2019, DEP filed a Proposed Change, which amended the Permit Modification from directing the placement of dredged material to "the eastern and western sides of East Pass" to requiring that "[b]each compatible material dredged from the initial maintenance dredge event following issuance of [the Permit Modification], shall be placed to the east of East Pass, which was referred to DOAH and assigned as DOAH Case No. 19-4979. On September 20, 2019, DOAH Case Nos. 19-3356 and 19-4979 were consolidated.

At the commencement of the final hearing, the City's renewed motion to dismiss the petition filed in DOAH Case No. 19-4979 was granted on the record. On January 29, 2020, DOAH Case No. 19-4979 was severed from this case. On December 8, 2019, the ALJ made an oral ruling that whether the East Pass Inlet Management Implementation Plan (IMP) is an unadopted rule was fully resolved by DEP's adoption of the RO in its Final Order for DOAH Case No. 19-1844.[1] The ALJ struck from the Petition the issue of whether the East Pass IMP is an unadopted rule and removed it as an issue for further consideration.

DOAH held the final hearing on November 20 and 21, 2019. At the final hearing, the City presented the testimony of Matthew Trammel, P.E. DEP presented the testimony of Ralph Clark, P.E., and Greg Garis. City Exhibits 10 through 12, 14 through 19, 27, and 38 through 46

[1] Because of the similarity of issues and the overlapping witnesses and evidence in this case (Case No. 19-3356) and those in Case No. 19-1844, the parties stipulated to the admission into evidence of the record from Case No. 19-1844, which includes the hearing transcript and the exhibits in Case No. 19-1844. Throughout this final order, the Department will cite to the transcript in Case No. 19-1844 as "Case No. 19-1844, T. Vol. X, p. X," and to the transcript in Case No. 19-3356 as "Case No. 19-3356, T. Vol. X, p. X."

were received in evidence. DEP Exhibits 1, 20, 27 through 29, 32, 33, and 35 were received in evidence. Three Corps employees - Jennifer Jacobsen, Elizabeth Godsey, and Waylon Register - also testified at the final hearing.

At the final hearing, Petitioners presented the testimony of Scott Douglas, Ph.D., P.E., and Robert Young, Ph.D. Petitioners Mr. Wilson, Mr. Sherry, Mrs. Sherry, and Mr. Donovan also testified as standing witnesses. Petitioners' Exhibits 3, 5, 8, 11, 26, 29, 39 (pages 0009 and 0010), 40 through 43, 45, 46, and 58 were received in evidence. Petitioners' Exhibits 47 and 62 through 64 were proffered, but not received in evidence.

A four-volume transcript of the final hearing was filed with DOAH on January 7, 2020. All parties filed proposed recommended orders (PRO) on January 17, 2020.

SUMMARY OF THE RECOMMENDED ORDER

In the RO, the ALJ recommended that the Department enter a final order to the Corps approving the November 14, 2016, Permit Modification No. 0288799-006-JN, as amended by the Department's Notice of Proposed Changes to Proposed Agency Action for maintenance dredging of East Pass. (RO at p. 41). 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 ¶¶ 31-35). In accordance with section 161.142, Florida Statutes, 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 Corps is entitled to the Permit Modification. (RO ¶¶ 77-81).

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 Cty. 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 Regulation*, 622 So. 2d 607, 609 (Fla. 1st DCA 1993); *Heifetz v. Dep't of Bus. Regulation*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). 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. Pub. Emp. Council, v. Daniels,* 646 So. 2d 813, 816 (Fla. 1st DCA 1994).

RULINGS ON THE PETITIONERS' EXCEPTIONS

Petitioners' Exception No. 1 regarding Paragraphs 16, 19, 26, 27, 28, 31, 35, 38, 39, 42, 43, 44, 46, 72, 73 and 77 through 81

The Petitioners take exception to certain findings of fact in paragraphs 16, 19, 26, 27, 28, 31, 35, 38, 39, 42, 43, 44 and 46 of the RO, alleging that portions of these paragraphs are not supported by competent substantial evidence. The Petitioners also take exception to certain conclusions of law in paragraphs 72, 73, and 77 through 81.

Paragraph 16 of the RO:

The Petitioners take exception to the ALJ's findings of fact in paragraph 16 that pursuant to a statutory requirement sand must be placed on "adjacent eroding beaches," and that an element of the strategy of the East Pass Inlet Management Implementation Plan is 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.'" RO ¶ 16. The Petitioners allege that these findings are not supported by competent substantial evidence.

Contrary to the Petitioners' exception, the ALJ's findings in paragraph 16 of the RO are supported by competent substantial evidence in the form of expert testimony from Ralph Clark, P.E., and a joint exhibit. (Case No. 19-1844, T. Vol. 3, pp. 295, 328-29, 371-72) (Case No. 19-3356, T. Vol. II, pp. 223-25; Joint Exhibit 4 (East Pass IMP)). For the abovementioned reasons, the Petitioners' exception to paragraph 16 is rejected.

Paragraph 19 of the RO:

The Petitioners take exception to what they allege is the ALJ's conclusion in paragraph 19 of the RO "that section 161.142(5) is the only provision applicable in this case." RO ¶ 19. Petitioners' Exceptions to the RO at p. 7. The Department concurs with the ALJ's statement in paragraph 19 that "[p]ursuant to section 161.142(5), beach compatible sand dredged from federal navigation channels is to be placed on the adjacent eroding beach." § 161.141(5), Fla. Stat. (2019). More importantly, the Department disagrees with the Petitioners' allegation that the ALJ concluded in paragraph 19 of the RO "that section 161.142(5) is the only provision applicable in this case." Petitioners' Exceptions to the RO at p. 7. The Department concludes the Petitioners have misconstrued the ALJ's reference to section 161.142(5), Florida Statutes, in paragraph 19

of the RO. For the abovementioned reasons, the Petitioners' exception to paragraph 19 is rejected.

Paragraph 26 of the RO:

The Petitioners appear to take exception to the portion of the findings of fact in paragraph 26 of the RO, which finds there is "'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].'" RO ¶ 26. Petitioners' Exceptions to the RO at p. 8.

Contrary to the Petitioners' exception to the above cited portion of paragraph 26 of the RO, the Department finds that the ALJ's findings are supported by competent substantive evidence; and thus, must be accepted by the Department. The provisions at issue in paragraph 26 of the RO are supported by competent substantial evidence in the form of expert testimony and exhibits. (Case No. 19-1844, T. Vol. 4, p. 458) (Case No. 19-3356, Joint Exhibit 4 at pp. 14-15 of 21). For the abovementioned reasons, the Petitioners' exception to paragraph 26 is rejected.

Paragraph 27 of the RO:

The Petitioners appear to take exception to that portion of the findings of fact in paragraph 27 of the RO, which references "longshore transport." RO ¶ 27. Petitioners' Exceptions to the RO at p. 8.

Contrary to the Petitioners' exception to the reference to "longshore transport" in paragraph 27 of the RO, the Department finds that the ALJ's findings are supported by competent substantive evidence; and thus, must be accepted by the Department. The provisions at issue in paragraph 27 of the RO are supported by competent substantial evidence in the form of expert testimony by both Ralph Clark, P.E., and Matthew Trammel, P.E., and a joint exhibit. (Case No. 19-1844, T. Vol 3, pp. 318-19; Case No. 19-1844, Vol. 5, pp. 588-89) (Case No.

19-3356, T. Vol. II, pp. 241-42; Joint Exhibit 4). For the abovementioned reasons, the Petitioners' exception to paragraph 27 is rejected.

Paragraph 28 of the RO:

The Petitioners appear to take exception to that portion of the findings of fact in paragraph 28 of the RO, which reference "longshore transport." Petitioners' Exceptions to the RO at p. 8. Paragraph 28 of the RO does not reference the phrase "longshore transport"; however, it does include the phrases "lateral sand transport" and "nodal point." As a result, the Department will rule on this exception.

Contrary to the Petitioners' exception to the reference to "longshore transport" in paragraph 28 of the RO, the Department finds that the ALJ's findings are supported by competent substantive evidence; and thus, must be accepted by the Department. The provisions at issue in paragraph 28 of the RO are supported by competent substantial evidence in the form of expert testimony by both Ralph Clark, P.E., and Matthew Trammel, P.E. (Case No. 19-1844, T. Vol 3, pp. 318-19; Case No. 19-1844, Vol. 5, pp. 588-89). For the abovementioned reasons, the Petitioners' exception to paragraph 28 is rejected.

Paragraph 31 of the RO:

The Petitioners take exception to that portion of the finding of fact in paragraph 31 of the RO, which finds that the beaches east of East Pass "are 'adjacent eroding beaches' as that term is used in section 161.142." RO ¶ 31.

Contrary to the Petitioners' exception to part of paragraph 31of the RO, the Department finds that the ALJ's findings in this part of paragraph 31 of the RO are supported by competent substantive evidence; and thus, must be accepted by the Department. The provision at issue in paragraph 31 of the RO is supported by competent substantial evidence in the form of expert

testimony. Matthew Trammel presented competent substantial evidence that the beaches east of East Pass are eroding beaches adjacent to East Pass and constitute East Pass' "adjacent eroding beaches." (Case No. 19-1844, T. Vol. 1, pp. 40-42, 115-16) (Case No. 19-3356, T. Vol. II, pp. 177-78, 188-89, 206). Ralph Clark presented similar testimony. (Case No. 19-1844, T. Vol. 3, p. 347) (Case No. 19-3356, T. Vol. II, pp. 227-28). *See also* Case No. 19-3356, Joint Exhibits 5, 6, and 7, City Exhibits 10, 11, 12, 14, and 41-42, and DEP Exhibit 1. For the abovementioned reasons, the Petitioners' exception to paragraph 31 is rejected.

Paragraph 35 of the RO:

The Petitioners take exception to that portion of the findings of fact in paragraph 35 of the RO, which finds 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." RO ¶ 35.

Contrary to the Petitioners' exception to part of paragraph 35 of the RO, the Department finds that the ALJ's findings in paragraph 35 of the RO are supported by competent substantive evidence; and thus, must be accepted by the Department. The provisions at issue in paragraph 35 of the RO are supported by competent substantial evidence in the form of expert testimony. Matthew Trammel, P.E., presented competent substantial evidence that the beaches west of East Pass are stable, if not accreting, and that the beaches west of East Pass are not eroding beaches adjacent to East Pass. (Case No. 19-1844, T. Vol. 1, pp. 40-43, 115-16, 116-18, 119-20) (Case No. 19-3356, T. Vol. II, pp. 178, 186-87, 206). Ralph Clark presented similar testimony. (Case No. 19-1844, T. Vol. 3, p. 347) (Case No. 19-3356, T. Vol. II, pp. 228-30). *See also* Case No. 19-3356, Joint Exhibit 6 at pp. 31-32 of 60, City Exhibits 19, 43, and 44. For the abovementioned reasons, the Petitioners' exception to paragraph 35 is rejected.

Paragraphs 38 and 39 of the RO:

The Petitioners take exception to that portion of the findings of fact in paragraphs 38 and 39 of the RO, which find that "the beaches to the east of East Pass constitute 'adjacent eroding beaches,' and that the beaches to the west of East Pass do not." Petitioners' Exceptions to the RO at p. 7. RO ¶¶ 38, 39.

