STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

DAVID A. BRADFORD, as Trustee of
the ELIZABETH M. BRADFORD
REVOCABLE TRUST,

Petitioner,

OGC Case No.: 24-2229
DOAH Case No.: 24-3976

v.

SANDPIPER COTTAGE, LLC and
STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION,

Respondents.
_____/

FINAL ORDER

This case presents a dispute over a modification to a permit and notice to proceed issued by the Coastal Construction Control Line (CCCL) program within the Department of Environmental Protection (the Department). The disputed modification, included in a "Notice to Proceed and Modification of Permit for Construction or Other Activities Pursuant to Section 161.053, Florida Statutes," authorized the substitution of materials in a retaining wall, from wood to concrete. The proposed agency action was designated as CCCL Permit Number WLOO1 468 M2.

Petitioners filed a timely and sufficient request for administrative hearing, which the Department referred to the Division of Administrative Hearings (DOAH). Following a three-day hearing, the Administrative Law Judge (ALJ) issued his Recommended Order (Exhibit A), which the Department received on August 11, 2025. Otherwise, the history of these proceedings is accurately shown in the Recommended Order.

The Recommended Order suggests that the Department enter a final order approving the application and dismissing the petition, but adding two additional conditions to the proposed permit. Respondent Sandpiper Cottage, LLC filed one exception, requesting only the correction of a one-word scrivener's error. The time for a response in opposition has expired, and Petitioner has not filed such a response. The exception is granted. It is confirmed that the word "landward" in the first sentence, paragraph 32 of the Recommended Order is a scrivener's error. The frontal dune is seaward, not landward, of the location described in that sentence.

There being no other matters to consider,

IT IS ORDERED:

A. The Recommended Order is adopted as clarified in this Final Order and is incorporated by reference.

B. The application by Sandpiper Cottage, LLC is granted, and the Office of Resilience and Coastal Protection is directed to issue a revised permit consistent with CCCL Permit Number WLOO1 468 M2, but with the two conditions in paragraphs a and b on page 50 of the Recommended Order. If appropriate, notice of proceed may be withheld or deemed withheld until the condition in paragraph a, page 50 is satisfied.

C. The Petition in these proceedings is hereby dismissed.

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; or by electronic mail to Agency_Clerk@dep.state.fl.us 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 19th day of September, 2025, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

ALEXIS A. LAMBERT
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 Digitally signed by Lea Crandall
Date: 2025.09.19 09:28:56 -04'00'

Clerk

September 19, 2025
Date

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been sent by electronic mail to the following on this 19th day of September, 2025.

D. Kent Safriet, Esq. Valerie L. Chartier-Hogancamp, Esq. Holtzman Vogel, Baran Torchinsky & Josefiak, PLLC 119 South Monroe Street, Suite 500 Tallahassee, FL 32301 kent@holtzmanvogel.com vhogancamp@holtzmanvogel.com mfischer@holtzmanvogel.com *Counsel for Petitioner, David A. Bradford, as Trustee of the Elizabeth M. Bradford Revocable Trust*	Richard P. Green, Esq. John J. Cavaliere, III, Esq. Lewis, Longman & Walker, P.A. 100 Second Ave South, Suite 501-S St. Petersburg, FL 33701 rgreen@llw-law.com jcavaliere@llw-law.com ekarkkainen@llw-law.com lwood@llw-law.com *Counsel for Respondent, Sandpiper Cottage, LLC*
Kelley F. Corbari, Esq. Kathryn E. D. Lewis, Esq. John Ryen Morgan-Ring, Esq. Department of Environmental Protection 3900 Commonwealth Boulevard, MS 35 Tallahassee, FL 32399-3000 kelley.corbari@floridadep.gov kathryn.lewis@floridadep.gov ryen.morganring@floridadep.gov laurie.roughton@floridadep.gov lateshee.m.daniels@floridadep.gov adrienne.kidder@floridadep.gov *Counsel for Respondent, Department of Environmental Protection*	

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

/s/ Jeffrey Brown
JEFFREY BROWN
Administrative Law Counsel

Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard, MS 35
Tallahassee, FL 32399-3000

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DAVID A. BRADFORD, AS TRUSTEE
OF THE ELIZABETH M. BRADFORD
REVOCABLE TRUST,

Petitioner,

vs. Case No. 24-3976

SANDPIPER COTTAGE, LLC AND
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Respondents.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on June 2 through 4, 2025, in DeFuniak Springs, Florida, before E. Gary Early, a designated Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: D. Kent Safriet, Esquire
Valerie L. Chartier-Hogancamp, Esquire
Holtzman Vogel Baran Torchinsky
& Josefiak, PLLC
119 South Monroe Street, Suite 500
Tallahassee, Florida 32301

For Respondent Sandpiper Cottage LLC:

Richard P. Green, Esquire
John J. Cavaliere, III, Esquire
Lewis, Longman & Walker, P.A.
100 Second Ave South, Suite 501-S
St. Petersburg, Florida 33701

For Respondent Department of Environmental Protection:

Kelley F. Corbari, Esquire
Kathryn E. D. Lewis, Esquire
John Ryen Morgan-Ring, Esquire
Department of Environmental Protection
Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

STATEMENT OF THE ISSUE

Whether Coastal Construction Control Line (CCCL) Permit Number WL001468 M2 (the M2 Permit) should be issued to Sandpiper Cottage, LLC (Sandpiper), as proposed in the Department of Environmental Protection's (DEP) April 10, 2024, Notice to Proceed and Modification of Permit For Construction or Other Activities Pursuant to Section 161.053, Florida Statutes (Notice).

PRELIMINARY STATEMENT

On April 10, 2024, DEP entered the Notice authorizing the issuance of the M2 Permit. On August 2, 2024, Petitioner, David A. Bradford, as Trustee of the Elizabeth M. Bradford Revocable Trust (Petitioner), filed a Petition for Formal Administrative Hearing (Petition) to contest the M2 Permit.

On October 23, 2024, the Petition was referred to DOAH for a formal administrative hearing and assigned to the undersigned as DOAH Case No. 24-3976. The final hearing was scheduled for March 10 through 13, 2025. Upon motion by DEP, the final hearing was continued and rescheduled to June 2 through 5, 2025.

On March 20, 2025, DEP filed a Motion in Limine, seeking to exclude evidence regarding a previously filed, and then withdrawn, application for the concrete retaining wall at issue, which was assigned CCCL Permit

Number WL001468 M1 (the M1 Permit); and to exclude evidence of favoritism towards Tony McNeal, Sandpiper's permitting agent, current private DEP contractor, and former DEP supervisory employee.

As to the M1 Permit, the Motion in Limine was granted. The issue at final hearing was limited to the changes made by the M2 Permit, noting that:

> "[t]he change of the retaining wall from wood to concrete is the only change to the retaining wall authorized by the M2 Permit, and the impacts of that change, including the footers and frangibility of the wall, are at issue. Elements of the wall not changed, i.e., distance from the face of the wall to the waters of the Gulf, length and height of the retaining wall, slope and grade of fill (if unchanged), and other unchanged elements that may be reflected in the standards applicable to the retaining wall are not relevant to the M2 modifications."

As to the issue of bias on the part of DEP in favor of Mr. McNeal, the Motion in Limine was denied.

On May 27, 2025, the parties filed their Joint Pre-hearing Stipulation (JPS). The JPS contained a number of stipulations of fact, which are, where relevant, adopted and incorporated herein. The JPS also identified disputed issues of fact and law remaining for disposition.

Issues of fact identified for disposition by Respondents relate to Petitioner's standing, and the timeliness of Petitioner's challenge to the M2 Permit.

Issues of fact identified for disposition by Petitioner in the JPS are:

> Whether the Applicant has met all the criteria and provided reasonable assurances that the proposed Project meets the criteria for a CCCL Permit

> pursuant to Part I of Chapter 161, Fla. Stat., and Chapter 62-33B, Fla. Admin. Code.
>
> Whether the concrete retaining wall is frangible.
>
> Whether the concrete retaining wall is a minor or major structure.
>
> Whether the concrete retaining wall is coastal armoring.
>
> Whether the concrete retaining wall approved in the Modified Permit will cause impacts different than or greater than the wood retaining wall approved in the Original Permit.
>
> Whether the Applicant and/or the Department considered and/or analyzed additional or different impacts from the Original Permit when approving the Modified Permit.
>
> Whether the concrete retaining wall will cause adverse impacts, including but not limited to: structure-induced scour during storm events; rerouting the natural flow of stormwater during rain or storm events; increased wave reflection, wave energy, and/or erosion causing impacts on Petitioner's property during storm events, including but not limited to destabilization of the dunes; and potential injury or take to marine/sea turtles.

The final hearing was convened on June 2, 2025. At the commencement of the hearing, the following matters were taken up: Sandpiper's Motion Requesting Determination of Improper Purpose against Petitioner, David A. Bradford, Trustee, filed on May 5, 2025; Sandpiper's First Motion in Limine, filed on May 20, 2025, and Petitioner's Response in Opposition thereto, filed on May 27, 2025; Sandpiper's Second Motion in Limine, filed on May 28, 2025; and Petitioner's Objection to Joint Prehearing Stipulation, filed on May 29, 2025. Ruling on the Motion Requesting Determination of Improper Purpose was reserved. Rulings on Sandpiper's First Motion in Limine, and

Sandpiper's Second Motion in Limine, which consisted of five subparts, were made for reasons explained on the record. Petitioner's Objection to Joint Prehearing Stipulation was granted for reasons explained on the record.

