STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RICHARD BARNETT AND STEPHEN HANLON,	)	
Petitioners,	)	
vs.	)	Case No. 02-3252
DANIEL G. WENTZ, DORIS WENTZ, AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
Respondents.	)	

RECOMMENDED ORDER

Pursuant to notice, this cause came on for formal hearing before P. Michael Ruff, duly-designated Administrative Law Judge of the Division of Administrative Hearings. A formal hearing was held December 2, 3 and 4, 2002, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioners: Kenneth G. Oertel, Esquire
Patricia A. Renovitch, Esquire
Oertel, Hoffman, Fernandez & Cole, P.A.
301 S. Bronough Street, Fifth Floor
Tallahassee, Florida 32301

For Respondents: Charles T. Collette, Esquire
Department of Environmental Protection
Office of the Attorney General
3900 Commonwealth Boulevard, Mail Stop-35
Tallahassee, Florida 32399-3000

Thomas G. Tomasello, P.A.
1107 Terrace Street
Tallahassee, Florida 32303

STATEMENT OF THE ISSUE

The issue to be resolved in this proceeding concern whether the Respondents, the permit applicants, Daniel and Doris Wentz, are entitled to a Coastal Construction Control Line Permit allowing them to build a single-family home seaward of the coastal construction control line on Cape San Blas in Gulf County, Florida.

PRELIMINARY STATEMENT

This cause arose when the applicants the Wentzes, filed an application seeking a Coastal Construction Control Line Permit to build a single family dwelling in Gulf County, Florida, on parcel number 6268-076R (the property). The application was filed on February 9, 2000. On July 3, 2002, the Department issued "Final Order," also known as permit GU-305, which was proposed final agency action purporting to authorize the applicants to construct a single-family dwelling and ancillary structures or facilities. The Petitioners filed a timely petition for formal hearing and the matter was referred to the Division of Administrative Hearings on August 16, 2002, and assigned to Administrative Law Judge, Charles A. Stampelos, on August 21, 2002. The cause was later assigned by transfer to P. Michael Ruff, Administrative Law Judge. On September 11, 2002,

a notice of hearing was issued setting the hearing for December 2-4, 2002, in Tallahassee, Florida.

On October 15, 2002, the Petitioners filed a Motion to Amend the Petition and an Amended Petition for Formal Hearing. That motion to amend was granted by order of October 25, 2002, subject to certain limitations set forth in the Order of that date by the Administrative Law Judge.

The Petitioners own a townhouse on a lot immediately adjacent to the property in question where the proposed dwelling would be built by the permit applicants. They asserted in their petition, in essence, that the Department (DEP) lacks authority to issue the permit because the proposed dwelling is seaward of the 30-year "erosion control line" and on the frontal dune, because it would result in a "take" of marine turtles or turtle habitat, and that it otherwise fails to comply with Sections 161.053 and 370.12(1)(c)(1), Florida Statutes, and Rule 62B-33.005, Florida Administrative Code.

The cause came on for hearing as noticed. The Petitioners presented the testimony of five witnesses one of whom was an expert witness. Twenty-five of the Petitioners exhibits were admitted into evidence. The applicants presented the testimony of four witnesses, two of whom were experts. Fourteen of the applicants' exhibits were admitted. The Department presented

the testimony of one witness and twelve Department exhibits were admitted into evidence.

The parties ordered a transcript of the proceedings and requested a 45-day period after the filing date of the transcripts during which to submit proposed recommended orders. The proposed recommended orders were timely filed and have been considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. Daniel G. and Doris Wentz (Applicants) own property on Cape San Blas, Gulf County, Florida, between department monuments R-93 and R-94. The property is 65 feet wide and extends to the mean high water line of the Gulf of Mexico. When it was plated in 1980, the property was some 350 feet deep between the landward eastern-most boundary and the waterward or western-most boundary, which is at the mean high water line (MHWL) of the Gulf. About 47 percent of the property's total depth has eroded since that time, such that some 90 feet of the property, by 65 feet wide, lies landward of the crest of the artificial berm at issue. The proposed house will be built 20 feet from the landward rear property boundary (east boundary).