Contrary to the Petitioners' exception to part of paragraphs 38 and 39 of the RO, the Department finds that the ALJ's findings are supported by competent substantive evidence; and thus, must be accepted by the Department. The provisions at issue in paragraphs 38 and 39 of the RO are supported by competent substantial evidence in the form of expert testimony. Matthew Trammel, P.E., presented competent substantial evidence that the beaches east of East Pass are adjacent eroding beaches. Matthew Trammel also presented competent substantial evidence that the beaches west of East Pass are not adjacent eroding beaches. (Case No. 19-1844, T. Vol. 1, pp. 40-42, 115-16) (Case No. 19-3356, T. Vol. II, pp. 177-78, 188-89, 206; City Exhibits 41-44). Ralph Clark presented similar testimony. (Case No. 19-1844, T. Vol. 3, p. 347) (Case No. 19-3356, T. Vol. II, pp. 227-28). For the abovementioned reasons, the Petitioners' exception to paragraphs 38 and 39 is rejected.

Paragraph 42 of the RO:

The Petitioners take exception to the portion of the findings of fact in paragraph 42 of the RO, which finds that "the Permit Modification is consistent with section 161.142 and will ensure that net long-term erosion or accretion rates on both sides of East Pass remain equal." RO ¶ 42. Petitioners' Exceptions to the RO at p. 7.

Contrary to the Petitioners' exception to part of paragraph 42 of the RO, the Department finds that the ALJ's findings are supported by competent substantive evidence; and thus, must be

accepted by the Department. The provision at issue in paragraph 42 of the RO is supported by competent substantial evidence in the form of expert testimony. Competent substantial evidence was presented that the net long-term erosion or accretion rates on both sides of East Pass remain equal. (Case No. 19-1844, T. Vol. 1, pp. 33-34) (Case No. 19-3356, T. II, pp. 241-42). For the abovementioned reasons, the Petitioners' exception to paragraph 42 is rejected.

Paragraph 43 of the RO:

The Petitioners take exception to that portion of the findings of fact in paragraph 43 of the RO, which finds that the beach disposal areas at "R-17 to R-20.5 [east of East Pass] are critically eroded, a condition influenced, if not caused, by East Pass, and constitute East Pass's 'adjacent eroding beaches.'" Petitioners' Exceptions to the RO at p. 7. RO ¶ 43.

Contrary to the Petitioners' exception to paragraph 43 of the RO, the Department finds that the ALJ's findings in paragraph 43 of the RO are supported by competent substantive evidence; and thus, must be accepted by the Department. Paragraph 43 of the RO is supported by competent substantial evidence in the form of expert testimony from Ralph Clark, P.E., and Matthew Trammel, P.E. Matthew Trammel presented competent substantial evidence that the beaches east of East Pass are eroding beaches adjacent to East Pass and constitute East Pass' "adjacent eroding beaches." (Case No. 19-1844, T. Vol. 1, pp. 40-42, 115-16) (Case No. 19-3356, T. Vol. II, pp. 177-78, 188-89, 206; City Exhibits 41-42). Ralph Clark presented similar testimony. (Case No. 19-1844, T. Vol. 3, p. 347) (Case No. 19-3356, T. Vol. II, pp. 227-28). For the abovementioned reasons, the Petitioners' exception to paragraph 43 is rejected.

Paragraph 44 of the RO:

The Petitioners take exception to that portion of the findings of fact in paragraph 44 of the RO, which finds that "the beach disposal areas at Monuments V-611 to V-622 (west of East

Pass), are stable, if not accreting, and are not East Pass's 'adjacent eroding beaches.'"

Petitioners' Exceptions to the RO at p. 7. RO ¶ 44.

Contrary to the Petitioners' exception to paragraph 44 of the RO, the Department finds that the ALJ's findings are supported by competent substantive evidence; and thus, must be accepted by the Department. Paragraph 44 of the RO is supported by competent substantial evidence in the form of expert testimony by Ralph Clark, P.E., and Matthew Trammel, P.E. Matthew Trammel presented competent substantial evidence that the beaches west of East Pass are stable, if not accreting, and are not East Pass' "adjacent eroding beaches." (Case No. 19-1844, T. Vol. 1, pp. 40-43, 115-16, 116-18, 119-20) (Case No. 19-3356, T. Vol. II, pp. 178, 186-87, 206; Joint Exhibit 6 at pp. 31-32 of 60). Ralph Clark presented similar testimony. (Case No. 19-1844, T. Vol. 3, p. 347) (Case No. 19-3356, T. Vol. II, pp. 228-30). For the abovementioned reasons, the Petitioners' exception to paragraph 44 is rejected.

Paragraph 46 of the RO:

The Petitioners take exception to the ALJ's ultimate finding of fact in paragraph 46 of the RO, which finds:

> 46. The greater weight of the competent substantial evidence establishes that the Corps met the standards for the Permit Modification as proposed for issuance by DEP on November 14, 2016, and August 21, 2019, including section 161.142 and rules 62B-41.003 and 62B-41.005. Evidence to the contrary was not persuasive. Thus, the Permit Modification should be issued.

Petitioners' Exceptions to the RO at p. 7. RO ¶ 46.

The Department concludes that paragraph 46 of the RO contains mixed issues of law and fact. Findings of fact include "ultimate facts," sometimes termed mixed issues of law and fact, necessary to determine the issues in a case. *Costin v. Fla. A & M Univ. Bd. of Trs.*, 972 So. 2d 1084, 1086-1087 (Fla. 5th DCA 2008). 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 Cty.*, 18 So. 3d at 1082; *Wills,* 955 So. 2d at 62.

Moreover, the ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting the decision. *See, e.g.*, *Peace River/Manasota Reg'l Water Supply Auth.*, 18 So. 3d at 1088; *Collier Med. Ctr.*, 462 So. 2d at 85; *Fla. Chapter of Sierra Club,* 436 So. 2d at 389. As the ALJ found, the greater weight of the competent substantial evidence establishes that the Corps met the criteria for issuance of the Permit Modification, and "[e]vidence to the contrary was not persuasive." RO ¶ 46.

Contrary to the Petitioners' exception to paragraph 46 of the RO, the Department finds that the ALJ's ultimate finding of fact is supported by competent substantive evidence; and thus, must be accepted by the Department. Paragraph 46 of the RO is supported by competent substantial evidence in the form of expert testimony and exhibits cited throughout this RO in response to each of the Petitioners' exceptions to numerous paragraphs of the RO. The Department's response to each of the Petitioners' exceptions are incorporated into this response to the Petitioners' exception to paragraph 46 of the RO.

For the abovementioned reasons, the Petitioners' exception to paragraph 46 is rejected.

Paragraph 72 of the RO:

The Petitioners take exception to the conclusions of law in paragraph 72 of the RO, asserting that the ALJ has misinterpreted section 161.142, Florida Statutes, and chapter 62B-41, Florida Administrative Code. Paragraph 72 of the RO does not mention in any manner chapter

62B-41, Florida Administrative Code, or any other Department rule; thus, the Department shall not rule on the ALJ's alleged interpretation or application of 62B-41, Florida Administrative Code in paragraph 72. The Department, which is the agency authorized to implement section 161.141, Florida Statutes, concurs with the ALJ's interpretation of section 161.142, Florida Statutes, as articulated in paragraph 72 of the RO. [2]

For the abovementioned reasons, the Petitioners' exception to paragraph 72 is rejected.

Paragraph 73 of the RO:

The Petitioners take exception to the conclusions of law in paragraph 73 of the RO, which reads:

> 73. The more specific and *unequivocal* legislative requirement that disposal of beach quality sand from maintenance dredging of navigation inlets be onto adjacent eroding beaches, as established in section 161.142(5), controls over more general provisions of section 161.142. *See, e.g. Nolden. v. Summit Fin. Corp.*, 244 So. 3d 322. 327 (Fla. 4th DCA 2018); *G.E.L. Corp. v. Dep't of Envtl. Prot.*, 875 So. 2d 1257, 1261 (Fla. 5th DCA 2004); *Barnett Banks, Inc., v. Dep't of Rev.*, 738 So. 2d 502, 505 (Fla. 1st DCA 1999).

RO ¶ 73(emphasis added). The Petitioners disagree with the ALJ's interpretation of the doctrines of statutory interpretation. Petitioners' Exceptions at pp. 4-5.

The Department concurs with the ALJ's interpretation of section 161.142, Florida Statutes. The ALJ concludes that Section 161.142, Florida Statutes, is unambiguous. Moreover, the Department concludes that the ALJ's analysis in paragraph 73 regarding the doctrines of statutory construction merely lends support to the plain and "unequivocal" language of the statute.

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[2] Similarly, the Department concurred with the ALJ's interpretation of section 161.142, Florida Statutes, as articulated in paragraph 85 of the RO in DOAH Case No. 19-1844, the record of which is incorporated by reference into this case, DOAH Case No. 19-3356, by stipulation of the parties.

For the abovementioned reasons, the Petitioners' exception to paragraph 73 is rejected.

Paragraphs 77 through 81 of the RO:

The Petitioners take exception to the conclusions of law in paragraphs 77 through 81 of the RO, asserting that the conclusions of law in paragraphs 77 through 81 of the RO are inconsistent with their interpretation of section 161.142, Florida Statutes.

The Department concludes that paragraphs 77 through 81 contain mixed issues of law and fact. Findings of fact include "ultimate facts," sometimes termed mixed issues of law and fact, necessary to determine the issues in a case. *Costin*, 972 So. 2d at 1086-1087. 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 Cty.*, 18 So. 3d at 1082; *Wills,* 955 So. 2d at 62.

The Petitioners take exception to the ALJ's finding in paragraph 77 of the RO that "the Beaches of East Pass are adjacent eroding beaches." RO ¶ 77. The Petitioners also take exception to the ALJ's finding in paragraph 78 of the RO that "the beaches west of East Pass are not adjacent eroding beaches." RO ¶ 78. Contrary to the Petitioners' exceptions to paragraphs 77 and 78 of the RO, the Department finds that the ALJ's findings in these two paragraphs are supported by competent substantive evidence; and thus, must be accepted by the Department. The findings in paragraph 77 and 78 of the RO are supported by competent substantial evidence in the form of expert testimony by Ralph Clark, P.E., and Matthew Trammel, P.E. (Case No. 19-1844, T. Vol. 1, pp. 40-42, 115-16) (Case No. 19-3356, T. Vol. II, pp. 177-78, 188-89, 206; City Exhibits 41-44). Ralph Clark presented similar testimony. (Case No. 19-1844, T. Vol. 3, p. 347) (Case No. 19-3356, T. Vol. II, pp. 227-28).

The Petitioners also take exception to the conclusions of law in paragraphs 79 through 81 of the RO, asserting that the ALJ has misinterpreted section 161.142, Florida Statutes, and chapter 62B-41, Florida Administrative Code.

The Petitioner contends that the ALJ could not, as a matter of law, conclude that the Project application meets the statutory and rule criteria for issuance of the Permit Modification without the factual findings in paragraphs 16, 19, 26, 27, 28, 31, 35, 38, 39, 42, 43, 44 and 46 of the RO. However, the Department herein above has rejected each of the Petitioner's exceptions to the findings in paragraphs 16, 19, 26, 27, 28, 31, 35, 38, 39, 42, 43, 44 and 46 of the RO, finding each paragraph was supported by competent substantial evidence. As a result, the Petitioner has no basis to allege that the Permit Modification does not meet the statutory requirements in section 161.141, Florida Statutes, and rule criteria in rule 62B-41, Florida Administrative Code. For the abovementioned reasons, the Petitioners' exceptions to paragraphs 79-81 are rejected.