At the final hearing, Joint Exhibits (JEx.) 1 through 16, 19, 23, and 31 were received in evidence. JEx. 16, being the deposition of David Bradford, a party, was received in evidence, with designations made on the record. JEx. 19, being the deposition of Steven Nease, and JEx. 23, being the deposition of Celora Jackson, P.E., were received in evidence and their deposition testimony will be given the weight as if they testified in-person.

Sandpiper called the following witnesses:[1] Marina Foote, a DEP Environmental Specialist; Cindy Morrison, an owner of the Sandpiper property, and managing member of Sandpiper before its dissolution; Richard Brunson, who was tendered and received as an expert in residential construction; Tony McNeal, P.E., who was tendered and received as an expert in coastal engineering and coastal construction; and Eric Seckinger, the Environmental Commenting Administrator for the Florida Fish and Wildlife Conservation Commission's (FWC) Imperiled Species Management Section, who was tendered and accepted as an expert in sea turtles and sea turtle nesting, habitat, and hatchlings. Sandpiper Exhibits A-3, A-6, A-44, and A-46 through A-49 were received in evidence.

DEP called the following witnesses: Tiffany Hilton, a DEP Environmental Specialist in its CCCL Section; and Douglas Aarons, P.E., DEP's Administrator for the CCCL Program, who was tendered and received as an

[1] Many of the witnesses were listed by each of the parties. Thus, a fair amount of latitude was afforded to the parties to exceed the scope of direct on cross-examination in order to limit the necessity of having witnesses recalled.

expert in coastal engineering. DEP offered Petitioner's Exhibit PET-19, which was received in evidence.

Petitioner testified on his own behalf, and presented testimony of Rick Newman, who was tendered and accepted as an expert in conservation biology, specializing in sea turtles; and Dr. Michael Jenkins, Ph.D, P.E., who was tendered and received as an expert in coastal engineering and coastal systems. Petitioner's Exhibits PET-1 through PET-3, PET-8 through PET-11, PET-16 (a duplicate of JEx. 2, p. 76), and PET-36 (a duplicate of JEx. 3) were received in evidence.

During the testimony of Mr. Newman, an *ore tenus* motion to strike was made objecting to an opinion of Mr. Newman regarding the thermal effect of the concrete retaining wall on a turtle nest in the space between the wall and the adjacent dune walkover. Mr. Cavalieri asserted that the opinion was not disclosed during Mr. Newman's deposition, as required by the Order of Pre-hearing Instructions. The motion was taken under advisement, and JEx. 18, being the deposition of Mr. Newman, was received in evidence. The parties were given leave to file designations of the transcript in support of, or opposition to, the motion to strike. On June 17, 2025, Sandpiper filed designations to the transcript, which have been received in evidence as JEx. 31. Having reviewed the entire transcript, with special attention paid to the designated portions, it is determined that Mr. Newman did not offer an opinion as to the thermal effect of the concrete wall on turtle nests or eggs. Thus, the motion to strike is granted, and the testimony as to that issue is disregarded.

A six-volume Transcript of the proceedings was filed on June 25, 2025. At the conclusion of the hearing, the parties agreed that post-hearing submittals would be due by July 11, 2025. Each of the parties timely filed Proposed

Recommended Orders, which have been duly considered by the undersigned in the preparation 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 Florida Statutes (2025), unless otherwise noted. *Lavernia v. Dep't of Pro. Regul*, 616 So. 2d 53 (Fla. 1st DCA 1993).

FINDINGS OF FACT

Parties

1. DEP is the administrative agency of the State of Florida having the power and duty to protect Florida's air and water resources and to administer and enforce the provisions of chapter 161, Part I, Florida Statutes (Florida Beach and Shore Preservation Act), and the rules promulgated thereunder in Florida Administrative Code Chapter 62B-33.

2. Between April 12, 2021, and March 15, 2024, Sandpiper, an Alabama Limited Liability Corporation, was the owner of record of the real property located at 235 Gulf Shore Drive, Santa Rosa Beach, Walton County, Florida (Parcel No. 08-3S-19-25020-00A-0140) (Sandpiper Property). Cynthia and Timothy Morrison (Morrisons) were Sandpiper's only managing members. On or about March 15, 2024, the Sandpiper Property was transferred to the Morrisons as joint-tenants. On March 19, 2024, Sandpiper Cottage, LLC, was dissolved. The Morrisons are the current legal owners of record of the Sandpiper Property.

3. The Morrisons intend to remain financially responsible for the permit and its conditions; are financially responsible for the consultants and contractors who are building the project; and intend to ensure the permit conditions are met. The Morrisons are thus able to assume the duties of Sandpiper, wrap up its affairs, and take responsibility for permit conditions that Sandpiper is responsible for on the Sandpiper Property that the

Morrisons now own in their personal capacities. *See generally* §§ 607.1405(2) and 605.0709(8), Fla. Stat.; *see also* rule 62B-33.0155(1)(o).

4. Petitioner, David A. Bradford, as Trustee of the Elizabeth M. Bradford Revocable Trust, is the current owner of record of the real property located at 251 Gulf Shore Drive, Santa Rosa Beach, Walton County, Florida (Parcel No. 08-3S-19-25020-00A-0130) (Petitioner's Property), which is located to the west of the Sandpiper Property, adjacent to the dune-walkover described below.

5. Located in between the Sandpiper Property and Petitioner's Property on Gulf Shore Drive is an approximately 9.5-foot-wide parcel (Parcel No. 8-3S-19-25020-000-00A0) owned by Gulf Trace Owners Association, Inc. (HOA Property). A dune-walkover structure is located on the HOA Property, which provides beach access for HOA members.

The Project and Permit History

6. DEP has established a CCCL for Santa Rosa Beach, Walton County, Florida.

7. On March 13, 2023, Sandpiper submitted an application for authorization to conduct construction activities seaward of the CCCL on Santa Rosa Beach, Walton County, Florida, which was assigned as CCCL Permit No. WL-1468 (Original Permit). The Original Permit application included: the construction of a three-story, single-family dwelling; a seaward, enclosed elevated swimming pool; a wood retaining wall extending along the western property line; excavation of 125.0 cubic yards of soil associated with pile installation; 2811 cubic yards of fill, much of which was for the re-creation of a frontal dune[2] on the Sandpiper Property; and other structures/activities, including a dune-walkover structure, a paved driveway, landscaping and planting, and exterior lighting (proposed project).

[2] Throughout this proceeding, all parties referred to the created dune on the Sandpiper Property and the large dune on Petitioner's Property fronting Petitioner's home as "frontal dunes," even though a smaller dune exists seaward along both properties. Thus, the large

8. The Original Permit application included the required "Letter of Non-Objection" for the Project from the Walton County Planning and Development Services, indicating that the proposed project would not contravene local setback or zoning requirements; evidence of property ownership; and sealed architectural and engineering plans (i.e., plan and profile sheet, a grading plan, a boundary and topographic survey, a landscaping plan, architectural plans, and lighting architectural plans).

9. On June 27, 2023, FWC provided DEP with notice that it did not object to the proposed project, including the wood retaining wall, stating that "FWC staff recommend the following conditions be included in the final order to ensure all state requirements for protection of threatened and endangered marine turtles are met in accordance with Florida Statute 379.2431(1) and 62B-33.005(4)(h) & (12), F.A.C." FWC provided conditions for the protection of marine turtles during construction, which were included by DEP as Special Conditions of the Permit.

10. When the Original Permit application was filed, the Sandpiper Property was vacant, with a residential structure having been recently demolished. The wall that served to hold up the driveway remained. The wall was permitted in April 2015, and repaired in April 2016. By the time of the Original Permit application in 2023, it was dilapidated and in disrepair.

11. The beach in front of the wall was a flat grade, with sparse vegetation and no dune of any kind remaining, a condition unrelated to the demolition of the house or any other action by Sandpiper.

12. On August 10, 2023, DEP, under Mr. Aarons' signature, issued the Original Permit to Sandpiper. The proposed project, including the retaining wall, was permitted as a "major structure." The Original Permit contained Special and General Conditions governing all phases of the proposed Project's

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dunes on the properties will be referred to as frontal dunes, and the smaller seaward dunes will be referred to as the smaller dunes.

construction (pre, during, and post), and incorporated by reference the plans included in the application and approved by DEP.

13. The Original Permit included the following description of the retaining wall at issue:

> Wood Retaining Wall
> 1. Location relative to control line: A maximum of 159.1 feet seaward.
> 2. Exterior dimensions: 81 linear feet.
> 3. Type of post: 10x10 with minimum 16-foot embedment.

14. Mr. Brunson, the contractor charged with construction of the permitted improvements, testified that the purpose of the retaining wall was to hold the sand from the created frontal dune, and protect the HOA Property and dune-walkover from being covered by the fill. It was not designed or intended to protect the lot or the house from erosion or the effects of storm surge. The house is being constructed on its own concrete piles, and the retaining wall is not needed for that purpose.

15. With regard to excavation at the Sandpiper Property, the Original Permit provided that:

> Excavation/Fill
> 1. Total volume of excavation: Approximately 125.0 cubic yards associated with pile installation. Volume of net excavation: None; excavated material to be placed as fill on the project site. See Special Permit Condition 7.

Special Condition 7 provided that:

> 7. All excavated material shall be maintained on site seaward of the coastal construction control line.

16. Shortly after the issuance of the Original Permit, Mr. Brunson expressed his concern with the longevity of the wooden retaining wall. His concern was triggered by the condition of the existing wooden wall on the Sandpiper Property, which was severely degraded, with pilings leaning and

timbers displaced. He suggested to the project engineer that the wooden retaining wall be replaced with a concrete wall with a shallow poured concrete footer.