2. The applicants propose to construct a pile-supported, single-family dwelling on that property with a wooden deck, pervious parking area, landward of the dwelling, a concrete slab under the dwelling and a septic tank and drain field to the

southeast side of the dwelling. All these structures and improvements are seaward of the coastal construction control line established for Gulf County.

3. The landward side of the dwelling to be located 20 feet seaward of the eastward or landward boundary of the property, cannot be located more landward or eastward due to local government set-back line requirements. The dwelling complies with all applicable department structural requirements. It is piling-supported and the lowest structural member is located above the department's design elevation. It meets all applicable wind load, wave, hydro-static and hydro-dynamic load requirements associated with a "100 year storm" event. The proposed dwelling would comply with all pertinent local set-back requirements, building code requirements and Gulf County growth management plan requirements. A permit has been issued authorizing construction of the septic tank and drain field, by Gulf County.

"Freedom" Procedural Background

4. This controversy originally arose when a prior owner of the property, Richard Price, submitted an application for a Coastal Construction Control Line Permit authorizing construction of a single family dwelling on the above-referenced parcel of property. That application was submitted on

December 20, 1999, and on February 9, 2000, the new owners of the property, the Wentzes, submitted a similar application.

5. The Department's Division of Water Resource Management and Office of Beaches and Coastal Systems requested the Florida Fish and Wildlife Conservation Commission (Commission) through its office of Environmental Services, to review the applicants' plans for the proposed house with a view to deciding whether the project would result in a take of marine turtles due to habitat destruction or similar considerations. The DEP, by policy, will not issue a coastal construction control line permit in the absence of such review or if commission review determines the project would result in a "take" with regard to marine turtles.

6. On March 14, 2000, Bradley Hartman of the Commission's office of Environmental Services responded to the Department's request by stating that the project would result in a take of marine turtles through interference with breeding behaviors, as envisioned in Section 370.12(1)(c), Florida Statutes, and that therefore the application should be denied.

7. On May 25, 2000, Director Hartman again wrote to DEP responding to a request for commission review of revised plans by the applicant, which showed that the dwelling would be proposed be located approximately 25 feet landward on the "frontal dune". The Commission again took the position that the

revised project would constitute a "take" of marine turtles as well.

8. Thereafter on May 30, 2000, the administrator of DEP's bureau of Beaches and Wetland Resources issued an assessment recommending denial of the applicants' application because it would constitute a "take" of marine turtles. The Department's position to initially choose to deny the permit application was also based on the fact that it believed that the proposed dwelling would be built upon the frontal dune on the property and beach system.

9. Thereafter, on July 18, 2000, Director Hartman of the Commission notified DEP that the applicant had presented a plan to restore a dune on the property and moved the proposed dwelling to a more landward location. Director Hartman's letter thus stated that if both of these events occurred there would be no "take" of marine turtles.

10. On June 27, 2002, DEP Administrator Anthony McNeil prepared an amended assessment of the applicants' pending project wherein he recommended granting the permit. The change in recommendation was based upon a March 2002 survey showing that a man-made dune had been constructed on the property "approximately 20 feet wide between he seaward and landward toes and has a crest elevation of plus 16.0 feet (NGVD)" or (National Geodetic Vertical Datum).

11. The Department noticed issuance of the coastal construction control line permit (permit) on July 3, 2002. It had changed its position to a grant posture because the Department decided that the man-made dune satisfied the requirements so as to be considered a "frontal dune." If it were not considered a frontal dune (by complying with the relevant statutory qualities a frontal dune must have) the Department would be denying issuance of a permit, in accordance with Section 161.053, Florida Statutes.