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

Petitioners' Exception No. 2 regarding Pages 3, 6, and 11 of the RO, and Paragraphs 10, 22, 23-46, 43-44, 59 and 76-81 of the RO

The Petitioners take exception to the findings of fact in paragraphs 3, 6, 11, 22, 23 through 46, and 43 through 44 of the RO; and moreover, take exception to the conclusions of law in paragraphs 59 and 76 through 81 of the RO.

Specifically, the Petitioners contend the ALJ erroneously concluded "that the issue to be determined in this case is limited solely to determining entitlement to place sand as part of the next dredging event to the east of East Pass." *See* Petitioner's Exception 2 at page 9. However, it is clear that the ALJ understood that the Permit Modification under litigation authorized more

than one dredging event. In fact, the ALJ stated as such in paragraph 22 of the RO, which reads as follows:

> 22. The Permit Modification provides that, for the first maintenance dredging event following issuance of the Permit Modification, dredged material is to be placed at fill sites east of East Pass, the condition that Petitioners' find objectionable. The Permit Modification then provides that "[f]or all subsequent maintenance dredging events conducted under this permit, disposal locations shall be supported by physical monitoring data of the beaches east and west of East Pass in order to identify the adjacent eroding beaches that will receive the maintenance dredged material, providing consistency with section 161.142, Florida Statutes." Thus, the placement of dredged material to the east of East Pass authorized by the Permit Modification applies to the next dredging event, and not necessarily to subsequent periodic dredging events authorized by the Permit Modification.

RO ¶ 22. *See also* Case No. 19-3356, DEP Exhibit 29. It is also clear that the Petitioners have no dispute with the sand being placed on the western side of East Pass as required under the 2009 Permit. In fact, this is the crux of their challenge. They contend the sand should be required to go only to the west (as provided in the 2009 Permit) and should not be authorized to ever go to the east (as allowed in the Permit Modification in the event it is the adjacent eroding beach). *See* Petitioner's Petition for Formal Administrative Hearing at ¶¶ 15, 17 (stating "[u]nless sand dredged from East Pass continues to go west … Petitioner will be harmed as described herein" and "[t]he contested agency action is the Department's decision to authorize the Corps, under the Modification, to deposit sand dredged from East Pass within the swash zone on the eastern side of East Pass"). In fact, in Case No. 19-1844, the Petitioners testified that their objective in bringing this litigation is to get 100 percent of the sand dredged from East Pass "to go to the west at all times." (Case No. 19-1844, T. Vol. 5, p. 566). Accordingly, the Department concludes that the ALJ has properly characterized that the main disputed issue is whether sand can be placed on the beaches to the east of East Pass.

Page 3 of the RO's Statement of the Issues:

The Petitioners take exception to a phrase in the ALJ's Statement of the Issues on page 3 of the RO. RO at p. 3. As described above, the ALJ correctly, characterized the disputed issue in this case. Moreover, the Petitioners' exception to the ALJ's Statement of the Issues is improper and must be denied, because parties may only file an exception to findings of fact and conclusions of law. Fla. Admin. Code R. 28-106.217 (2019). For the abovementioned reasons, the Petitioners' exception to a phrase in the ALJ's Statement of the Issues is rejected.

Pages 6, 9 and 11 of the RO's Preliminary Statement:

The Petitioners take exception to several statements in the ALJ's Preliminary Statement on pages 6, 9 and 11 of the RO. RO at pp. 6, 9, 11. As described above, the ALJ correctly, characterized the disputed issue in this case. Moreover, the Petitioners' exception to the ALJ's Preliminary Statement is improper and must be denied, because parties may only file an exception to findings of fact and conclusions of law. Fla. Admin. Code R. 28-106.217 (2019). For the abovementioned reasons, the Petitioners' exception to several statements in the ALJ's Preliminary Statement is rejected.

Paragraph 10 of the RO:

The Petitioners take exception to a statement in paragraph 10 of the RO's findings of fact, which reads, in its entirety, that "[t]he issue in dispute in this case, as it was in 19-1844, is the determination of whether beaches adjacent to the East Pass inlet are eroding, stable, or accreting, for purposes of meeting the statutory objective of section 161.142." RO ¶ 10.

The Petitioners object that paragraph 10 of the RO "suggests that the issues in this case and in Division Case No. 19-1844 are the same." Petitioners' Exceptions to the RO at p. 10. The

Department rejects the Petitioners' reading of paragraph 10 of the RO that the ALJ "suggested" that the issues in DOAH Case Nos. 19-1844 and 19-3356 are the same.

First, the Department concludes that paragraph 10 of the RO contains mixed issues of law and fact. *Costin*, 972 So. 2d at 1086-1087. 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 Cty.*, 18 So. 3d at 1082; *Wills,* 955 So. 2d at 62.

This final order is replete with citations to the record for both DOAH Case No. 19-1844 and the case at issue, DOAH Case No. 3356, which provide competent substantial evidence that certain beaches adjacent to the East Pass Inlet, proposed for dredging, are eroding, and other beaches are stable or accreting. The Department's rulings on the Petitioners' numerous objections to paragraphs in their Exceptions No. 1, 2 and 3 are incorporated herein in response to this exception.

Second, the Petitioners' have waived any exception to the ALJ's "suggestion" in paragraph 10 of the RO, because the parties, including the Petitioners, stipulated to the admission into evidence of the record, including the hearing transcript, from DOAH Case No. 19-1844, because of the similarity of issues and overlapping witnesses and evidence in both cases. RO at p. 12 (Preliminary Statement).

For the abovementioned reasons, the Petitioners' exception to paragraph 10 is rejected.

Paragraph 22 of the RO:

The Petitioners take exception to a portion of paragraph 22 of the RO's findings of fact. However, the Petitioners statements on pages 10-11 of their exceptions appear internally

inconsistent. The Department is not obligated to consider an exception that does not clearly identify the disputed portion of the recommended order or identify the legal basis for the exception. *See* § 120.57(1)(k), Fla. Stat. (2019).

Nevertheless, the Department will attempt to interpret the Petitioners' objection to paragraph 22 RO. It appears that the Petitioners object to any finding by the ALJ "as it relates to future dredge events authorized by the Permit Modification. [R.O. ¶ 22 ('[T]he placement of dredged material to the east of East Pass authorized by the Permit Modification applies to the *next* dredge event, and not necessarily to subsequent dredging events authorized by the Permit Modification.' (emphasis added))]." Petitioners' Exceptions to the RO at pp. 10-11.

The Department concludes that the ALJ's statement cited above in paragraph 22 of the RO is citing to the terms of the Permit Modification. The conditions of the Permit Modification authorize the specific placement of dredged material for the *next* dredging event, but not necessarily subsequent dredging events. The Permit Modification requires each new dredging event to be analyzed to determine which shoreline constitutes the "adjacent eroding beach" for placement of the dredged material. (Case No. 19-3356, DEP Exhibit 29).

For the abovementioned reasons, the Petitioners' exception to paragraph 22 is rejected.

Paragraphs 23 through 46 of the RO:

The Petitioners take exception to the findings of fact in paragraphs 23 through 46 of the RO, asserting that they fail to address all requirements relating to placement of dredge spoil from *future* dredge events under the Permit Modification. Petitioners' Exceptions to the RO at pp. 11-12.

The Petitioners' appear to object to the ALJ's failure to reference placement of dredge spoils from future dredge events under the Permit. The conditions of the Permit Modification

authorize the *specific* placement of dredged material for the *next* dredging event, but not subsequent dredging events. The Permit Modification requires each new dredging event to be analyzed to determine which shoreline constitutes the "adjacent eroding beach" for placement of the dredged material. *See* RO ¶ 22 and Case No. 19-3356, DEP Exhibit 29.

The Petitioners appear to be requesting the Department to supplement the ALJ's findings of fact in paragraphs 23 through 46 of the RO. 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. For the abovementioned reasons, the Petitioners' exception to paragraphs 23 through 46 is rejected.

Paragraphs 43 and 44 of the RO:

The Petitioners take exception to the ultimate findings of fact in paragraphs 43 and 44 of the RO. However, the Petitioners statements on pages 10-11 of their exceptions are unclear. The Department is not obligated to consider an exception that does not clearly identify the disputed portion of the recommended order or identify the legal basis for the exception. *See* § 120.57(1)(k), Fla. Stat. (2019).

Nevertheless, the Department will attempt to interpret the Petitioners' objection to paragraphs 43 and 44 of the RO. The "ultimate finding of fact" in paragraph 43 can be summarized to state that the greater weight of the competent substantial evidence establishes that the shoreline east of East Pass is critically eroded and constitutes East Pass' "adjacent eroding beaches." RO ¶ 43. The "ultimate finding of fact" in paragraph 44 can be summarized to state that the greater weight of the competent substantial evidence establishes that the shoreline west of East Pass are stable, if not accreting, and are not East Pass' "adjacent eroding beaches."

The Petitioners contend that

> [W]hile the Division's conclusions in R.O. paragraphs 43 and 44 regarding the status of the beaches east and west of East Pass as "adjacent eroding beaches" might arguably apply to the immediate dredge event for which the Permit Modification requires placement to the east, those conclusions have no relevance to the placement of dredge spoils from future dredge events under the Permit.

Petitioners' Exceptions to the RO at p. 11.

The Petitioners' appear to object to the ALJ's failure to reference placement of dredge spoils from future dredge events under the Permit. The conditions of the Permit Modification authorize the *specific* placement of dredged material for the *next* dredging event, but not subsequent dredging events. The Permit Modification requires each new dredging event to be analyzed to determine which shoreline constitutes the "adjacent eroding beach" for placement of the dredged material. *See* RO ¶ 22 and Case No. 19-3356, DEP Exhibit 29.

The Petitioners appear to be requesting the Department to supplement the ALJ's findings of fact in paragraphs 43 and 44 of the RO. 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.

For the abovementioned reasons, the Petitioners' exceptions to paragraphs 43 and 44 are rejected.

Paragraph 59 of the RO:

The Petitioners take exception to a phrase in conclusion of law paragraph 59 of the RO, which states that "the immediate case involves a single maintenance dredging event, and not all maintenance dredging authorized over the term of the Permit Modification." RO ¶ 59. Paragraph 59 is directed to the Petitioners' standing. The ALJ added the phrase above to emphasize their questionable standing to challenge the Permit Modification, especially as it relates to the

speculative and remote nature of any potential injury to the Petitioners. The Petitioners conclude that the ALJ intended to imply that the Permit Modification under litigation only involves "a single maintenance dredging event, and not all maintenance dredging authorized under the terms of the Permit Modification." As described above, the Department rejects this conclusion.

The ALJ understood that the Permit Modification under litigation authorized more than one dredging event. In fact, the ALJ stated as such in paragraph 22 of the RO, which reads as follows:

> 22. The Permit Modification provides that, for the first maintenance dredging event following issuance of the Permit Modification, dredged material is to be placed at fill sites east of East Pass, the condition that Petitioners' find objectionable. The Permit Modification then provides that "[f]or all subsequent maintenance dredging events conducted under this permit, disposal locations shall be supported by physical monitoring data of the beaches east and west of East Pass in order to identify the adjacent eroding beaches that will receive the maintenance dredged material, providing consistency with section 161.142, Florida Statutes." Thus, the placement of dredged material to the east of East Pass authorized by the Permit Modification applies to the next dredging event, and not necessarily to subsequent periodic dredging events authorized by the Permit Modification.

RO ¶ 22. *See also* Case No. 19-3356, DEP Exhibit 29.