17. Structural drawings were prepared that depicted the concrete retaining wall, and included a footer extending 12 inches to the west of the wall face at a depth of about 37 inches at the slope break, and less than 24 inches at the toe. To the east of the wall, the footer extended horizontally up to nine feet (though that width varied) beneath the Sandpiper Property. The revision made no changes to the retaining wall's permitted above-ground height, length, shape, orientation, or configuration. The purpose of the wall and the amount of sand placed against the concrete retaining wall was the same as that for the wooden wall permitted by the Original Permit.

18. On September 14, 2023, Mr. McNeal sent an email to Ms. Jackson from his DEP email, stating "Please see me before you leave." Petitioner characterized this email as a "demand." Nothing in the email suggests that it is a demand. It seems, rather, to be a polite request, though it probably should have been sent from his private business email. In any event, Ms. Jackson did not respond to the email. Neither Ms. Jackson nor Mr. McNeal have a recollection of any meeting having taken place.

19. Mr. McNeal testified that he spoke with Ms. Hilton regarding the requirements for modifying the retaining wall, which he characterized as a "pre-application meeting." Ms. Hilton, who was asked repeatedly whether she had any specific recollection of the discussion with Mr. McNeal or with other DEP co-workers about the issue stated that she had none, noting that "[t]his was September, 2023, no." However, whatever the nature of the conversation, Mr. McNeal concluded that the modification of the retaining wall from wood to concrete would require a modification of the Original Permit.

20. Late in the afternoon on September 14, 2023, Mr. McNeal sent Ms. Morrison, Mr. Dougherty, and Mr. Brunson the following from his business email address:

> All,
>
> I showed DEP the concrete wall design today. They said it would require a formal modification. Attached is the application and fee schedule.
>
> The permit authorizes 125 yds3 of cut and 2811 yds3 of fill. If these numbers change because of the redesign, please let me know.
>
> Mrs. Morrison, please have the application signed and returned to me. The application fee is $450 and should be sent directly to FDEP at the address on page 2 of the fee schedule. Reference application file WL-1468 M1.

21. On September 27, 2024, Mr. McNeal submitted a CCCL permit modification application requesting to modify the wooden retaining wall to a concrete retaining wall (the M1 Permit). The application was assigned to Ms. Hilton. In accordance with Mr. McNeal's instruction, the permit fee had already been submitted.

22. Ms. Hilton reviewed the drawings and documents submitted with the M1 Permit application. She determined that the impacts of the concrete wall, including the subsurface change to the foundation, would not increase any impacts already permitted and for which mitigation had been provided. She focused on the fact that the above-grade location and footprint of the retaining wall was not changed. She made no detailed calculation of the footer, but did review and pay attention to the plans. She believed that the proposed change would be a "minor modification" as defined in rule 62B-33.013(2), which provides, in pertinent part, that "[m]inor additions, revisions, or structural modifications are those changes which will not increase the risk of adverse impacts."

23. Rule 62B-33.002(26)(a) defines "adverse impacts" as "impacts to the coastal system that may cause a measurable interference with the natural functioning of the coastal system."

24. Though the modification was minor, the wall itself was a major structure. Therefore, Ms. Hilton applied General Condition (1)(r) of the Original Permit (derived from rule 62B-33.0155(1)(r)), which she applies on occasion to allow deviations from the approved plans that do not increase adverse impacts, and which provides, in pertinent part, that:

> (r) For permits involving major structures …, the permittee shall provide the Department with a report by a registered professional within 30 days following completion of the work. ... The report shall state that all locations specified by the permit have been verified and that other construction and activities authorized by the permit, … have been performed in compliance with the plans and project description approved as a part of the permit and all conditions of the permit; *or shall describe any deviations from the approved plans*, project description, or permit conditions, and any work not performed. (emphasis added)

25. Ms. Hilton determined that the approval of the change in the retaining wall from wood to concrete could be done through the certification report in lieu of a formal modification of the Original Permit. She indicated such was "pretty common," and was trying to be efficient.

26. On October 18, 2023, Ms. Hilton, after consulting with Ms. Jackson, advised Mr. McNeal, by the following email, that the proposed change to the Original Permit was not significant enough to warrant a permit modification:

> After reviewing your proposed plan it has been determined that this material change can be noted on your final certification. You may withdraw this application.
>
> Please let me know if you have any questions.

27. Mr. McNeal replied to Ms. Hilton about an hour later with the following:

> Thank you for your email below Tiffany. The change in the design will be noted in the Final Certification as per your email.
>
> By this email, I hereby withdraw application WL-1468 M1, and request a refund of the application fee.

28. Mr. McNeal did not recall if he spoke with Ms. Hilton between his submission of the M1 Permit application and Ms. Hilton's email, nor did he recall if Ms. Hilton explained the reason for the decision. He does hold the opinion that the change in material has no impact on the coastal system.

29. The modification of the retaining wall from wood to concrete was not subject to a permit, and notice of the change was not published or provided to adjacent property owners.

30. Activities authorized by the Original Permit, which then included the concrete retaining wall, along with the construction of the frontal dune and planting it with seagrasses, were substantially completed by February 2024. The house and pool are not yet completed.

31. Construction of the concrete retaining wall did not result in net excavation or removal of in situ sandy soils, with a specific condition of both the Original Permit and the M2 Permit requiring that excavated material be placed as fill on the project site seaward of the CCCL.

32. The frontal dune was created landward of the proposed location of the residential structure after completion of the retaining wall. Sand was brought in and placed and compacted in two-foot lifts, with roughly 2,800 cubic yards of sand ultimately compacted in place. The resulting frontal dune matched the elevation of the frontal dune on Petitioner's Property, though it was bisected by the HOA Property's dune-walkover. A smaller dune was also constructed seaward of the frontal dune, likewise consistent with that in front of Petitioner's Property, and sand fencing was installed to connect up to existing fencing, to catch and hold sand at the property. The frontal dune and the smaller dune were planted with native grassy vegetation which, by all

accounts, has rooted well and is spreading. In the days leading up to the hearing, it was noted by Mr. McNeal that another small dune was naturally forming seaward of the restored frontal dune and smaller dune, which indicates that there is plenty of sand in the system – for now.

33. In terms of net excavation, there is considerably more sand in the project area since the retaining wall and frontal dune creation was completed than before.

34. The change in the concrete wall footer has had no effect on the impact of the retaining wall in normal circumstances.

35. The change in the vertical retaining wall from wood to concrete has had no measurable effect on stormwater runoff in a seaward direction. The retaining wall does not interfere with public access to the beach.

36. There have been no impacts, adverse or otherwise, to any of the dune features on the Sandpiper Property or Petitioner's Property as a result of the change in the retaining wall from wood to concrete.

37. Following construction, DEP conducted a site visit to survey the completed retaining wall and determined that the wall was constructed in accordance with the Original Permit, subject to the material change to be noted on the final permit certification.

38. After the wall was constructed, the Morrisons decided to add several decks to the proposed residential structure. Drawings were prepared, and on March 13, 2024, Sandpiper filed the M2 Permit application requesting to modify the Original Permit to authorize the construction of two additional decks – a cantilevered, on-grade concrete deck and a pile-supported, wooden deck, and the modification to the exterior dimensions of the dwelling structure to include cantilevered balconies. The application also included drawings previously submitted in the M1 Permit application that were intended to memorialize the modification of the retaining wall.

39. The M2 Application was processed by Ms. Hilton. Since Ms. Hilton is an Environmental Specialist III, she had signing authority for the Notice to Proceed.

40. To establish entitlement to a CCCL permit, Sandpiper must, among other things, demonstrate that the concrete retaining wall meets the following criteria:

> (a) The construction will not result in removal or destruction of native vegetation which will either destabilize a frontal, primary, or significant dune or cause a significant adverse impact to the beach and dune system due to increased erosion by wind or water;
>
> (b) The construction will not result in removal or disturbance of in situ sandy soils of the beach and dune system to such a degree that a significant adverse impact to the beach and dune system would result from either reducing the existing ability of the system to resist erosion during a storm or lowering existing levels of storm protection to upland properties and structures;
>
> (c) The construction will not direct discharges of water or other fluids in a seaward direction and in a manner that would result in significant adverse impacts. For the purposes of this rule section, construction shall be designed so as to minimize erosion induced surface water runoff within the beach and dune system and to prevent additional seaward or off-site discharges associated with a coastal storm event.
>
> (d) The construction will not result in the net excavation of the in situ sandy soils seaward of the control line or 50-foot setback;
>
> (e) The construction will not cause an increase in structure-induced scour of such magnitude during a storm that the structure-induced scour would result in a significant adverse impact;

> (f) The construction will minimize the potential for wind and waterborne missiles during a storm;
>
> (g) The activity will not interfere with public access, as defined in Section 161.021, F.S.; and,
>
> (h) The construction will not cause a significant adverse impact to marine turtles, or the coastal system.

Fla. Admin. Code R. 62B-33.005(4).

41. "Significant adverse impacts" are:

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

Fla. Admin. Code R. 62B-33.002(26)(b).

42. A "take" is defined in section 379.2431(1)(c)2., Florida Statutes, as "an act that actually kills or injures marine turtles, and includes significant habitat modification or degradation that kills or injures marine turtles by significantly impairing essential behavioral patterns, such as breeding, feeding, or sheltering." There was no allegation or evidence that the conversion of the retaining wall from wood to concrete would result in death or injury to sea turtles. Rather, the allegation is that if a turtle made it into

the 42-inch wide gap between the retaining wall and the beach walkover, and attempted to dig a nest atop the eastern 12 inches, it would encounter the shallow footer, which could interfere with the ability of the sea turtle to dig an egg chamber deep enough to protect the eggs.