Description of Subject Property

12. Five aerial photographs showed the applicants' two lots and the adjacent, upland, five-unit complex. The Petitioners own and reside in the northern-most unit, which is the unit appearing on the left side of their condominium building in the aerial photographs in Petitioners' exhibit three. The lot which is the subject of the proceeding is the northern-most lot of the applicants' two adjacent lots. It is immediately seaward of the Petitioners' condominium or townhouse unit. See Petitioners' Exhibit Three in evidence.

13. The Northern boundary of the property is the boardwalk shown on the aerials. The only densely vegetated area, which includes woody species on the property, is where the proposed home would be built. That is the highest point on the subject property or approximately 14 to 15 feet NGVD. A second heavily

vegetated area shown on the area photographs is not on the subject project and not at issue.

14. The eastern-most portion of the proposed dwelling is 20 feet from the eastern most or landward property line of the applicants' lot. The roof provides an overhang for the entire house including the porch and the septic tank and drain field would be located southeast of the house on the same lot.

15. An artificial berm or man-made dune was constructed on the property by the applicant on or about March 18, 2002. The property extends to about 90 feet behind or landward of the artificial berm or dune and the property is 65 feet wide. The house would be placed 20 feet seaward from the eastern-most or landward boundary of the subject lot, based upon requirements of the local government set-back from the easement along the eastern boundary of the property.

Erosion of Beach and Dunes

16. DEP survey monument, R-94, is about 150 feet from the property. The property is thus close enough from an engineering perspective that it is essentially subject to the same physiographic changes which are occurring in the vicinity of monument R-94. Survey data gathered by the State at the monument since 1973 creates an historical profile of the shoreline and the immediate vicinity of the property, including the subject property.

17. Because of the progressive erosion of the local beach system since 1973, the DEP has been forced to relocate monument R-94 three times. All survey data at the monument has been adjusted so that it can be reliably compared over the period of record. The historical survey data at R-94 allows for reliable engineering estimates of shoreline change at this location.

18. The shoreline of the property has exhibited an extremely high erosion rate over the years as to both the MHWL and the upland dune. On an eroding beach such as this one, dunes do not build up, but rather are lost as the MHWL recedes in a landward direction.

19. A 1993 DEP aerial photo shows a home in the immediate vicinity of monument R-94 and seaward of the subject property. See Petitioner's Exhibit 15 in evidence. A 1998 aerial of that same area reveals that the house is no longer there. It was destroyed by Hurricane Opal in 1996 and ensuing erosion. If it were still there the house would be seaward of the present day MHWL. During the five year period from 1993 to 1998 the MHWL at R-94 monument receded 120 feet landward. From January 1998 to October 2002, the MHWL has receded another 50 feet.

20. The shoreline in the vicinity of and including the subject property has eroded over a long period of time at a rapid rate such that it has actually eroded back into the piney flat woods ecological zone. There are numerous pine tree stumps

on the active beach and surf zone. Indeed the whole Cape San Blas land form is retreating and rotating to the eastward. The seaward-most dune formations presently have mature pines growing on them, indicating a shoreline receding at such a rapid rate that it has progressed well into different vegetative eco-systems.

21. The Cape San Blas spit has a north-south orientation of its shoreline, unlike any other orientation along most of the northern Gulf Coast mainland or barrier island land forms, which generally lie in a more east and west orientation. This orientation of Cape San Blas spit makes the shoreline more susceptible to wave energy and recession from being struck by waves at an angle rather than head-on or at a near perpendicular approach. Thus the Cape San Blas spit is more highly erosional.

22. The beach in the vicinity of and including the subject property is moving backward and through the historical upland dune ridges. These historical dune ridges are not parallel to the present day shoreline orientation, but rather are at an angle, or more or less diagonal to the present day shoreline. Resultingly, there are sections of historical dunes which are on the existing beach front with gaps between them because they each represent the ends, on the beach, of separate historic dune ridges.