For the abovementioned reasons, the Petitioners' exception to paragraph 59 is rejected.

Paragraphs 76 through 81 of the RO:

The Petitioners take exception to the conclusions of law in paragraphs 76 through 81 of the RO, asserting that they fail to address all requirements relating to placement of dredge spoil from *future* dredge events under the Permit Modification. Petitioners' Exceptions to the RO at p. 12.

The Petitioners' appear to object to the ALJ's failure to reference placement of dredge spoils from future dredge events under the Permit. The conditions of the Permit Modification authorize the *specific* placement of dredged material for the *next* dredging event, but not

subsequent dredging events. The Permit Modification requires each new dredging event to be analyzed to determine which shoreline constitutes the "adjacent eroding beach" for placement of the dredged material. *See* RO ¶ 22 and Case No. 19-3356, DEP Exhibit 29.

The Petitioners appear to be requesting the Department to supplement the ALJ's underlying findings of fact that support paragraphs 76 through 81 of the RO. 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. For the abovementioned reasons, the Petitioners' exception to paragraphs 76 through 81 is rejected.

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

Petitioners' Exception No. 3 regarding Paragraphs 23, 24, 30, 31, 32, 33 and 43

The Petitioners take exception to the findings of fact in paragraphs 23, 24, 30, 31, 32, 33 and 43 of the RO. Regarding paragraphs 23, 24, 30, 31 and 43 of the RO, the Petitioners take exception to the ALJ's reference in these paragraphs to whether a shoreline is designated as "critically eroded." The Petitioners allege that whether a shoreline is critically eroded is irrelevant to where and what quantity of sand dredged from East Pass should be placed and whether the Permit Modification complies with section 161.142, Florida Statutes, or Chapter 62B-41, Florida Administrative Code. Their exception to these paragraphs must be rejected, because the Petitioners did not contend, expressly or by implication, that these findings are not supported by competent substantial evidence.

Moreover, the ALJ's findings of fact at issue in paragraphs 23, 24, 30, 31 and 43 of the RO are supported by competent substantial evidence in the form of expert testimony and hearing exhibits. Regarding paragraphs 23, 30, 31 and 43, competent substantial evidence was presented that the eastern areas of influence of East Past, which include the beaches east of East Pass, are

critically eroded. (Case No. 19-1844, T. Vol. 1, pp. 41-42, 60-64, 91-92, 115-16, 121-26; Case No. 19-1844, T. Vol. 2, pp. 255-57; Case No. 19-1844, T. Vol. 3, pp. 296-302, 307) (Case No. 19-3356, T. Vol. II, pp. 222-230, 234-36, 241; Joint Exhibits 3, 6, and 7, City Exhibits 10, 11, 12, 14, and 41, DEP Exhibit 1). Regarding paragraph 24, competent substantial evidence was presented that the "shoreline landward of the western fill site has not been designated as critically eroded by the Department." (Case No. 19-1844, T. Vol. 1, p. 42).

The Petitioners also take exception to the statement in paragraph 32 that the beach on Santa Rosa Island to the west of East Pass recovered "naturally" following impacts from hurricanes in 2004-2005, alleging this portion of paragraph 32 is not supported by competent substantial evidence. RO ¶ 32.

Contrary to the Petitioners' exception, the ALJ's above cited finding in paragraph 32 of the RO is supported by competent substantial evidence in the form of expert testimony from Matthew Trammell, P.E., and photographic evidence he presented. (Case No. 19-1844, T. Vol. 1, pp. 39-40) (Case No. 19-3356, T. Vol. II, pp. 203-206; City Exhibits 45 and 46).

The Petitioners also take exception to the statement in paragraph 33 of the RO that "the Santa Rosa Island shoreline is not deemed by DEP to be 'critically eroded,'" alleging this statement is not supported by competent substantial evidence. RO ¶ 33.

Contrary to the Petitioners' exception, the ALJ's above cited finding in paragraph 33 of the RO is supported by competent substantial evidence in the form of expert testimony from Matthew Trammell, P.E., who testified that the beaches within the western area of influence are not currently designated as critically eroded. (Case No. 19-1844, T. Vol. 1, p. 42).

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, 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. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Constr. Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623. For the abovementioned reasons, the Petitioners' exception to paragraphs 23, 24, 30, 31, 32, 33 and 43 of the RO is rejected.

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

Petitioners' Exception No. 4 regarding Paragraphs 26 and 27

The Petitioners take exception to the findings of fact in paragraphs 26 and 27 of the RO, alleging that these paragraphs are based on similar conclusions in the RO for Case No. 19-1844, which the Petitioners allege were based on statements from the Physical Monitoring Plan in the City's separate permit from Case No. 19-1844.

The Petitioners disagree with the ALJ's findings in paragraphs 26 and 27 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' exception, the ALJ's findings in paragraphs 26 and 27 of the RO are supported by competent substantial evidence. Because of the similarity of issues and the overlapping witnesses and evidence in this case and Case No. 19-1844, the parties in this case stipulated to the admission into evidence of the record from Case No. 19-1844, including but not limited to the hearing transcript from Case No. 19-1844. The ALJs findings are supported by more than the Physical Monitoring Plan in the City's separate permit from Case No. 19-1844.

The ALJ's findings in paragraphs 26 and 27 are supported by competent substantial evidence in the form of expert testimony and exhibits from both Case No. 19-1844 and Case No. 19-3356. (Case No. 19-1844, T. Vol. 1, pp. 50, 93; Case No 19-1844, T. Vol. 3, pp. 288-89, 318-19; Case No. 19-1844, T. Vol. 5, pp. 569-70, 572-73, 576, 581, 588-89) (Case No. 19-3356 Joint Exhibit 4 (East Pass IMP)).

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

Petitioners' Exception No. 5 regarding Paragraphs 4 and 41

The Petitioners take exception to certain findings in paragraphs 4 and 41 of the RO related to the Petitioners' injuries, alleging the statements were not supported by competent substantial evidence. Specifically, they object to the ALJ's finding that the Petitioners' objective is "to have any sand dredged from East Past to be placed on the western disposal areas at all times." RO ¶ 4.

Contrary to the Petitioners' exception, the ALJ's above cited finding in paragraph 4 of the RO is supported by competent substantial evidence. Because of the similarity of issues and the overlapping witnesses and evidence in this case and Case No. 19-1844, the parties in this case stipulated to the admission into evidence of the record from Case No. 19-1844, including but not limited to the hearing transcript from Case No. 19-1844. In Case No. 19-1844, the Petitioners testified that their objective in bringing this litigation is to get 100 percent of the sand dredged from the pass "to go to the west at all times." (Case No. 19-1844, T. Vol. 5, p. 566).

The Petitioners also take exception to the ALJ's statement in paragraph 41 of the RO that "placement of the dredged material on the eastern beach placement areas would, to some degree, accomplish the goals of allowing sand transport to the western beaches, as was the relief sought in the Petition." RO ¶. The ALJ's statement was based on Google Earth engine images

"depict[ing] sand moving across the ebb shoal to the western side of the inlet and attaching at various distances from the west jetty." RO ¶ 41.

The Petitioners disagree with the ALJ's above cited finding in paragraph 41 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' exception, the ALJ's above cited finding in paragraph 41 of the RO is supported by competent substantial evidence in the form of expert testimony from Ralph Clark, P.E. (Case No. 19-3356, T. Vol. IV, p. 386).

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

Petitioners' Exception No. 6 regarding Page 11 of the RO's Preliminary Statement

The Petitioners take exception to a phrase in the ALJ's Preliminary Statement of the RO. RO at p. 11. However, Petitioners' exception to the ALJ's preliminary statement is improper and must be denied, because parties may only file an exception to findings of fact and conclusions of law. Fla. Admin. Code R. 28-106.217 (2019).

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

RULINGS ON CITY'S EXCEPTIONS

City's Exception No. 1 regarding Paragraphs 48 through 59 and Recommendation Paragraph

The City takes exception to paragraphs 48 through 59 and the Recommendation paragraph of the RO, which includes every paragraph directed to the Petitioners' standing to challenge issuance of the proposed Permit Modification. The City alleges that the ALJ should

have made a precise ruling in the RO that the Petitioners' lacked standing and that their petition should be dismissed because of a lack of standing.

In paragraph 59 of the RO, the ALJ identified facts that questioned whether the Petitioners demonstrated at the DOAH hearing that they had standing to challenge the proposed Permit Modification. Specifically, the ALJ found:

> Despite their allegations that they were "substantially affected," 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, or that they were otherwise adversely affected by the issuance of the Permit Modification. The evidence was not persuasive that perceptible quantities of sand deposited on the western disposal site would migrate from the area of influence, or make its way to their property, or would adversely affect the already accretional nature of the shoreline adjacent to their properties. Furthermore, even accepting that sand would eventually make it to their properties, the evidence was convincing that the journey would be lengthy, hardly an immediate or adverse effect, particularly since the immediate case involves a single maintenance dredging event, and not all maintenance dredging authorized over the term of the Permit Modification. Thus, despite their allegations, Petitioners wholly failed to prove at the hearing that the Permit Modification as issued would – or could – result in actual or immediate threatened adverse effects to their property or their ability to use and enjoy the beaches west of East Pass.

RO ¶ 59. 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. Regulation*, 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 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. Regulation*, 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. Regulation*, 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). [3]

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

City's Exception No. 2 regarding Paragraphs 48 through 59 and Recommendation Paragraph

The City takes exception to paragraphs 48 through 59 and the Recommendation paragraph of the RO, which includes every paragraph directed to the Petitioners' standing to challenge issuance of the proposed Permit Modification. The City alleges that the ALJ should

[3] In paragraph 58 of the RO, the ALJ concluded he was willing to accept the Petitioners' "tenuous" standing "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." RO ¶ 58.

have made a precise ruling in the RO that the Petitioners' lacked standing and that their petition should be dismissed because of a lack of standing.

In particular, the City alleges that the ALJ's interpretation of the law of standing in paragraph 57 of the RO "may have been misapplied in Conclusions of Law ¶¶ 48-49." City's Exceptions at p. 3. Paragraph 57 of the RO reads, as follows:

> 57. 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."

RO ¶ 57.

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.,* 406 So. 2d *at* 481-82. As explained above in response to the City's Exception No. 1, the issue of the Petitioners' standing is essentially moot at this administrative stage of these proceedings, because their claims were litigated on the merits in the DOAH hearing. *See Hamilton Cty. Bd. of Cty. Comm'rs*, 587 So. 2d at 1383 (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.,* DOAH Case Nos. 17-0795 and 17-0796 (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.*, ER F.A.L.R. 1992: 032, p. 6 (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).

Based on the foregoing reasons, the City's Exception No. 2 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, and is incorporated by reference herein; and

B. The proposed Permit Modification No. 0288799-006-JN, as amended by DEP's August 21, 2019, Notice of Proposed Changes to Proposed Agency Action, to the U.S. Army Corps of Engineers is APPROVED, subject to the general and specific conditions set forth therein.

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 6th day of April, 2020, 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.