43. Ms. Hilton evaluated the M2 Permit application, applying each of the criteria listed in rule 62B-33.005. Her review included an evaluation of the siting and design criteria for the wall, and whether the impacts had been minimized and mitigated. She determined that the combination of the addition of thousands of cubic yards of sand to rebuild the frontal dune, resulting in no "net" excavation of soils, and "planting a lot" of native vegetation where there had been relatively little was sufficient to mitigate for any adverse impacts. Her testimony was substantiated by that of Mr. Aarons and Mr. McNeal, and is accepted.

44. DEP did not require Sandpiper to obtain a new letter of non-objection from Walton County. As explained by Ms. Hilton, major modifications are required to be processed as a new application under rule 62B-33.013, which would include a renewed local government review. However, the change in the construction of the wall material and the subsurface features of the footer is a minor modification. Since the change did not affect the retaining wall's siting, location, or distances from other features, it had no effect on local setbacks or zoning, compliance with which is the purpose of the letter. DEP's determination that the modification of the retaining wall from wood to concrete did not require a new letter of non-objection is supported by the record and is accepted.

45. On April 10, 2024, DEP, under Ms. Hilton's signature, issued its notice of intent to issue the M2 Permit. Prior to the issuance of the M2 Permit, Ms. Hilton did not consult either Ms. Jackson or Mr. Aarons. The M2 Permit included a revised draft permit that authorized the proposed decks and balconies. It also included the following "type and strike" permit modification to the retaining wall:

~~Wood~~ Concrete Retaining Wall
1. Location relative to control line: A maximum of 159.1 feet seaward.
2. Exterior dimensions: 81 linear feet.
~~3. Type of post: 10x10 with minimum 16 foot embedment.~~
3. Type of foundation: Concrete footer.

46. Petitioner had been traveling, and only learned of the modification of the retaining wall from wood to concrete upon viewing its construction adjacent to his property. Since there was no record of any approval of the concrete wall, the M1 Permit having been withdrawn, Petitioner was not able to find out anything about the change from DEP. He retained counsel, and learned of the M2 permit modification after a public records request for the same.

47. On August 2, 2024, Petitioner filed a "Petition for Formal Administrative Hearing" challenging the M2 Permit. As established in the JPS, Petitioner is not challenging decks or balconies authorized in the M2 Permit. Rather, the issues for disposition are those related to the modification of the retaining wall from wood to concrete, and include: structure-induced scour during storm events; rerouting the natural flow of stormwater during rain or storm events; increased wave reflection, wave energy, and/or erosion causing impacts to Petitioner's property during storm events, including, but not limited to, destabilization of the dunes; and potential injury or take to marine/sea turtles.

Major or Minor Structure

48. A "structure" is defined, in pertinent part, as:

> the composite result of putting together or building related components in an ordered scheme. Enumeration of types of structures in this rule subsection shall not be construed as excluding from the application of this rule chapter any other structure which by usage, design, dimensions, or structural configuration meets the general definition herein provided and requires engineering considerations similar to the following:

* * *

> (c) "Major Structures" which, as a result of design, location, or size could cause an adverse impact to the beach and dune system. Major structures include:
>
> 1. "Nonhabitable Major Structures" which are designed primarily for uses other than human occupancy. Typically included within this category are roads, bridges, storm water outfalls, bathhouses, cabanas, swimming pools, and garages.

Fla. Admin. Code R. 62B-33.002(55)(c).

49. Dr. Jenkins testified that "specifically with the proposed concrete retaining wall. In my evaluation, I noted that it was a major -- a major structure." Asked to explain, he testified that:

> I would defer to the – the definition under Rule 62B-33, and the definition for major structure under paren (c)(55) structure, major structures, which as a result of design, location or size, could cause an adverse impact to the beach and dune system. Major structures include nonhabitual major structures, which this is a nonhabitual major structure.

50. Consistent with Dr. Jenkins, Mr. Aarons testified that:

> the threshold for a minor structure is one that will be – that will come apart and breakaway during a high frequency storm event. I'm not sure that would be true from this case, with the deep driven – I forgot the size of the piles, 10, 12, whatever they were, driven 20 feet in the ground, I don't see them going away under the influence of a high frequency storm event. So it would meet the definition of major.

He maintained that, under that rationale, the concrete retaining wall under the M2 permit is still a major structure.

51. In contrast to major structures:

> "Minor Structures" are designed to be expendable, and to minimize resistance to forces associated with high frequency storms and to break away when

> subjected to such forces, and which are of such size or design as to have a minor impact on the beach and dune system.

Fla. Admin. Code R. 62B-33.002(55)(b).

52. The retaining wall, whether of wood or concrete, was not designed to break away during high frequency storms. As stated by Mr. McNeal, "the more frequent storms, up to the 15-year storm that we talked about, would not cause that much impact." Thus, in those more frequent storms, the retaining wall should remain intact, and is not expendable. Though the wall, regardless of its composition, may fail in a stronger and less frequent storm, i.e., one with a one or two percent chance of happening in any year (a 100-year or 50-year storm), the retaining wall was not designed to be expendable, and is not a minor structure.

53. A preponderance of the competent, substantial, and persuasive evidence, including testimony from experts presented by Petitioner and DEP, establishes that the retaining wall is a major structure. As applicable to other issues discussed herein, a major structure is not one that is intended to be expendable, and is one to which General Condition (1)(r) of the Original Permit, which allows deviations from the approved plans to be described in the final as-built report, applies.

Frangible

54. Much was made of whether the concrete retaining wall is "frangible," that is, whether it would break apart in a major storm. All parties agreed that the concrete retaining wall was not designed to break into pieces during a storm event. Dr. Jenkins agreed that chapter 62B-33 does not require retaining walls to be frangible.

55. The term "frangible" is not used in chapter 62B-33, and is used a single time, as a definition, in chapter 161. Dr. Jenkins – and Petitioner in general – construed the terms "expendable" and "frangible" as being synonymous. They are not.

56. Petitioner argued that the original wall design was a "frangible" wood wall design such that the wood wall would break apart during a storm allowing the fill behind the wall to spill out over the HOA Property. This design, according to Petitioner, would buffer wave reflection off of the wall, and minimize damage to Petitioner's Property. However, there is no rule requiring that a retaining wall, the purpose of which is to retain the sand on the property, be frangible.

57. Mr. McNeal testified that the terms "frangible" and "breakaway" are used in the Florida Building Code (FBC) to describe certain walls located below the first floor of a building. He stated that the FBC requires that those walls have a frangible or breakaway design so that when a storm surge comes through, the lower walls break apart, and do not transmit water loads onto the foundation of the building. He further indicated that the requirement that such structures be frangible, along with all other FBC standards, was repealed in 2012 as a requirement for obtaining a DEP permit, and transferred to the local building departments for administration.[3]

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[3] Pursuant to the Order of Pre-hearing Instructions, official recognition was taken of rules promulgated by governmental agencies and published in the Florida Administrative Code. Mr. McNeal's description of the process by which determinations of "frangibility" were removed as a DEP permitting standard is substantiated by the history of rule 62B-33.

Prior to 2012, rule 62B-33.007, entititled "Structural and Other Requirements Necessary for Permit Approval," established that:

> (1) All building permit applications submitted to the Department or to the appropriate local building department prior to March 1, 2002, the effective date of the Florida Building Code Act (Part VII, Chapter 553, F.S.), shall be governed in accordance with the standards contained within this rule section for the life of the permitted work and for any extensions granted to the permit.

The rule went into to a fair degree of detail regarding the requirements for buildings, particularly habitable major structures. Among the requirements was that:

> (4) Major structures shall conform to the following requirements:
>
> * * *

58. Even when DEP's rules incorporated the concept of frangibility, the requirement that a feature be frangible was a building code standard for the protection of habitable major structures. It was not a requirement for the protection of dunes, or coastal features in general.

59. The only criteria for structures to be capable of breaking apart in a storm for which regulatory authority arguably exists is that of expendability. "Expendable" is defined as "a structure that is subject to use or consumption, suitable for sacrifice, or is not essential to preserve." Fla. Admin. Code R. 62B-33.002(16).

60. Dr. Jenkins admitted that the concrete retaining wall is not subject to use or consumption, that it is not suitable for sacrifice (in that it will not sacrifice), and that it is not essential to preserve.

61. As set forth above, only "minor structures" are designed to be expendable and to break away in high frequency storms. Fla. Admin. Code R. 62B-33.002(55)(b). There is no corresponding requirement for major structures. Thus, there is no requirement that the concrete retaining wall – a major structure – be expendable.

62. A preponderance of the competent, substantial, and persuasive evidence, and applying the regulatory history applicable to CCCL permits,

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> (f) Substantial walls or partitions shall not be constructed below the level of the first finished floor of habitable major structures and seaward of the CCCL or 50-foot setback. This does not preclude, subject to Department permit and applicable federal, county, and municipal regulations, the construction of:
>
> * * *
>
> 9. Break-away or frangible walls.

Rule 62-33.007 was repealed in its entirety effective February 16, 2012. The definition of "breakaway wall" or "frangible wall" ("a partition independent of supporting structural members that is intended to withstand design wind forces but to collapse from a water load less than that which would occur during a 100-year storm event without causing collapse, displacement, or other structural damage to the elevated portion of the building or supporting foundation system.") was repealed, effective November 28, 2018. There remain no references to any sort of "frangible" structure in chapter 62B-33.

establishes that there is no requirement that the concrete retaining wall be frangible. Furthermore, even if frangible was synonymous with expendable – it is not – the concrete retaining wall is a major structure, and not one that is either required or intended to be expendable.