The Frontal Dune

23. A frontal dune is defined in Section 161.053(6)(a)(1), Florida Statutes, to be "the first natural or man-made mound or bluff of sand which is located landward of the beach and which has sufficient vegetation, height, continuity and configuration to offer protective value." There is no dispute that a frontal dune must provide protective value to upland property.

24. The most densely vegetated area on the property, which includes woody species, is part of the natural frontal dune. That is, the dune existing at approximately a height of 14 feet NGVD upon which the subject house is proposed to be built.

25. The property is extremely prone to erosion by any source of elevated wave energy and, in particular, that associated with tropical depressions or storms moving through the Gulf. The destruction of one-half of the man-made dune on the applicants' property about six months after its construction, by Tropical Storm Isadore in late September 2002, illustrates this point. That storm actually made landfall in the vicinity of Biloxi, Mississippi, approximately 200 miles west of the subject property. The storm, however, eroded a total of about 30 feet of beach at the property. The annual storm activity in the area of monument R-94 has sufficient wave energy to cause significant beach erosion at the property.

26. According to DEP, when the artificial dune was constructed it was about 20 feet wide from the landward toe to the seaward toe and crested at approximately 16 feet in height. On September 12, 2002, the peak was about 15 feet. After Tropical Storm Isadore, the berm was half as wide. The entire forward or waterward slope of the original man-made dune had mostly eroded away leaving a sheer scarp or bluff. After Tropical Storm Isadore the dune crested at about nine to 14 feet. The return frequency of storm effects from distant storms, like those of Isadore at the subject property is about one to two-year frequency. This means that during an average year the remainder of the man-made dune at this location likely will be obliterated.

27. The shoreline at the property as measured at monument R-94 has progressively receded landward since 1973. There is no history of episodic accretion or expansion of the shoreline; instead, the survey data uniformly indicates, for R-94, that there is a constant landward recession of the beach and dune face, due to continuous erosion. The seaward-most dune bluff in existence at hearing was the eroded face of the man-made dune. Half of that berm has disappeared due to erosion only short few months after it was constructed and in March 2002.

28. The duration of the man-made dune on the property can be determined by calculating the documented recession rate of

the dune formation historically located in the vicinity of the property. Application of this recession rate will reveal the likely life of the man-made dune and determine its potential protective value. Mr. Walther, the engineer who designed the berm, acknowledged that, indeed, the berm will eventually be eroded by storm events and might be obliterated within a year.

29. Measurement by survey of the dunes at R-94 indicates that they have historically receded at a far greater rate than the MHWL. This is because the sand eroded from the dune line served to nourish the active beach face where the MHWL is located, so that it recedes landward at a slower rate than the dune line itself. Using the survey data for DEP monument R-94, the MHWL recession rate was calculated at seven feet per year. The dune recession rate landward at R-94 however is approximately 13 feet per year. The width of the remaining man-made dune is about 10 to 15 feet. Therefore, the dune recession rate calculated and in evidence, shown by witness Olson, illustrates that the remaining portion of the man-made dune will likely be lost to erosion in a year or a little more. That calculation and opinion is more persuasive and is accepted.

30. The dune recession at R-94 was estimated using a 10 foot contour line. Any contour elevation number that reasonably represents the face of the eroding bluff of the artificial dune could be used. The result would be basically the same, that

the house proposed to be constructed by the applicants' will be intercepted by the bluff line in less than three years, since the proposed dwelling is set back 31 feet from the seaward face of the artificial dune.

31. Given a dune recession rate of 13 feet per year and taking into account that the man-made dune was constructed in March of 2002, it has been shown that the proposed dwelling will be most likely located on the active beach within five years. It will be subject to wave action on almost a daily basis. In ten years the limits of erosion would exceed the home and will reach the townhouses, including the Petitioners' townhouse, landward of the proposed dwelling. The applicants' proposed dwelling will be then totally stranded on the beach or destroyed, as shown by the testimony of expert engineer Eric Olson, which was unrefuted and is accepted.