Lea Crandall
CLERK

04/06/2020
DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order has been sent by electronic mail this 6th day of April, 2020 to:

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THOMAS WILSON,

Petitioner,

and

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

Intervenors,

VS. CASE NO. 19-3356

U.S. ARMY CORPS OF ENGINEERS
AND FLORIDA DEPARTMENT OF
ENVIRONMENTAL PROTECTION

Respondents,

and

CITY OF DESTIN AND OKALOOSA COUNTY,
FLORIDA,

Intervenors,

_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on November 20 and 21, 2019, in Tallahassee, Florida, before E. Gary Early, a designated Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner Thomas Wilson:

D. Kent Safriet, Esquire
Joseph Alexander Brown, Esquire
Hopping Green & Sams, P.A.
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For Intervenors David H. Sherry, Rebecca R. Sherry, and John S. Donovan:

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For Intervenor Okaloosa County, Florida:

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STATEMENT OF THE ISSUES

The issues to be determined are whether the U.S. Army Corps of Engineers ("Corps") 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 Department of Environmental Protection ("DEP") Permit Modification No. 0288799-006-JN ("Permit Modification"), as amended by the DEP's August 21, 2019, Notice of Proposed Changes to Proposed Agency Action ("Proposed Change") in the nearshore zone east of East Pass; and whether the East Pass Inlet Management Plan ("East Pass IMP") is an unadopted rule as described in section 120.57(1)(e), Florida Statutes.

PRELIMINARY STATEMENT

On October 28, 2009, DEP issued Permit No. 0288799-001-JC ("Permit") to the Corps to perform maintenance dredging of the East Pass Navigation Channel and the Old Pass Lagoon Channel, and to rehabilitate the eastern and western jetties. Materials dredged from the Main Channel south of the U.S. Highway 98 bridge would be primarily bypassed to a portion of the beach on Eglin Air Force Base west of East Pass.

On November 14, 2016, DEP issued the Permit Modification to the Corps. The Permit Modification did not change the authorization or requirements for

the dredging, but allowed dredged material to be placed on "the Gulf-front beaches on the eastern and western sides of East Pass."

On November 16, 2018, John S. Donovan, David H. Sherry, and Rebecca R. Sherry filed a Petition for Administrative Hearing challenging the Permit Modification, which was referred to DOAH and assigned as DOAH Case No. 19-1915. On June 19, 2019, the ALJ assigned to that case entered an Order Granting Motion in Limine, Relinquishing Jurisdiction, and Closing File in which she found the challenge was not timely filed. On July 16, 2019, DEP entered a Final Order in DOAH Case No. 19-1915 dismissing the challenge to the Permit Modification, with prejudice. That Final Order was not appealed. A full account of the procedural history of that case is contained in the docket of DOAH Case No. 19-1915.

On June 5, 2019, Petitioner, Thomas Wilson, filed his Petition for Formal Administrative Hearing ("Petition"). The Petition, though differing in the identification of the party and in the manner in which notice was received, is substantively identical to that filed in DOAH Case No. 19-1915. The Petition was referred to DOAH on June 19, 2019, and assigned to the undersigned as DOAH Case No. 19-3356. On June 28, 2019, David H. Sherry, Rebecca R. Sherry, and John S. Donovan filed a motion to intervene in Case No. 19-3356, which was granted on July 8, 2019. Unless context requires otherwise, Mr. Wilson, Mr. and Mrs. Sherry, and Mr. Donovan will be collectively referred to as "Petitioners."

On August 20, 2019, the City of Destin ("Destin") moved to intervene in this case. On September 10, 2019, Okaloosa County, Florida ("Okaloosa County") moved to intervene. Orders granting their intervention were entered on August 26, 2019, and September 28, 2019, respectively. Unless

context requires otherwise, DEP, the Corps, Destin, and Okaloosa County will be collectively referred to as "Respondents."

On August 21, 2019, DEP filed the Proposed Change, which amended the Permit Modification from directing the placement of dredged material to "the eastern and western sides of East Pass" to requiring that "[b]each compatible material dredged from the initial maintenance dredge event following issuance of [the Permit Modification], shall be placed to the east of East Pass." The Proposed Change also extended the term of the Permit. Unless context requires otherwise, the "Permit Modification" shall include the terms of the "Proposed Change."

On September 4, 2019, John S. Donovan, David H. Sherry, and Rebecca R. Sherry filed a Petition for Formal Administrative Hearing to challenge the Proposed Change allowing dredged material to be placed east of East Pass, which was referred to DOAH and assigned as DOAH Case No. 19-4979. On September 20, 2019, Case No. 19-4979 was consolidated with this case.

On October 21, 2019, Petitioners filed a Motion for Leave to File Amended Petition for Formal Administrative Hearing along with a First Amended Petition for Formal Administrative Hearing. The Motion was granted on November 5, 2019, and the First Amended Petition for Formal Administrative Hearing was accepted as filed.

On November 15, 2019, Petitioners filed a second Motion for Leave to File Amended Petition for Formal Administrative Hearing, along with a Second Amended Petition for Formal Administrative Hearing, which was to apply to both this case and DOAH Case No. 19-4979. That Motion was granted at the final hearing as to this case. The primary effect of the Second Amended Petition was to drop Petitioners' objection to the extended term of the Permit

authorized by the Proposed Change. Thus, the issue for disposition is limited to whether the dredged material from the Corps' dredging of East Pass may be placed on beaches to the east of East Pass. The original Petition and the subsequent amendments will be collectively referred to as the "Petition," unless context requires their separate identification.

On November 12, 2019, Destin filed a Renewed Motion to Dismiss Petition for Formal Administrative Hearing Filed in Case Number 19-4979, which sought the dismissal of that case based on the untimely challenge to the Permit Modification in DOAH Case No. 19-1915, and the application of *Rudloe v. Florida Department of Environmental Regulation*, 517 So. 2d 731 (Fla. 1st DCA 1987), to a foreseeable and non-substantial modification of proposed agency action.

On November 15, 2019, the parties filed their Joint Pre-hearing Stipulation ("JPS"). The JPS contained 21 stipulations of fact, each of which is adopted and incorporated herein, and seven stipulations of law, which are determined to accurately reflect law applicable to this proceeding.

The JPS also identified disputed issues of fact and law remaining for disposition.

Petitioners identified the disputed issues of fact as follows:

> a. Whether Petitioners [ ] have standing to challenge issuance of the [Permit Modification.];
>
> b. Whether reasonable assurance has been provided that the [Permit Modification] complies with the requirements of Chapter 161, Florida Statutes, and Chapter 62B-41, Florida Administrative Code.

Petitioners identified the disputed issues of law as follows:

> 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 [Permit Modification] can be issued.
>
> c. Whether the U.S. Army Corps of Engineers has demonstrated entitlement to [the Permit Modification] through competent substantial evidence.
>
> d. Whether Petitioners [ ] have sufficient standing to participate in this proceeding.

Respondents identified the disputed issues of fact as follows, a number of which Petitioners dispute (issues related to DOAH Case No. 19-4979 are now moot, and have been excluded):

> a. Whether [Petitioners] have sufficient standing to challenge the proposed agency action.
>
> * * *
>
> c. Whether reasonable assurances have been provided that the [Corps] is entitled to the issuance of the [Permit Modification].
>
> d. Whether [Petitioners] have participated in this proceeding for any improper purposes, to primarily harass, or cause unnecessary delay, or for frivolous purpose, or to needlessly increase the cost of litigation, licensing, or securing or approval of an activity.
>
> e. Whether [Petitioners], and/or their attorneys knew or should have known that their claims when presented to the court or at any time before the final hearing were not supported by material facts

> necessary to establish the claims, or would not be supported by the application of then existing laws to those material facts.
>
> f. Whether any moving party is entitled to sanctions, reasonable expenses and/or attorney's fees.
>
> g. Whether the [Corps] is entitled to the issuance of the [Permit Modification].
>
> h. Whether [DEP] is entitled to attorney's fees.

Respondents identified the disputed issues of law as follows, a number of which Petitioners dispute (issues related to DOAH Case No. 19-4979 are now moot, and have been excluded):

> a. Whether [Petitioners] have sufficient standing to challenge the proposed agency action.
>
> * * *
>
> c. Whether the [Corps] is entitled to the issuance of the [Permit Modification].
>
> d. Whether [Petitioners] have participated in this proceeding to primarily harass, or cause unnecessary delay, or for frivolous purpose, or to needlessly increase the cost of litigation, licensing, or securing or approval of an activity. [As to the Department and the City, upon motion];
>
> e. Whether [Petitioners], and/or their attorneys knew or should have known that their claims when presented to the court or at any time before the final hearing were not supported by material facts necessary to establish the claims, or would not be supported by the application of then existing laws to those material facts. [As to the Department and the City, upon motion];
>
> f. Whether any moving party is entitled to sanctions, reasonable expenses and/or attorney's

> fees. [As to the Department and the City, upon motion].

The final hearing was convened on November 20, 2019, as scheduled.

At the commencement of the final hearing, Destin's Renewed Motion to Dismiss Petition for Formal Administrative Hearing Filed in DOAH Case Number 19-4979 was taken up, and granted on the record. On January 29, 2020, DOAH Case No. 19-4979 was severed from this case, and an Order Granting Renewed Motion to Dismiss, Relinquishing Jurisdiction, and Closing File was entered, based upon the previous untimely challenge to the Proposed Modification in DOAH Case No. 19-1915. A full account of the procedural history of DOAH Case No. 19-4979, and the basis for the action taken in that case, is contained in the docket of that case.

Issues related to the disposition of DOAH Case No. 19-1844 ("19-1844") were also taken up as a preliminary matter. 19-1844 involved the issuance of a permit to Destin to perform maintenance dredging of East Pass north of the U.S. Highway 98 bridge, with placement of dredged material to the beaches to the east of East Pass. The Recommended Order, entered on October 14, 2019, determined that dredged material from the maintenance dredging of East Pass should, to be compliant with section 161.142, Florida Statutes, be placed on adjacent eroding beaches east of the inlet. It also determined that the East Pass IMP is not an unadopted rule as described in section 120.57(1)(e). At the commencement of the final hearing, a Final Order in 19-1844 had not yet been entered. The similarities in the issue of law and fact between 19-1844 and this case were discussed, and it was determined that if the Final Order in 19-1844 substantially adopted the Recommended Order, an Order to Show Cause would be entered, asking the parties to address whether collateral estoppel applied to some or all of the issues in this case.

On November 20, 2019, DEP entered its Final Order in 19-1844. The Final Order adopted the Recommended Order with minor modifications that are not pertinent here. An Order to Show Cause was issued on November 22, 2019, to which the parties filed responses.

A hearing on the Order to Show Cause was held on December 8, 2019. Based on case law and analysis set forth in the Order to Show Cause, and on argument of counsel, the undersigned determined that the issue of whether the East Pass IMP was an unadopted rule was one solely between the Petitioners and DEP. The identical issue was presented in 19-1844; the parties were identical; and the issue was actually litigated. The issue was fully considered and addressed at paragraphs 22 through 25, and 74 through 83 of the Recommended Order in 19-1844, which are adopted herein. Whether the East Pass IMP is an unadopted rule was fully resolved by DEP's adoption of the Recommended Order in its Final Order in 19-1844. The doctrine of collateral estoppel is available in administrative proceedings in the same manner as it is available in judicial proceedings. *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140, 1142, n.4 (Fla. 2d DCA 2001); *Doheny v. Grove Isle, Ltd.*, 442 So. 2d 966, 970 (Fla. 1st DCA 1983). Thus, collateral estoppel bars Petitioners from re-litigating whether the East Pass IMP is an unadopted rule. *State v. McBride*, 848 So. 2d 287, 290 (Fla 2003); *Pearce v. Sandler*, 219 So. 3d 961 (Fla. 3d DCA 2017); *Felder v. State, Dep't of Mgmt. Servs., Div. of Ret.*, 993 So. 2d 1031, 1034-1035 (Fla 1st DCA 2008). The oral ruling made at the December 8, 2019, hearing is hereby reiterated and affirmed, and the issue of whether the East Pass IMP is an unadopted rule is stricken from the Petition and removed as an issue for further consideration.