Coastal Armoring

63. "Armoring" is defined as "a manmade structure designed to either prevent erosion of the upland property or protect structures from the effects of coastal wave and current action." Fla. Admin. Code R. 62B-33.002(3). Pursuant to rule 62B-33.0051, coastal armoring is intended as a "means to protect existing private structures and public infrastructure from damage from frequent coastal storms... ." Fla. Admin. Code R. 62B-33.0051(1).

64. The evidence clearly established that the retaining wall was not designed, intended, or necessary to prevent erosion of the Sandpiper Property, or to protect existing private structures and public infrastructure from damage. Its intended and actual purpose is to allow the created frontal dune to hold in place. If the retaining wall fails, and the frontal dune is washed away, which may well happen in a severe (e.g., 50-year) storm event, the private residential structure will not be affected, since it is anchored by its own foundational pilings.

65. The evidence was uncontroverted that the retaining wall was not designed to prevent erosion or protect any structure from the effects of coastal wave and current action. Thus, the retaining wall, whether constructed of wood or concrete, is not "armoring" as defined.

Impacts Different or Greater Than the Wood Retaining Wall

66. The concrete retaining wall is in the same location as the wood wall. It is the same length, height, and angular slope as the wood wall. Its distance from and orientation to the waters of the Gulf are identical to the wood wall. The amount, slope, and grade of fill being held back by the wall is not affected by the material used in its construction. The distance from the

concrete wall and the wood wall to the beach-walkover, and the width of the gap between those structures is identical.

67. The only impacts that vary between the wooden retaining wall permitted by the Original Permit and the concrete retaining wall memorialized in the M2 Permit are those set forth in detail herein.

Whether Respondents considered and/or analyzed additional or different impacts from the Original Permit when approving the M2 Permit.

68. This proceeding is a de novo proceeding. § 120.57(1)(k), Fla. Stat. The purpose of this proceeding is not to review Sandpiper's thought processes in deciding to proceed with a concrete retaining wall, or DEP's decision to memorialize its earlier decision to authorize the concrete retaining wall as part of the M2 Permit. DEP's Notice has not been afforded any presumption of correctness. Rather, each of the additional or different impacts alleged by Petitioner has been weighed against the competent, substantial, and persuasive evidence offered by the parties. Thus, whether Respondents considered or analyzed additional or different impacts from the concrete wall vis-à-vis the wood wall before this proceeding is immaterial.

Structure-Induced Scour

69. "Scour" is defined as "erosion caused by the interaction of waves and currents with man-made structures or natural features." Fla. Admin. Code R. 63B-33.002(50).

70. Structure-induced scour occurs when water flows around a stationary object, causing an increase in the speed or velocity of the water, which in turn, increases localized erosion. Water is forced to accelerate around that fixed object, which causes slightly more erosion there than would occur in the absence of a fixed structure. Storm-induced scour is typically going to be relatively localized.

71. A CCCL permit may be issued when "[t]he construction will not cause an increase in structure-induced scour of such magnitude during a storm that

the structure-induced scour would result in a significant adverse impact." Fla. Admin. Code R. 62B-33.005(4)(e).

72. As indicated previously, "significant adverse impacts" are impacts that would be expected to: a) measurably affecting the existing shoreline change rate; b) significantly interfere with the ability of the coastal system to recover from a coastal storm; or c) disturb the topography or vegetation such that the dune system becomes unstable or suffers catastrophic failure or the protective value of the dune system is significantly lowered. Fla. Admin. Code R. 62B-33.002(26)(b).

73. Every major structure is assumed to have scour. Here, Ms. Hilton testified convincingly that the routine effects of scour have been mitigated by the 2,800 cubic yards of sand placed on the Sandpiper Property to create a frontal dune at a location that was flattened over time.

74. The issue for determining whether the concrete retaining wall may be permitted is whether it will be expected to cause an increase in structure-induced scour in comparison to the effects of the wood retaining wall. As Mr. Aarons testified, "both of those structures, in the right circumstances are going to cause scour, and very similar type scour. So, no, I don't see how the -- I don't see the difference associated with the two." His testimony was credible and is accepted.

75. The effects of scour will be comparable along the retaining wall itself, regardless of its composition. Once the pilings of the wooden wall are exposed, a cone may form. Once the footer of the concrete wall is exposed, storm induced scour may occur along the footer. However, though the footer is of greater length, the width of the scour line along the foundation will be roughly the same as the width around the exposed wood pilings. As stated by Mr. Aarons, "[t]here's a lot of dynamics associated with a storm ... but [ ] those are the general effects someone might see."

76. A preponderance of the evidence demonstrated that before storm-driven water and waves begin to affect the Sandpiper retaining wall, the

frontal dune in front of the Sandpiper Property or Petitioner's Property, depending on the direction from which a storm is approaching, will have been already significantly damaged or destroyed. Thus, any scour associated with the concrete retaining wall – or the wooden retaining wall for that matter – would have no effect on the local topography or vegetation "such that the dune system becomes unstable or suffers catastrophic failure or the protective value of the dune system is significantly lowered on the frontal dune system." By the time storm-driven water and waves encounter the retaining wall, the frontal dune will have failed.

77. Aside from the direct effects of storm-induced scour, there was no evidence presented to suggest that the Sandpiper retaining wall would measurably affect the existing shoreline change rate, or would significantly interfere with the ability of the coastal system to recover from a coastal storm.

78. The preponderance of the competent, substantial, and persuasive evidence demonstrated that the concrete retaining wall will not result in scour to such a degree as to cause significant adverse impacts to the beach and dune system or adjacent properties.

Rerouting the Natural Flow of Stormwater

79. Mr. Brunson testified that the purpose of the retaining wall, regardless of the material from which it is constructed, is not to redirect stormwater. Furthermore, since the above-ground location and configuration of the concrete retaining wall is unchanged from the Original Permit's wood retaining wall, there is nothing to suggest, and no evidence was presented, that stormwater would be directed any differently due to the change in the wall's composition.

80. The only evidence presented that stormwater on the Sandpiper Property, or water in general, could be subject to any difference as a result of the composition of the wall was due to the presence of "weep holes" that extend through the concrete. Weep holes are standard design features that

allow for the discharge of water through a wall to prevent the buildup of water behind a wall.

81. Dr. Jenkins testified that his evaluation of stormwater drainage was based on his observation of the weep holes, with his concern being that the water could be discharged through the wall to adjacent property.

82. From the end of the weep hole pipe to the edge of the Sandpiper Property and the start of the HOA Property is a distance of about 9 inches. When asked his opinion of whether water would be discharged off of the Sandpiper Property, Dr. Jenkins testified that "I was never of the opinion that the water would shoot out of those weep holes. They are weep holes. The concern was raised about discharge. It is not my primary concern, and it can be argued that the discharge would not go beyond the property."

83. Mr. Brunson testified that if any water "came out at all, it would be a slow drip." He testified convincingly that no water coming through the weep holes would be discharged off of the Sandpiper Property, with his level of confidence being "[a] hundred percent."

84. A preponderance of the competent, substantial, and persuasive evidence establishes that the material from which the retaining wall is constructed will have no effect on the flow of stormwater from the Sandpiper Property, or to the HOA Property or Petitioner's Property.

Increased Wave Reflection, Wave Energy, and/or Erosion

85. Hurricane Ivan in 2004 and Hurricane Dennis in 2005 both made landfall in Walton County. The damage was so severe that the CCCL was reestablished landward of its existing location to the storm surge elevation of a 100-year storm event, estimated at approximately 10.5 feet NAVD. That elevation is the required elevation for habitable structures built seaward of the CCCL. At the location of the Sandpiper Property, the CCCL is at or landward of Gulf Shore Drive.

86. Storm surge and the waves that overtop the surge will not have a significantly different effect on Petitioner's Property as a result of the change

of the wall from wood to concrete when storms approach from the southeast or straight in from the south. In fact, the evidence supports a finding that the concrete wall will offer greater protection to Petitioner's Property when the direction of the surge, water, and waves are from the southeast.

87. Mr. Brunson indicated that, in his opinion, the concrete retaining wall could withstand the forces of a storm up to a Category 3 hurricane. In a larger storm, everything in its path would likely be heavily damaged, if not demolished. The frontal dune at Petitioner's Property would be swept away, as would the frontal dune constructed on the Sandpiper Property.

88. As to the effects of a 50-year storm (i.e., a storm with a 2 percent chance of occurring in any given year) on Petitioner's Property, surge and waves coming from the southwest will have advanced over Petitioner's frontal dune, eroding it away before the surge would encounter the Sandpiper retaining wall, regardless of its composition, and as a precursor to additional impacts.

89. The surge and waves from a 50-year storm is projected to be at a height of 8.9 feet NAVD (9.3 feet NGVD). Such would not overtop the frontal dune on the Sandpiper Property, which has a crest elevation of 11.0 NAVD, but would very likely erode and, if the storm was of sufficient duration, destroy the dune. Such a storm, and its attendant surge, water, and waves, would be expected to impact not only the retaining wall, the Sandpiper Property, and Petitioner's Property, but would cause significant damage up and down the coastline.

90. In a major storm, the wood wall would begin to break apart, starting at the top and working to the bottom, as boards succumb to the pressure and are torn way. The pilings, having been driven to a depth of 16 feet, would likely remain in place. As the boards tear away, the western edge of the frontal dune behind the wall would be exposed, with the sand muting wave energy as it is washed away. According to Dr. Jenkins, the wood wall would provide greater protection of Petitioner's Property as the reduction of the

reflection of the water and waves would also reduce the effect of reflected scour and erosion.

91. Dr. Jenkins opined that the concrete wall would not allow water and waves approaching from the southwest to pass through. Rather, he testified that waves would reflect off the wall at the same angle as their approach and with such force that the wave energy would reflect back against the force of the storm, cross the HOA Property, and potentially result in scour and erosion of Petitioner's Property, erosion that, in his opinion, would not otherwise occur but for the concrete wall.

92. In a controlled and static environment, the "fundamental physical process" of a wave reflecting at an equivalent angle and force from a solid wall may be supported. However, those mechanics fail to account for the fact that the water and waves from a major storm, that are "happening everywhere," will still be pushed by the continuing onslaught of the storm's winds and surge of incoming water even as they encounter the wall, muting and offsetting any reflection of the wave energy back into the teeth of the storm. That waves being driven against the concrete retaining wall would simply bounce back through the force of the storm, and cause damage to Petitioner's Property measurably greater than that of the storm itself, is simply not plausible.

93. Mr. Aaron's assessment of the action of the water and waves was that water driven ahead of the storm would be directed up, down, or along the edge of the wall to the north and toward the road, with any reflection back into the storm's force being completely dispersed after a few feet. Likewise, Mr. McNeal testified that the effect of waves from a 50-year or a 100-year storm hitting the concrete wall would not affect the damage to Petitioner's Property. In such storms, everything will be "pretty messed up," and the retaining wall, regardless of the material from which it is constructed, will likely have failed.

94. Mr. McNeal's opinion that the wall, regardless of the material from which it is constructed, will have no impact on the damage caused by a major storm on Petitioner's Property, the HOA Property and dune walkover, or the coastal area in general, is accepted.

95. A preponderance of the competent, substantial, and persuasive evidence establishes that the material from which the retaining wall is constructed will have no measurable effect on wave reflection, wave energy, or erosion affecting Petitioner's Property from storm events affecting the coastline.

Marine Turtle Habitat

96. FWC works jointly with DEP to make determinations about CCCL permits regarding marine turtles. FWC reviews permit applications to reach a conclusion as to whether a project will adversely impact marine turtles or their nesting habitat. If FWC requires more information or requires modifications to a CCCL application, it provides its comments to DEP and the applicant. When FWC determines that a project will not constitute a "take" or otherwise adversely impact marine turtles, it provides conditions for construction to be included in the permit. Although FWC provides comments and conditions as part of its review, the decision for approving a CCCL permit rests with DEP.

97. Rule 62B-33.002(29) defines marine turtle nesting habitat as "all sandy beaches adjoining the waters of the Atlantic Ocean, the Gulf of Mexico, and the Straits of Florida in all coastal counties and all inlet shorelines of those beaches. Nesting habitat includes all sandy beach and unvegetated or sparsely vegetated dunes immediately adjacent to the sandy beach and accessible to nesting female turtles."

98. On June 27, 2023, FWC provided DEP with notice that it did not object to the Original Permit, including the wood retaining wall, stating that "FWC staff recommend the following conditions be included in the final order to ensure all state requirements for protection of threatened and endangered

marine turtles are met in accordance with Florida Statute 379.2431(1) and 62B-33.005(4)(h) & (12), F.A.C." and provided conditions for the protection of marine turtles during construction. The conditions recommended by FWC were included as Special Conditions of the Original Permit.

99. On February 28, 2025, FWC advised counsel for Sandpiper that "FWC staff have no objections to the identified modifications of [the M2 Permit] provided the conditions listed in the original permit WL-1468 dated August 10, 2023, are applied to ensure all state requirements for the protection of threatened and endangered marine turtles are met in accordance with section 379.2431(1) of the Florida Statutes and Rule 62B-33.005(4)(h)&(12), Florida Administrative Code."

100. Permit conditions applicable to turtle nesting season include requirements regarding communication with FWC about nests prior to and during construction, instructions for how to conduct construction if nests are present on the site, guidelines for the construction site to prevent disturbances of the sand on the beach, and a restriction on nighttime construction. The Permit conditions are sufficient to minimize adverse impacts to turtles and their nesting habitat, and allow construction during sea turtle nesting season.

101. Petitioner's primary, if not exclusive, concern regarding the impact of the retaining wall on sea turtles was the impact on nesting if turtles were to navigate their way up the beach, over the smaller dune, through the sand fences, ultimately threading the needle into the 42-inch gap between the wall and the HOA Property's dune-walkover. The concern was not the width of the gap, which was unchanged from the Original Permit, but the effect of the concrete footer that extends 12 inches into the gap. That effect was that a turtle would be unable to dig an egg chamber of adequate depth (roughly 65 centimeters) to protect the eggs if it encountered the shallow footer. Even then, however, turtles are capable of moving to a different location if they encounter inhospitable nesting conditions while digging a nest.

102. That a turtle could conceivably navigate into the narrow space between the retaining wall and the beach walk-over to dig a nest is possible. However, a preponderance of the evidence indicates that, given the abundance of suitable nesting conditions a turtle would encounter before reaching the gap, and the various barriers, including sand fencing, they would encounter on the way, it would be unlikely, and not such that it would constitute a "significant habitat modification" or that it would "significantly impair[ ] essential behavioral patterns, such as breeding." Thus, the possible effect that the concrete footer might have on the ability of a turtle to successfully nest does not rise to the level of a "take" as defined in section 379.2431(1)(c)2.

103. Nonetheless, Mr. Newman testified that "woody vegetation," similar to that he observed on Petitioner's Property, would be an effective impediment to sea turtles accessing the gap. Thus, planting of such woody vegetation to block the 42-inch gap would fully eliminate the already improbable chance that a marine turtle would enter that narrow gap, since "if they encounter thick woody vegetation, they're less likely to try to advance beyond it."

104. Special Condition 10 of the Original Permit and the M2 Permit provides that:

> 10. To reduce the risk of marine turtle entrapment, walkover structures shall have three (3) feet of vertical clearance beneath them and at least five (5) feet of horizontal clearance where they meet the beach. The vertical clearances include support bracing, as well as stairs. The horizontal clearances include between support pilings, and between stair blocking and pilings. Where these clearances cannot be met (such as under the stairs), blocking with appropriate materials shall be used to preclude marine turtle, including hatchling, access. Appropriate materials include solid boards, planks with no more than one inch spacing, or nylon 1 x 1 mesh. The blocking material shall be buried a

> minimum of one foot into the sand, have a vertical minimum height of two feet, and are properly secured to support posts. These clearances shall be maintained if the elevation of the beach rises or lowers after construction. If adjacent to a bulkhead, structures shall be constructed as close to the bulkhead as possible (less than a foot) to avoid entrapment between pilings and the bulkhead.

105. If the planting of woody vegetation is impractical, the risk of a marine turtle nesting in the gap could be eliminated entirely by the construction of a simple fence or gate made of "blocking material" to restrict access to the gap.

106. Based on the foregoing, planting woody vegetation to block the 42-inch gap between the beach walk-over and the retaining wall, or the construction of a barrier or gate consisting of "appropriate materials," as identified in Special Condition 10, to block the gap, would eliminate even the slightest possibility of the retaining wall affecting marine turtles.

Bias

107. Throughout this proceeding, much was made of the fact that Sandpiper's agent, Mr. McNeal, a former long-time supervisory employee of DEP, is now a private contractor for DEP, with the implication being that Sandpiper was given preferential treatment because of Mr. McNeal's relationship with DEP. As stated by the undersigned on more than one occasion, in this type of de novo proceeding, if an application meets all criteria for issuance of a permit, then the permit should issue, even if there is an undertone of bias or favoritism on the part of agency staff towards the applicant. Nonetheless, a review of the relationship between DEP and Mr. McNeal is warranted due to the degree of interest by Petitioner.

108. Mr. McNeal had 35 years of service with state government, starting in 1985 with the Department of Natural Resources (DNR), and then with DEP after the merger of DNR with the Department of Environmental Regulation, until his retirement as the program administrator for the Coastal

Construction Control Line Program in 2020. In that capacity, he supervised Ms. Jackson.

109. When he retired, Mr. McNeal formed his own business, drawing plans as a civil engineer, obtaining flood letters, consulting for coastal properties, and obtaining permits from DEP.

110. In 2022, Hurricane Ian came ashore near Fort Myers, causing extensive damage to the southwest Florida coastline. *See* Wikipedia, *Hurricane Ian*, https://en.wikipedia.org/wiki/Hurricane_Ian (last accessed June 30, 2025). The damage resulted in a large backlog in emergency permit applications to repair, reconstruct, and recover from the damage. Mr. McNeal was hired on a contract basis to assist DEP in processing applications and otherwise assist in managing the backlog. He was contacted by Lainie Edwards, who was then a DEP deputy director, and she approved his contract.

111. In his contract capacity, Mr. McNeal was provided with an office in the DEP building and a DEP email address. He does not have a DEP telephone number. He attends meetings, consults with landowners, and reviews applications for emergency permits. He does not "sign off" on any permits. Mr. McNeal works on an hourly rate, with the contract being for up to $240,000.

112. Mr. McNeal has no supervisory authority over Mr. Aarons, Ms. Jackson, or Ms. Hilton.

113. While working as a DEP contractor, Mr. McNeal has not reviewed any applications for his clients.

114. Mr. McNeal was Sandpiper's permitting agent for the Original Permit. He had no involvement in the design of the wooden retaining wall, though he reviewed the plans, and saw no problem with the ability of the wood wall to perform its function of retaining sand.

115. After Mr. Brunson and the project engineer, Joe Dougherty, decided that a concrete retaining wall would be advisable, Mr. McNeal was asked by

Mr. Dougherty if he could get the modification approved. Mr. McNeal was not involved in the decision to modify the wall from wood to concrete. He was tasked with obtaining the required permit.