Though credible arguments were made that the entirety of this case should be barred under the doctrine of collateral estoppel, it was recognized

that there was not an absolute identity of parties, with the Corps being the applicant for the Permit Modification. Therefore, the Order to Show Cause was discharged, and this case proceeded on whether the Permit Modification and Proposed Change requiring placement of dredged material from the dredging of East Pass to the beaches to the east of East Pass should be issued.

The Permit 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) is not applicable, and the burden is with the Corps, as the applicant, to demonstrate that it meets the criteria for issuance of the Permit Modification.

At the final hearing, Joint Exhibits 1 through 12, 14, and 16 through 18 were received in evidence.

At the final hearing, Destin presented the testimony of Matthew Trammel, P.E., who was accepted as an expert in coastal engineering. DEP presented the testimony of Ralph Clark, P.E., who was accepted as an expert in coastal engineering, beach and inlet management, hydrographic surveying, photo interpretation, coastal processes and hydrodynamics, hurricane impacts, and coastal construction regulation; and Greg Garis, Program Administrator with DEP's Beaches, Inlets, and Ports Program. Mr. Trammell and Mr. Clark also testified in rebuttal. Destin Exhibits 10 through 12, 14 through 19, 27, and 38 through 46 were received in evidence. DEP Exhibits 1, 20, 27 through 29, 32, 33, and 35 were received in evidence.

The Corps did not present its own witnesses or evidence, but relied upon the evidence offered by DEP and Destin in support of its Permit Modification.

Three Corps employees: Jennifer Jacobsen, Elizabeth Godsey, and Waylon Register, were subpoenaed by Petitioners, and testified as to their personal involvement in the processing of the application for the Permit Modification. They were not permitted to provide opinion testimony, expert or otherwise, or policy and procedure testimony.

Petitioners presented the testimony of Scott Douglas, Ph.D., P.E., who was accepted as an expert in coastal engineering, and Robert Young, Ph.D., who was accepted as an expert in coastal engineering, coastal management, coastal sediment movement, coastal sediment transport, coastal storm impacts, coastal erosion, and evaluation of coastal structures and processes. Petitioners, Thomas Wilson, David Sherry, Rebecca Sherry, and John Donovan, were called as standing witnesses. Mr. and Mrs. Sherry and Mr. Donovan adopted their previous testimony in 19-1844, and each offered additional testimony relative to their perceived injuries. Petitioners' Exhibits 3, 5, 8, 11, 26, 29, 39 (pages 0009 and 0010), 40 through 43, 45, 46, and 58 were received in evidence. Petitioners' Exhibits 47 and 62 through 64 were offered but not received in evidence. They were proffered and, though not considered by the undersigned in the development of this Recommended Order, will accompany the record of this proceeding.

Because of the similarity (if not identity) of issues and the overlapping witnesses and evidence in this case and those in 19-1844, the parties stipulated to the admission into evidence of the record from 19-1844. That record incorporates the hearing transcript from 19-1844, which includes the testimony of Mr. Garis, and the expert testimony of Mr. Trammell, Michael Trudnak, and Mr. Clark, on behalf of Respondents; and the testimony of Petitioners and Dr. Lainie Edwards, Deputy Director of DEP's Division of Water Resource Management, and the expert testimony of Dr. Todd Walton, on behalf of Petitioners, all of which has been considered and given weight as

though the testimony was separately offered in this case (Petitioners' Exhibit 58), and exhibits received in this case as Joint Exhibits 1 through 12 and 16 through 18; Destin Exhibits 10 through 12, 14 through 19, and 27; DEP Exhibits 1 and 20; and Petitioners' Exhibits 3, 5, 8, 11, and 26 (photographs only). Supplemental exhibits new to this proceeding are Joint Exhibit 14; DEP Exhibits 27 through 29, 32, 33, and 35; Destin Exhibits 38 through 46; and Petitioners' Exhibits 29, 39 (pages 0009 and 0010), 40 through 43, 45, and 46. Petitioner, Mr. Wilson; Petitioners' witnesses Dr. Douglas and Dr. Young; and the three Corps witnesses were new to this case.

Counsel for Destin objected to testimony offered by Petitioners' experts, Dr. Douglas and Dr. Young, as being cumulative of the testimony of Dr. Walton in 19-1844. The objection was overruled, with the reminder that taking testimony "two times doesn't equal two times the weight." Much of the "heavy lifting" in this case will be in determining the extent to which testimony and evidence elicited in this case, or the application of different law, will result in findings and conclusions that differ from those in the Recommended Order and Final Order in 19-1844. Thus, the findings and conclusions from the Recommended Order in 19-1844 will be the starting point for this Recommended Order, and are adopted as such, with changes supported by competent substantial evidence set forth as appropriate.

A four-volume Transcript of the final hearing was filed on January 7, 2020. All parties filed proposed recommended orders ("PRO") on January 17, 2020, each of which has been considered in the preparation of this Recommended Order.

On November 15, 2019, Destin filed a Motion for Attorney's Fees, Expenses and Costs, by which it seeks an award pursuant to sections 120.569(2)(e), and, on December 18, 2019, an Amended Motion for Attorney's

Fees, Expenses and Costs seeking the same relief. Petitioners filed their responses on November 19, 2019, and January 17, 2020, respectively. The Amended 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. Petitioner, 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, which is on Santa Rosa Island in the unincorporated community of Okaloosa Island[1], and fronts the Gulf of Mexico. Petitioner's property is in the vicinity of Monument R-14, which is roughly 2.3 miles west of DEP Virtual Monument V-611, and 4.3 miles west of the west side of East Pass. Mr. Wilson uses and enjoys the gulf-front beaches between his property in Okaloosa Island and East Pass.

2. Intervenors, David H. Sherry and Rebecca R. Sherry, own Unit 511 at the Surf Dweller Condominium, 554 Coral Court, Fort Walton Beach, Florida, fronting the Gulf of Mexico and in the Okaloosa Island community.

[1] Okaloosa Island is the name of an unincorporated community that stretches about 2.8 miles along Santa Rosa Island from DEP reference monument R-1 through R-16, and is across Santa Rosa Sound from the mainland community of Ft. Walton Beach. Okaloosa Island is the name of the unincorporated community, while Santa Rosa Island is the name of the much longer island of roughly 40 miles in length, which includes U.S. Air Force/Eglin AFB property that extends from the Okaloosa Island community to East Pass.

The Surf Dweller Condominium 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.

3. Intervenor, John S. Donovan, owns Units 131 and 132 at the El Matador Condominium, 909 Santa Rosa Boulevard, Fort Walton Beach, Florida, fronting the Gulf of Mexico and in the Okaloosa Island community. The El Matador Condominium 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.

4. Petitioners' residential properties do not abut either the area established as the zone of influence of East Pass or the stretch of beach that is adjacent to the west fill placement site. Petitioners' stated injuries are related to the allegation that the lateral movement of sand from the East Pass area 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 Permit Modification. 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. Respondent, DEP, is an agency of the State of Florida pursuant to section 20.255, Florida Statutes, having the power and duty to protect Florida's air and water resources and to administer and enforce the provisions of chapters 161, 373, and 403, Florida Statutes, and rules promulgated thereunder in Florida Administrative Code Chapters 62 and 62B, regarding activities in surface waters of the state. DEP has been designated by the legislature as the beach and shore preservation authority for the State of Florida and is authorized to take all necessary initiatives to implement the provisions of chapter 161. *See* § 161.101, Fla. Stat. DEP is the permitting authority in this proceeding and issued the Permit Modification at issue in this proceeding to the Corps.

6. Respondent, the Corps, is a federal agency responsible for maintenance dredging of East Pass, and is the applicant for the Permit Modification. The Corps and DEP are parties to an Interagency Agreement pursuant to which the Corps has agreed that for joint coastal permits, beach compatible dredged material shall be disposed on Florida's beaches consistent with chapter 161 and other beneficial use criteria specified by the Department and federal standards. Pursuant to the Interagency Agreement, if DEP determines that a permit modification is required to meet state standards, as was the case here, the Corps agrees to apply for and obtain the modification.

7. Intervenor, Destin, is a municipality in Okaloosa County, Florida, and abuts the east side of East Pass.

8. Intervenor, Okaloosa County, is the local sponsor of the federally authorized East Pass Navigation Project. It has a substantial interest in the safety and navigability of the East Pass Navigation Channel and its protection from effects of tropical storm systems. Okaloosa County also has a substantial interest in preserving its recreational and environmental resources.

9. The Permit Modification was issued on November 14, 2016, without publication, or a notice of rights language regarding the right to request a

hearing or time limits for doing so. Petitioner, Mr. Wilson, alleged that he received a copy of the Permit Modification on or after May 22, 2019. There was no evidence to the contrary. He, thereafter, filed a challenge with DEP on June 5, 2019, no more than 14 days from the date on which he received notice.

East Pass

10. The issue in dispute in this case, as it was in 19-1844, is the determination of whether beaches adjacent to the East Pass inlet are eroding, stable, or accreting, for purposes of meeting the statutory objective of section 161.142.

11. 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.

12. East Pass separates the gulf-fronting beaches of Destin 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.

13. East Pass includes a federal navigation channel. The federal navigation channel requires routine maintenance to prevent it from shoaling. On 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. Although there was a suggestion that recent storms may have opened the channel to some extent, the evidence was not sufficient to alter the findings based on the 19-1844 record that the channel remains hazardous for marine traffic.

East Pass Inlet Management Implementation Plan

14. The East Pass IMP was adopted by Final Order of DEP on July 30, 2013.

15. 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 permits issued by DEP. Rather, disposal sites are 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. Areas of influence are the beach areas east and west of East Pass affected by tidal forces generated by the inlet.

16. The critical element of the East Pass 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 Permit Modification

17. On October 28, 2009, DEP issued Permit No. 0288799-001-JC to the Corps to perform maintenance dredging of the East Pass Navigation Channel and the Old Pass Lagoon Channel, and to rehabilitate the eastern and western jetties. Materials dredged from the Main Channel south of the U.S. Highway 98 bridge would be primarily bypassed to a portion of the beach on Eglin Air Force Base west of East Pass.

18. As originally issued, the 2009 Permit limited placement of dredged sand to sites west of the inlet, and prohibited placement to the east of the inlet. Contrary to the 2008 amendment to section 161.142 and the 2013 East

Pass IMP, the 2009 Permit did not require that sand dredged from the federal navigation channel be placed on the adjacent eroding beach, nor did it extend the life of the proximate West Destin Beach Restoration Project.

19. The Corps requested the Permit Modification in furtherance of an inter-agency agreement between DEP and the Corps, by which the Corps agreed, to the best of its abilities, to act in a manner consistent with state requirements. Pursuant to section 161.142(5), beach compatible sand dredged from federal navigation channels is to be placed on the adjacent eroding beach.

20. On November 14, 2016, DEP issued the Permit Modification to the Corps. The Permit Modification did not change the authorization or requirements for the dredging, but allowed dredged material to be placed on "the Gulf-front beaches on the eastern and western sides of East Pass."

21. On August 21, 2019, DEP filed the Proposed Change, which amended the Permit Modification to require that "[b]each compatible material dredged from the initial maintenance dredge event following issuance of [the Permit Modification], shall be placed to the east of East Pass."