116. The process by which Mr. McNeal first applied for the M1 Permit, and then received approval for the "material change" and withdrew the M1 Permit, was primarily driven by his interactions with Ms. Hilton. There was nothing in the evidence and testimony in this case that suggested Ms. Hilton or, for that matter, any other employee of DEP, colluded with Mr. McNeal, or provided special favors for Mr. McNeal. The evidence supported that Ms. Hilton's decision to accept the change proposed in the M1 Permit application as part of the certification report in lieu of a formal modification of the Original Permit was "pretty common," and was done as a means of expedience and efficiency, rather than the result of any favoritism.

117. The only thing out of the ordinary was Mr. McNeal's use of his DEP email to request a meeting with Ms. Jackson (for which there is no evidence that it took place), which was more a result of improvidence than any effort to bully his way into a favorable decision. In fact, after the subsequent meeting with DEP, he advised Sandpiper that a permit for the change to the retaining wall was needed, a result inconsistent with bias, collusion, or favoritism.

118. The record evidence does not support a finding that any decision made by DEP with regard to the permits for construction at the Sandpiper Property were influenced in any way by Mr. McNeal's relationship with DEP, either as an employee or a contractor.

CONCLUSIONS OF LAW

A. Jurisdiction.

119. DOAH has jurisdiction over the subject matter of this proceeding and of the parties thereto. §§ 120.569 and 120.57(1), Fla. Stat.

120. DEP is Florida's state administrative agency having the power and duty to protect Florida's air and water resources and to administer and

enforce the provisions of chapter 161, as well as the rules promulgated thereunder in chapter 62B-33 regarding CCCL permitting activities.

B. Burden of Proof

121. This is a de novo proceeding, pursuant to section 120.57, Florida Statutes, intended to formulate final agency action rather than to review DEP's decision to issue the CCCL permit, and the preliminary agency action is not entitled to a presumption of correctness. § 120.57(1)(k), Fla. Stat.; *see also Dep't. of Transp. v. J.W.C. Co.*, 396 So. 2d 778, 785 (Fla. 1st DCA 1981) (quoting *McDonald v. Dep't of Banking and Fin.*, 346 So. 2d 569, 584 (Fla. 1st DCA 1977)); *Capeletti Bros. v. Dep't of Gen. Servs.*, 432 So. 2d 1359, 1363 (Fla. 1st DCA 1983). In addition, interpretation of a statute or rule in an administrative proceeding is de novo. Art. V, § 21, Fla. Const.; s*ee also Kanter Real Est., LLC v. Dep't of Env't Prot.*, 267 So. 3d 483, 487 (Fla. 1st DCA 2019).

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

123. "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 Util. 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)). Conversely, evidence which is incredible, mere speculation, or unreliable is not competent 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)).

124. For a CCCL permit, the applicant bears both the initial burden of going forward with the evidence and the ultimate burden of proving entitlement to the permit by a preponderance of evidence. *J.W.C. Co.*, 396 So. 2d at 788-89; § 120.57(1)(i), Fla. Stat.

C. Reasonable Assurance

125. Issuance of the M2 Permit is dependent upon there being reasonable assurance that the activities authorized will meet applicable standards.

126. Reasonable assurance means "a substantial likelihood that the project will be successfully implemented." *Metro. Dade Co. 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 evidence 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).

D. Standing

127. 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."

128. 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; *see also St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist.*, 54 So. 3d 1051 (Fla. 5th DCA 2011); *Palm Beach Cnty. Env't Coal. v.*

Fla. Dep't of Env't Prot., 14 So. 3d 1076 (Fla. 4th DCA 2009); *Mid-Chattahoochee River Users v. Fla. Dep't of Env't Prot.*, 948 So. 2d 794, 797 (Fla. 1st DCA 2006).

129. *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*, 948 So. 2d at 797 (citing *Gregory v. Indian River Cnty.*, 610 So. 2d 547, 554 (Fla. 1st DCA 1992)).

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

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

Palm Beach Cnty. Env't Coal., 14 So. 3d at 1078 (citing *Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1083 (Fla. 2d DCA 2009); and *Hamilton Cnty. Bd. of Cnty. Comm'rs v. State, Dep't of Env't Regul.*, 587 So. 2d 1378 (Fla. 1st DCA 1991)); *see also St. Johns Riverkeeper, Inc.,* 54 So. 3d at 1055 ("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.").

131. Petitioner alleged standing based on his proximity to the retaining wall. He also alleges that the retaining wall will cause adverse effects to his property, particularly during storm events, and will adversely impact his enjoyment derived from the presence of sea turtles.

132. Petitioner meets the second prong of the *Agrico* test, that is, this proceeding is designed to protect him from potential impacts to dunes and the coastal system from construction and other activities that are the subject of chapter 161 and the rules adopted thereunder.

133. The question as to the first prong of the *Agrico* test is whether Petitioner has alleged injury in fact of sufficient immediacy as a result of the retaining wall to entitle him to a section 120.57 hearing.

134. Petitioner's interests are affected by his being directly adjacent to the retaining wall. Thus, Petitioner demonstrated an "injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing."

135. Respondent has standing to participate in this proceeding as the applicant for the M2 Permit. *Ft. Myers Real Est. Holdings, LLC v. Dep't of Bus. & Pro. Regul.*, 53 So. 3d 1158, 1162 (Fla. 1st DCA 2011); *Maverick Media Grp. v. Dep't of Transp.*, 791 So. 2d 491, 492-93 (Fla. 1st DCA 2001).

E. CCCL Standards

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

137. Section 161.053(4)(a)3. provides that DEP may authorize a structure seaward of a CCCL, "upon consideration of facts and circumstances, including

... potential effects of the location of the structures or activities, including potential cumulative effects of proposed structures or activities upon the beach-dune system, which, in the opinion of the department, clearly justify a permit."

138. Rule 62B-33.005, entitled General Criteria for Areawide and Individual Permits, provides, in pertinent part, that:

> (2) In order to demonstrate that construction is eligible for a permit, the applicant shall provide the Department with sufficient information pertaining to the proposed project to show that adverse and other impacts associated with the construction have been minimized and that the construction will not result in a significant adverse impact.
>
> (3) After reviewing all information required pursuant to this rule chapter, the Department shall:
>
> (a) Deny any application for an activity which either individually or cumulatively would result in a significant adverse impact including potential cumulative effects. ... The impact assessment shall include the anticipated effects of the construction on the coastal system and marine turtles. Each application shall be evaluated on its own merits in making a permit decision; therefore, a decision by the Department to grant a permit shall not constitute a commitment to permit additional similar construction within the same fixed coastal cell.
>
> (b) Deny any application for an activity where the project has not met the Department's siting and design criteria; has not minimized adverse and other impacts, including stormwater runoff; or has not provided mitigation of adverse impacts.
>
> (4) The Department shall issue a permit for construction which an applicant has shown to be clearly justified by demonstrating that all standards, guidelines, and other requirements set forth in the applicable provisions of Part I, Chapter

161, F.S., and this rule chapter are met, including the following:

(a) The construction will not result in removal or destruction of native vegetation which will either destabilize a frontal, primary, or significant dune or cause a significant adverse impact to the beach and dune system due to increased erosion by wind or water;

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

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

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

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

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

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

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

139. Rule 62B-33.013, entitled Permit Modifications, Time Extensions, and Renewals, provides, for minor modifications, that:

> (2) A determination that minor changes or modifications, including minor additions, revisions, or structural modifications of permitted projects or activities that are within the scope of the permit, shall be made upon request of the applicant. Minor additions, revisions, or structural modifications are those changes which will not increase the risk of adverse impacts.

140. The competent, substantial evidence established that the change in the material from which the retaining wall was constructed was a minor modification of the Original Permit.

141. Requests for "major changes" to a permit, which are those "that will affect compliance with structural standards of this rule or which increase the potential for adverse impacts," are required to "be reviewed in the same manner as the initial application." Fla. Admin. Code R. 62B-33.013(1). No comparable level of review is required for minor modifications.

F. Conclusions as to Issues in Dispute

142. The parties filed their JPS on May 27, 2025, which identified the disputed issues for disposition. The JPS constitutes "the final agreed-upon 'executive summary' as to what the impending trial is about and the specific issues that remain on the table." *Palm Beach Polo Holdings, Inc. v. Broward Marine, Inc.*, 174 So. 3d 1037 (Fla. 4th DCA 2015). "Pretrial stipulations prescribing the issues on which a case is to be tried are binding upon the parties and the court, and should be strictly enforced." *Broche v. Cohn*, 987 So. 2d 124, 127 (Fla. 4th DCA 2008)(citations omitted). The binding nature of stipulations include those in administrative proceedings. *Seminole Elec. Co-op. v. DEP*, 985 So. 2d 615, 621 (Fla. 5th DCA 2005)

143. Petitioner raised, as an issue for disposition in this case, whether Sandpiper met all the criteria and provided reasonable assurances that the M2 Permit meets the criteria for a CCCL Permit pursuant to Part I of chapter 161, and chapter 62-33B. This broad and all-encompassing allegation has been determined to be narrowed by the specific identification of disputed issues of fact listed in the JPS, and actually raised at the final hearing.

144. Petitioner raised, as an issue for disposition in this case, whether the concrete retaining wall is a minor or major structure. Based on a preponderance of the competent, substantial, and persuasive evidence offered at the hearing, and applying the law applicable to the issue, the concrete retaining wall is a major structure as that term is used in chapter 62B-33.