22. The Permit Modification provides that, for the first maintenance dredging event following issuance of the Permit Modification, dredged material is to be placed at fill sites east of East Pass, the condition that Petitioners' find objectionable. The Permit Modification then provides that "[f]or all subsequent maintenance dredging events conducted under this permit, disposal locations shall be supported by physical monitoring data of the beaches east and west of East Pass in order to identify the adjacent eroding beaches that will receive the maintenance dredged material, providing consistency with section 161.142, Florida Statutes." Thus, the placement of dredged material to the east of East Pass authorized by the Permit Modification applies to the next dredging event, and not necessarily to subsequent periodic dredging events authorized by the Permit Modification.

Fill Placement Site

23. The eastern fill placement site authorized by the Permit Modification extends from R-17 to R-20.5. The shoreline adjacent to the eastern fill placement site has been designated as critically eroded for more than ten years. The eastern fill placement site is within the Western Destin Beach Restoration Project and designated as "Reach 1."

24. The fill placement site west of East Pass is located between V-611 and V-622. The shoreline landward of the western fill site has not been designated as critically eroded by the Department. There are no current beach restoration projects in or adjacent to the western fill site.

25. 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.

26. 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 evidence in this proceeding, which includes the evidence adduced in 19-1844, 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]."

27. The evidence 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.

28. The evidence as to the existence and effect of the East Pass drift nodal point, and its effect 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.

29. Competent substantial evidence in the record of this proceeding includes 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; data from the Holiday Isle Emergency Beach Fill Two-Year Post-construction Report; historical monitoring data for the area west of East Pass, including the Western Beach Monitoring Report, which covered 2006 to 2017; the Potential Borrow Area Impact Report, which included data from 1996 through 2012; and recent profile data from April 2019. These reports, and the data contained within them, cumulatively provide more than 20 years of 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.

30. 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[2] 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.

31. The photographic evidence supports the data collected over time for the beaches east of East Pass, and the persuasive testimony offered by Mr. Clark, Mr. Trammell, Mr. Garis, and Mr. Trudnak (who testified in 19-1844), collectively establishes, by a preponderance of the evidence, that the beaches 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, except for the area immediately abutting the eastern jetty, are critically eroded, a condition that is influenced by East Pass and its navigational channel, and are "adjacent eroding beaches" as that term is used in section 161.142.

32. The evidence demonstrates that 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

[2] "Having an irregularly wavy or serrate outline." See "crenulate," Merriam-Webster Dictionary, https://www.merriam-webster.com/ dictionary/crenulate (last visited February 2, 2020).

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.

33. 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 thickly 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."

34. Mr. Trammel's photographs offered in 19-1844 were supplemented by a series of photographs taken from several of the same locations after the passage of Tropical Storm Nestor in October 2019. Those photographs are consistent with a finding that the beaches to the east of East Pass are highly eroded and erosional, and that the beaches to the west of East Pass are not.

35. 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 establish, 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.

36. Petitioners offered testimony of Dr. Douglas and Dr. Young in an effort to shore up weaknesses in the evidence offered in 19-1844. Their testimony and the evidence discussed therein was largely, if not exclusively designed to demonstrate that the direction of lateral sand transport in the vicinity of

East Pass was predominantly east to west, which was the prevailing theme of Petitioners' argument in 19-1844.

37. The evidence adduced from Dr. Douglas was, in many respects, cumulative of that previously offered by Dr. Walton in 19-1844, and considered in the development of the Recommended Order in that case. For example, both Dr. Walton and Dr. Douglas reviewed and assessed information from the Taylor study, the Morang study, and the CP&E report in developing their opinions. Both agreed that sand placed in proximity to the jetties would tend to stay in place. Both ultimately concluded that sand placed to the west of the East Past west jetty would migrate to the west.

38. Dr. Douglas offered new opinion testimony largely based on the Wave Information Study ("WIS"), which is an estimate of wave height and direction from a location two miles off-shore of East Pass. The data is a mathematical estimate, and does not rely on physical measurements from buoys or wave gauges. The wave estimates were then used as inputs in a model developed by the Coastal Engineering Research Center ("CERC"). Dr. Douglas candidly testified that the CERC model, even with normal input data, involves a substantial degree of uncertainty -- up to an order of magnitude. Adding to that uncertainty is that the CERC model assumes bottom contours and offshore volume calculations that were either inapplicable to the area around East Pass, or unavailable. Dr. Douglas was convincing that the CERC model is a tool commonly used by coastal engineers. His testimony, and the evidence on which it was based, was not unreasonable. However, it was not sufficient to outweigh the evidence introduced in support of the Permit Modification. In particular, and in addition to the evidence and testimony introduced in 19-1844, the testimony of Mr. Clark, whose extensive and direct knowledge, observations, and familiarity with the area, and of the data and information collected over periods of years, is found to be more persuasive regarding the processes and conditions in and around East Pass, and supports a finding, by a preponderance of the evidence, that the area to the east of East Pass

constitutes "adjacent eroding beaches," and that the area to the west of East Pass does not.

39. Similarly, the evidence adduced from Dr. Young was largely cumulative, a fact that resulted in sustained objections to questions eliciting such information. He did provide testimony regarding time-lapse images from Google Earth Engine, and a critique on how to balance a sediment budget, though without providing a budget. As was the case with Dr. Douglas, Dr. Young's testimony and the evidence discussed therein, was not sufficient to outweigh the more persuasive evidence introduced in support of the Permit Modification that the area to the east of East Pass constitutes "adjacent eroding beaches," and that the area to the west of East Pass does not.

40. The evidence is persuasive that placing dredged material at R-17 to R-20.5 in Holiday Isle on the eastern side of East Pass would not result in erosion on the western side of East Pass.

41. 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, some -- but certainly not all -- of the dredged material placed on the eroding beaches to the east of East Pass can be introduced into the ebb shoal and move to the west. In that regard, the Google Earth Engine images depict sand moving across the ebb shoal to the western side of the inlet and attaching at various distances from the west jetty. As such, placement of the dredged material on the eastern beach placement areas would, to some degree, accomplish the goals of allowing sand transport to the western beaches, as was the relief sought in the Petition.

42. The evidence was convincing that depositing dredged material onto the eroding beaches east of East Pass, as authorized by the Permit Modification, will not result in significant adverse impacts to areas either east or west of East Pass, nor will it interfere with the use by the public of any area of a beach seaward of the mean high-water line. Furthermore, the

evidence introduced in this case and 19-1844 provide reasonable assurance that the Permit Modification is consistent with section 161.142 and will ensure that net long-term erosion or accretion rates on both sides of East Pass remain equal.

Ultimate Findings of Fact

43. 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, are critically eroded, a condition influenced, if not caused, by East Pass, and constitute East Pass's "adjacent eroding beaches." Evidence to the contrary was not persuasive.

44. 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.

45. The greater weight of the competent substantial evidence establishes that the placement of dredged material on the eastern side of East Pass will extend the life of the proximate West Destin Beach Restoration Project.

46. The greater weight of the competent substantial evidence establishes that the Corps met the standards for the Permit Modification as proposed for issuance by DEP on November 14, 2016, and August 21, 2019, including section 161.142 and rules 62B-41.003 and 62B-41.005. Evidence to the contrary was not persuasive. Thus, the Permit Modification should be issued.

CONCLUSIONS OF LAW

Jurisdiction

47. 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

48. 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."

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

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

Id. at 482.

50. *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 Cty.*, 610 So. 2d 547, 554 (Fla. 1st DCA 1992)).

51. 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 could reasonably 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 Cty. 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 Cty. Bd. of Cty. 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.").

52. "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)).

53. 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 Dep't of Nat. Res.*, 577 So. 2d 1383, 1388 (Fla. 4th DCA 1991)).

54. 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. However, it was the effects alleged, rather than the distance, that appeared to be controlling.

55. 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.

56. 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 Permit Modification to entitle them to a section 120.57 hearing, and not whether those allegations were ultimately proven. "[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).

57. 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."

58. 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 as alleged in this case.

59. Despite their allegations that they were "substantially affected," 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, or that they were otherwise adversely affected by the issuance of the Permit Modification. The evidence was not persuasive that perceptible quantities of sand deposited on the western disposal site would migrate from the area of influence, or make its way to their property, or would adversely affect the already accretional nature of the shoreline adjacent to their properties. Furthermore, even accepting that sand would eventually make it to their properties, the evidence was convincing that the journey would be lengthy, hardly an immediate or adverse effect, particularly since the

immediate case involves a single maintenance dredging event, and not all maintenance dredging authorized over the term of the Permit Modification. Thus, despite their allegations, Petitioners wholly failed to prove at the hearing that the Permit Modification as issued would -- or could -- result in actual or immediate threatened adverse effects to their property or their ability to use and enjoy the beaches west of East Pass.

60. The Corps has standing as the applicant for the Permit Modification. *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).

61. Intervenors, Destin and Okaloosa County, established that their substantial interests are affected by the Permit Modification, and they are entitled to participate as parties to this proceeding. Furthermore, their standing was stipulated by the parties in the JPS.

Timeliness of Petition

62. Petitioner, Thomas Wilson, filed his Petition for Formal Administrative Hearing more than 14 days from his receipt of the Permit Modification. Mr. Wilson did not receive actual notice of the Permit Modification. The Permit Modification was not published so as to provide constructive notice of its issuance. Petitioner was not notified of the Permit Modification until, at the earliest, May 22, 2019. 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 Petitioner Thomas Wilson's lack of actual or constructive notice of the Permit Modification, the Petition for Formal Administrative Hearing was timely.

Nature of the Proceeding

63. This is a de novo proceeding, intended to formulate final agency action and not to review action taken earlier and preliminarily. § 120.57(1)(k), Fla. Stat; *Young v. Dep't of Cmty. Aff.*, 625 So. 2d 831, 833 (Fla. 1993); *Hamilton Cty. Bd. of Cty. Comm'rs v. Dep't of Envtl. Reg.*, 587 So. 2d 1378, 1387; *McDonald v. Dep't of Banking & Fin.*, 346 So. 2d 569, 584 (Fla. 1st DCA 1977).

Burden and Standard of Proof

64. The Corps bears the burden of demonstrating, by a preponderance of the evidence, entitlement to the Permit Modification. *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).

65. The standard of proof in this case is a preponderance of the competent, substantial evidence. § 120.57(1)(j), Fla. Stat.; *Jacobs and Solar Sportsystems, Inc. v. Far Niente II, LLC and S. Fla. Water Mgmt. Dist.*, Case No. 12-1056 (Fla. DOAH Apr. 26, 2013; Fla. SFWMD May 22, 2013).

66. "Competent substantial evidence is 'such evidence as will establish a substantial basis of fact from which the fact at issue can reasonably be inferred [or] such relevant evidence as a reasonable mind would accept as adequate to support a conclusion.'" *Duval Utility Co. v. Fla. Pub. Serv. Comm'n*, 380 So. 2d 1028, 1031 (Fla. 1980) (quoting *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957)).

67. "Surmise, conjecture or speculation have been held not to be substantial evidence." *Dep't of High. Saf. & Motor Veh. v. Trimble*, 821 So. 2d 1084, 1087 (Fla. 1st DCA 2002) (*citing Fla. Rate Conf. v. Fla. R.R. & Pub. Utils. Comm'n*, 108 So. 2d 601, 607 (Fla. 1959)).

Reasonable Assurance Standard

68. Issuance of the Permit Modification is dependent upon there being reasonable assurance that the activities authorized will meet applicable standards.

69. Reasonable assurance means "a substantial likelihood that the project will be successfully implemented." *Metro. Dade Cty. 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).

Standards

70. Section 161.142 provides, in pertinent part, that:

> Legislature recognizes the need for maintaining navigation inlets to promote commercial and recreational uses of our coastal waters and their resources. The Legislature further recognizes that inlets interrupt or alter the natural drift of beach-quality sand resources, which often results in these sand resources being deposited in nearshore areas or in the inlet channel, or in the inland waterway adjacent to the inlet, instead of providing natural nourishment to the adjacent eroding beaches. Accordingly, the 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. Such activities cannot make up for the historical sand deficits caused by inlets but shall be designed to balance the sediment budget of the inlet and adjacent beaches and extend the life of proximate beach-restoration projects so that periodic nourishment is needed less

> frequently. 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.
>
> * * *
>
> (5) The department shall ensure that *any disposal of the beach-quality sand from federal projects* in this state which involve dredging for the purpose of navigation *is on, or in the nearshore area of, adjacent eroding beaches*. (emphasis added).

71. As stipulated by the parties, East Pass is dredged periodically by the Corps, which is authorized by the U.S. Congress to maintain the federal navigational channel.

72. 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. That interest is even more pronounced where, as here, the dredging is in furtherance of a federal navigation project, in which case the disposal of beach quality sand is specifically directed to be "on, or in the nearshore area of, adjacent eroding beaches." § 161.142(5), Fla. Stat.

73. The more specific and unequivocal legislative requirement that disposal of beach quality sand from maintenance dredging of navigation inlets be onto adjacent eroding beaches, as established in section 161.142(5), controls over more general provisions of section 161.142. *See, e.g. Nolden v. Summit Fin. Corp.*, 244 So. 3d 322, 327 (Fla. 4th DCA 2018); *G.E.L. Corp. v. Dep't of Envtl. Prot.*, 875 So. 2d 1257, 1261 (Fla. 5th DCA 2004); *Barnett Banks, Inc. v. Dep't of Rev.*, 738 So. 2d 502, 505 (Fla. 1st DCA 1999).

74. Rule 62B-41.003 provides, in pertinent part, that:

> (2) The Department shall deny any application for a coastal construction project if, after considering any proposed mitigation plan, the proposed project as a whole will result in a significant adverse impact.
>
> (3) No coastal construction shall interfere, except during construction, with the use by the public of any area of a beach seaward of the mean high-water line. . . .

75. Rule 62B-41.005 provides, in pertinent part, that:

> (13) . . . [M]aintenance of inlets shall require on an average annual basis, placement of a quantity of beach-quality sand on adjacent eroding beaches that is equal to natural net annual longshore sediment transport.
>
> * * *
>
> (15) Any permit application for . . . maintenance of a coastal inlet and related shoals shall be consistent with the statewide strategic beach management plan for long term management of the inlet pursuant to Sections 161.142 and 161.161, F.S. Any permit issued shall be conditioned on continued bypassing of the sand in sufficient quantity to insure that net long term erosion or accretion rates on both sides of the inlet remain equal . . . .

76. Rule 62B-41.008 establishes information to be included in an application "to demonstrate that the proposed activity will not have a significant adverse impact on adjacent beaches or the inlet system."

ENTITLEMENT TO THE PERMIT MODIFICATION

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

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

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

80. The Permit Modification, and the decision to place sand from the dredging of East Pass on the beaches east of East Pass, are in compliance with the criteria for issuance established in rule 62B-41.

81. As established in the Findings of Fact, reasonable assurance was provided that the Corps' fill site complied with the applicable standards established by statute and rule 62B-41, and that the Corps is entitled to the Permit Modification.

ATTORNEYS' FEES

82. Destin has moved for an award of attorneys' fees, expenses, and costs pursuant to sections 120.569(2)(e).

83. 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.

84. 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 Cty., Inc. v. Nassau Cty.*, 752 So. 2d 42, 50-51 (Fla. 1st DCA 2000).

85. 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 Comm. Realty*, 690 So. 2d 603, 608, n.9, (quoting *Mercedes Lighting & Electrical Supply v. State, Dep't of Gen. Servs.*, 560 So. 2d 272, 277 (Fla. 1st DCA 1990)).

86. DOAH has jurisdiction to resolve the issue of sanctions by separate final order. *See, e.g., Procacci Comm. Realty, Inc.*, 690 So. 2d at 606. Therefore, jurisdiction is reserved to consider that request through a separate final order, provided Destin renews its Motion within 30 days of DEP's entry of the final order in this case.

87. If Destin elects to renew its Motion upon entry of the final order, the renewed Motion should provide a discussion and analysis of the issues in the paragraphs that follow.

88. Despite Destin's intervention on October 24, 2019, the original Motion for Attorney's Fees, Expenses and Costs was filed on November 15, 2019, three business days prior to the commencement of the final hearing. The seven-day time allowed for filing a response under Florida Administrative

Code Rule 28-106.204 did not run until after the final hearing was complete. The Amended Motion for Attorney's Fees, Expenses and Costs ("Amended Motion") was filed on December 18, 2019.

89. As was the case in *French*, Destin "filed a general notice of intent to seek attorney's fees pursuant to this [ ] statute[ ] prior to the hearing in this case, [but] the notice did not identify any 'pleadings, motions, or other papers' it believed had been filed for an improper purpose." Rather, the Amended Motion was designed "[t]o determine whether a proceeding was initiated for an improper purpose;" requested consideration of issues related to "participation in a proceeding;" and concluded that "the maintenance of this case is done for an improper and frivolous purpose and an appropriate sanction should be applied."

90. Unlike section 120.595(1), which allows for an award of costs and attorney's fees when "the nonprevailing adverse party has been determined by the administrative law judge to have *participated* in the proceeding for an improper purpose," section 120.569(2)(e) is directed to whether pleadings have been signed and filed for an improper purpose. As stated by Judge Daniel Manry:

> 14. Section 120.569(2)(e) is aimed at deterring parties from filing "pleadings, motions, and other papers" for improper purposes. The statute is not intended to shift fees and costs to compensate the prevailing party. Section 120.569(2)(e) is aimed at the conduct of counsel and not the outcome of the proceeding. *See Mercedes Lighting and Electrical Supply, Inc. v. State, Department of General Services*, 560 So. 2d 272, 276 (Fla. 1st DCA 1990)(involving former Section 120.57(1)(b)5 that is now codified in Section 120.569(2)(e)).
>
> 15. A party seeking sanctions under Section 120.569(2)(e) is required to take action to mitigate the amount of resources expended by the party in defense of a pleading that the party claims is filed for an improper purpose. *Mercedes*, 560 So. 2d at

> 277. The party must give prompt notice to the opposing party and allow the ALJ an opportunity to promptly punish an offending party. The purpose of Section 120.569(2)(e) is not well served if an offending party is not sanctioned until the end of the administrative hearing. *Id.*

Beverly Health and Rehab. Servs-Palm Bay v. Ag. for Health Care Admin., Case No. 02-1297F (Fla. DOAH Apr. 25, 2003).

91. Judge Donald Alexander provided an even more detailed analysis of the requirements and limitations of section 120.595(2)(e) in the following lengthy, but pertinent and comprehensive, discussion:

> Several broad tenets govern a sanctions request. First, an essential element of a claim for sanctions is for the moving parties to identify a specific pleading, motion, or other paper interposed 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." § 120.569(2)(e), Fla. Stat.; *French v. Dep't of Child. & Fams.*, 920 So. 2d 671, 676-77 (Fla. 5th DCA 2006). To determine whether a paper is filed for an improper purpose, it is necessary to determine whether the filing is reasonable under the circumstances. *Mercedes Lighting & Elec. Supply Co. v. Dep't of Gen. Servs.*, 560 So. 2d 272, 276 (Fla. 1st DCA 1990). The determination must be based on an objective evaluation of the circumstances existing at the time the papers were filed. *See Friends of Nassau Cnty.*, 752 So. 2d at 57. (Unlike claims under sections 57.111 and 57.105(5), liability under section 120.569(2)(e) is determined only based on the circumstances as of the time of the filing of the offending document, not subsequently.) The issue is not whether the non-moving party would ultimately prevail on the merits. Rather, the question is whether a party or attorney made a reasonable inquiry of the facts and law prior to signing and filing a pleading, motion, or other paper. *Id.* at 52. Finally, and especially relevant here, if an obvious offending paper is filed, a party is obligated to promptly take action to

mitigate the amount of resources expended in defending against the offending paper. *See Mercedes*, 560 So. 2d at 276-77. A delay in seeking sanctions undermines the mitigation principle that applies to the imposition of sanctions. *Id.* The purpose of the statute is to deter subsequent abuses, a purpose not well-served if an offending pleading is fully litigated and the offender is not punished until the end of the trial. *Id.*

* * *

Accepting the City's invitation to rule otherwise would encourage a party to sit back and fully litigate a case, and depending on the final outcome, to then seek sanctions under section 120.569(2)(e); clearly, this process is not contemplated by the statute. *See, e.g., Spanish Oaks of Cent. Fla., LLC v. Lake Region Audubon Soc'y, Inc.*, Case No. 05-4644F, 2006 Fla. Div. Adm. Hear. LEXIS 294 at *48 (Fla. DOAH July 7, 2006)(where moving party did not file request for sanctions until "just prior to the final hearing," delay warranted denial of request); *Rustic Hills Phase III Prop. Owners Ass'n v. Olson*, Case No. 00-4792, Order Denying Sanctions Under Section 120.569(2)(e), (Fla. DOAH July 31, 2001)(where moving parties waited until final hearing to seek sanctions, and the basis for sanctions was the weakness of the evidentiary presentation, sanctions not awarded); *Hasselback v. Dep't of Envtl. Prot.*, Case No. 07-5216, 2011 Fla. ENV. LEXIS 63 (Fla. DOAH June 14, 2011)(failure to timely take action to mitigate the amount of resources expended in litigating the permit criteria warranted denial of request for sanctions); *Still v. New River Solid Waste Ass'n*, Case No. 01-1033, 2001 Fla. Div. Adm. Hear. LEXIS 2720 (Fla. DOAH Aug. 7, 2001)(request denied where moving party waited until final hearing to seek sanctions directed to non-moving party's amended petition for hearing); *Alfonso v. Constr. Indus. Licensing Bd.*, Case No. 05-4711, Order Denying Motion for Attorney's Fees, (Fla. DOAH July 26, 2006)(sanctions denied as being untimely where

> request was filed two weeks after proposed recommended orders were submitted by parties). The moving parties have cited no contrary authority on this issue. Accordingly, as to all papers filed prior to the filing of the Motion, the request for sanctions is denied.

David and Cynthia Cope v. Dep't of Envtl Prot. and City of Gulf Breeze, Case No. 10-8893 (Fla. DOAH Oct. 26, 2011).

92. This discussion is not intended to reach the merits of whether any element of this case was "interposed for any improper purposes," but is rather intended to identify issues for consideration and discussion in any renewed motion and response thereto.

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 approving the November 14, 2018, Permit Modification No. 0288799-006-JN, as amended by the DEP's August 21, 2019, Notice of Proposed Changes to Proposed Agency Action, for the maintenance dredging of East Pass, subject to the general and specific conditions set forth therein.

DONE AND ENTERED this 20th day of February, 2020, in Tallahassee, Leon County, Florida.

E. GARY EARLY
Administrative Law Judge
Division of Administrative Hearings
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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.