145. Petitioner raised, as an issue for disposition in this case, whether the concrete retaining wall is frangible. Based on a preponderance of the competent, substantial, and persuasive evidence offered at the hearing, and applying the law applicable to the issue, whether the concrete retaining wall is "frangible" is not an issue applicable to CCCL permits as a result of the repeal of rules referencing that standard. Furthermore, since the concrete retaining wall is a major structure, there is no requirement that it be "expendable" as is required for minor structures under rule 62B-33.002(55)(b).

146. Petitioner raised, as an issue for disposition in this case, whether the concrete retaining wall is coastal armoring. Based on a preponderance of the competent, substantial, and persuasive evidence offered at the hearing, and applying the law applicable to the issue, the retaining was not designed, nor is it intended, to prevent erosion or protect any structure from the effects of coastal wave and current action. Thus, the retaining wall, whether constructed of wood or concrete, is not "coastal armoring" as defined in rule 62B-33.002(3). Furthermore, the concrete retaining wall is not intended as a means to protect existing private structures and public infrastructure from damage from "frequent coastal storms." Thus, the retaining wall, whether

constructed of wood or concrete, is not "coastal armoring" pursuant to rule 62B-33.0051(1).

147. Petitioner raised, as an issue for disposition in this case, whether the concrete retaining wall approved in the Modified Permit will cause impacts different than or greater than the wood retaining wall approved in the Original Permit. Again, this broad and unrestricted allegation has been determined to be narrowed by the identification of disputed issues of fact related to specific impacts listed in the JPS, and actually raised at the final hearing.

148. Petitioner raised, as an issue for disposition in this case, whether Sandpiper and DEP considered or analyzed additional or different impacts from the Original Permit when approving the Modified Permit. Applying the applicable law, this issue is not material in a de novo proceeding, in which the proposed agency action has no presumption of correctness, and in which all permitting standards in dispute are subject to proof by competent, substantial evidence.

149. Petitioner raised, as an issue for disposition in this case, whether the concrete retaining wall will cause adverse impacts from structure-induced scour during storm events. Based on a preponderance of the competent, substantial, and persuasive evidence offered at the hearing, and applying the law applicable to the issue, the concrete retaining wall will not result in any adverse impacts resulting from structure-induced scour of such magnitude during a storm that the structure-induced scour would result in a significant adverse impact contrary to rule 62B-33.005(4)(e).

150. Petitioner raised, as an issue for disposition in this case, whether the concrete retaining wall will cause adverse impacts from rerouting the natural flow of stormwater during rain or storm events. Based on a preponderance of the competent, substantial, and persuasive evidence offered at the hearing, and applying the law applicable to the issue, the concrete retaining wall will

not result in any adverse impacts resulting from stormwater runoff or other water discharges contrary to rules 62B-33.005(3)(b) or 62B-33.005(4)(c).

151. Petitioner raised, as an issue for disposition in this case, whether the concrete retaining wall will cause adverse impacts from increased wave reflection, wave energy, and/or erosion causing impacts on Petitioner's property during storm events, including but not limited to destabilization of the frontal dunes. Based on a preponderance of the competent, substantial, and persuasive evidence offered at the hearing, and applying the law applicable to the issue, the concrete retaining wall will not cause adverse impacts from increased wave reflection, wave energy, and/or erosion causing impacts on Petitioner's property during storm events, including but not limited to destabilization of the frontal dunes contrary to rule 62B-33.005(4)(a), (b), or (c).

152. Petitioner raised, as an issue for disposition in this case, whether the concrete retaining wall will cause adverse impacts that could result in potential injury or take to marine or sea turtles. Based on a preponderance of the competent, substantial, and persuasive evidence offered at the hearing, and applying the law applicable to the issue, the concrete retaining wall will not result in a take of marine or sea turtles contrary to rule 62B-33.005(4)(h).

153. Petitioner argued that the approval of the concrete retaining wall was improperly tainted by undue influence exercised over DEP staff by Mr. McNeal. This case is a de novo proceeding, in which the issues raised have been resolved by competent, substantial evidence accepted during the final hearing. Thus, what may have happened preliminarily is of no import or consequence. Nonetheless, in order to squarely address the issue, the evidence was insufficient to establish any impropriety between Mr. McNeal and any employee of DEP related to the Original Permit, the withdrawn M1 Permit, or the M2 Permit at issue.

154. The preponderance of the competent, substantial, and persuasive evidence, as set forth in the Findings of Fact, established that Respondent

provided reasonable assurance that the concrete retaining wall meets all requirements in section 161.053 and rule 62B-33.005 identified in the JPS as subject to disposition.

IMPROPER PURPOSE

155. On May 5, 2025, Respondent filed a Motion Requesting Determination of Improper Purpose Against David A. Bradford, Trustee (Motion), seeking an assessment against Petitioner under the authority of sections 120.595(1).[4] A Notice of Response was filed on May 9, 2025, indicating that, by agreement of the parties, the Motion would be addressed in the Proposed Recommended Orders. The analyses of the issue presented by the parties have been considered in the preparation of this Order.

156. Section 120.595(1) provides, in pertinent part, that:

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

[4] The first sentence of the Motion indicates that it was being filed "pursuant to sections 120.595 and 120.569(2)(e), Florida Statutes." However, the body of the Motion was limited to an analysis of section 120.595. Thus, to the extent the Motion is intended to seek fees under section 120.569(2)(e), it is denied as unsupported by any analysis of that section.

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

157. There is no evidence that Petitioner has participated in two or more proceedings involving Sandpiper and the same project as an adverse party. Thus, the issue is whether Petitioner brought this action "primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of litigation, licensing, or securing" the Permit.

158. 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 Com. Realty v. Dep't of HRS*, 690 So. 2d 603, 608 (Fla. 1st DCA 1997), citing *Mercedes Lighting & Elec. Supply, Inc. v. State, Dep't of Gen.*

Servs., 560 So. 2d 272, 278 (Fla. 1st DCA 1990). To determine whether a proceeding was initiated for an improper purpose, the trier of fact must use an objective standard to determine if the filing was based on reasonably clear legal justification. *Procacci*, 690 So. 2d at 608 n.9.

159. An objective test is used to determine whether a party challenged the agency action for an "improper purpose." *See Friends of Nassau Cnty., Inc. v. Nassau Cnty.*, 752 So. 2d 42, 51 (Fla. 1st DCA 2000). As established in *Procacci*:

> The use of an objective standard creates a requirement to make reasonable inquiry regarding pertinent facts and applicable law. In the absence of "direct evidence of the party's and counsel's state of mind, we must examine the circumstantial evidence at hand and ask, objectively, whether an ordinary person standing in the party's or counsel's shoes would have prosecuted the claim."

Id. at 608 n.9.

160. Whether a party has participated in a proceeding for an improper purpose is a question of fact, and even absent direct evidence of intent, "[i]n determining a party's intent, the finder of fact is entitled to rely upon permissible inferences from all the facts and circumstances of the case and the proceedings before him." *Burke v. Harbor Estates Assoc.*, 591 So. 2d 1034, 1037 (Fla. 1st DCA 1991).

161. As indicated in this Recommended Order, Petitioner demonstrated that his substantial interests could have been affected by the effects of the proposed retaining wall. That he ultimately did not prevail is not evidence that he participated for an improper purpose.

162. The evidence taken over the three days of hearing was substantial. Petitioner offered well-qualified experts who opined that the change of the retaining wall from wood to concrete, with a different footer, would alter the effects of storm-driven water and waves as to change their impact on Petitioner's Property, and would potentially affect the nesting behavior of

marine turtles. The evidence produced by Respondents established that they are entitled to issuance of the M2 Permit. That does not mean that Petitioner's concerns were "so clearly devoid of merit that there [was] little, if any, prospect of success."

163. Based upon a full review and consideration of the record in this proceeding, and applying an objective standard regarding pertinent facts and applicable law, the undersigned finds that the allegations of fact in this case, and the application of the law as asserted by Petitioner, though ultimately lacking in proof, were not so devoid of merit as to infer an improper purpose under section 120.595(1)(e)1. Thus, it is determined that Petitioner did not participate in the proceeding for an improper purpose.

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:

a) issuing CCCL Permit Number WL001468 M2 to Cynthia and Timothy Morrison as the lawful successors-in-interest to Sandpiper Cottage, LLC, subject to the General and Special Permit Conditions therein, and upon their filing of a "Permit Transfer Agreement" as provided in rule 62B-33.0155(1)(o) and General Permit Condition (1)(o) of the Original Permit, and;

b) requiring that Cynthia and Timothy Morrison either plant woody vegetation to block the 42-inch gap between the beach walk-over and the retaining wall, or construct a barrier or gate consisting of "appropriate materials" as identified in Special Condition 10 to block the gap; and

c) dismissing the Petition for Formal Administrative Hearing filed by David A. Bradford, as Trustee of the Elizabeth M. Bradford Revocable Trust.

DONE AND ENTERED this 11th day of August, 2025, in Tallahassee, Leon County, Florida.

E. GARY EARLY
Administrative Law Judge
DOAH Tallahassee Office

Division of Administrative Hearings
2001 Drayton Drive
Tallahassee, Florida 32311
(850) 488-9675
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of August, 2025.

COPIES FURNISHED:

Kelley F. Corbari, Esquire
(eServed)

D. Kent Safriet, Esquire
(eServed)

John Ryen Morgan-Ring, Esquire
(eServed)

John J. Cavaliere, III, Esquire
(eServed)

Alexis A. Lambert, Secretary
(eServed)

Valerie L. Chartier-Hogancamp, Esquire
(eServed)

Kathryn E. D. Lewis, Esquire
(eServed)

Richard P. Green, Esquire
(eServed)

Lea Crandall, Agency Clerk
(eServed)

Justin G. Wolfe, General Counsel
(eServed)

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.