32. The seasonal high waterline (SHWL) will be at the proposed home in about 6.6 years from October of 2002. This finding is calculated by dividing the distance the house lies from the 2002 seasonal high waterline (46 feet) by seven feet per year, the erosion rate. That will mean that waves will run under the house on a daily basis within five years from October 2002. By that time there will be a sandy beach under the house back to the ten foot contour line.

33. The dune recession rate provides a more reliable estimate of the maximum erosion limits at the property than does the SHWL. SHWL is intended to define the back portion of the day to day dynamic beach for most beaches in Florida. However, for Gulf County where this property is located, the elevation of the SHWL is not as good an indicator of the back portion of the beach because the local tides are mixed, i.e., two equal or near equal tides do not occur at this location on a daily basis and accordingly the elevation of mean high water or MHW, upon which the SHWL is based, is lower than the actual high water experienced. A more realistic indicator of erosion for this site is therefore the documented dune recession rate which was used to calculate the expected life of the man-made dune.

34. The residential structure proposed will thus be completely on the active beach in a little over five years. That is, substantially before the 30-year period which statutorily defines the erosion line beyond which or seaward of which most construction is prohibited, except for single family residences under the exceptional circumstances provided in the statutes and rules addressed and at issue herein. Ten years hence, the SHWL will be under two-thirds of the home and the ground level of the house at the SHWL will be about plus 2.8 feet above sea level.

Artificial Dune Characteristics

35. The man-made dune lacks continuity. It is most vulnerable to wave and water penetration at its northerly terminus where it ends near the boardwalk and near the property line. It is not part of a contiguous dune system. The berm's flank or end-point will be the focal point of waive penetration and accelerated erosion due to the low elevation above the MHWL or SHWL, as the case may be, at that point. Due to the lack of continuity of the artificial dune, it will tend to collapse from its northerly end. There is not a dip in the dunes system between the property and the adjacent lot to the north which would still render it a continuous dune system. Instead there is no dune at all at that point. There is a gap in the system which has been caused over time by waves or tides, as well as the fact that the beach had eroded into the remnant dunes located in the piney flat woods area of Cape San Blas at the vicinity of and on the property.

36. The shorter the dune is the easier it is for water to get around it and for wave action to destroy it. The man-made dune is 65 feet long. The short length of the artificial dune means it can not provide much protective value. Its expected effective life will be short, as demonstrated by Mr. Olson's opinions which are accepted.

37. Prior to the construction of the man-made dune, as shown in the original site profile in the application, there was a natural grade from the water to the natural frontal dune. As a result of Tropical Storm Isadore the man-made dune has sharp escarpment on its waterward side and less height.

38. Due to Tropical Storm Isadore, the man-made dune lost half its planted vegetation. The October 2002 aerial photographs contained in Petitioner's Exhibits 3 and 12A reveal that the remaining berm vegetation is sparse.

39. Before Hurricane Opal struck in 1996 there was a large continuous dune formation, including a 15-foot high dune on the property near where the remainder of the man-made dune is now located. Hurricane Opal totally eroded that dune. It has not since rebuilt or restored. After Opal, and before the applicant constructed the man-made dune, the beach gently sloped to the naturally heavily vegetated dune on the 14-foot contour line. Opal had completely destroyed the more seaward dune that was on the property leaving no discernible mound of sand in that location.

40. The heavily vegetated dune that still exists at the rear portion of the property is what protected the townhouses during Hurricane Opal. This is presently the only dune remnant on the property providing protective value to upland properties and structures. It is the natural frontal dune upon which the

proposed home is proposed to be built. The proposed home will not be landward of that natural frontal dune. It will be built on top of that dune and its construction will somewhat lower the elevation of that dune by excavation to place the concrete slab and parking area which will exist under and landward of the house. This natural frontal dune crests at the present time, at about 14-15 feet and continues across the property and onto adjacent lots.

41. The project when originally proposed in early 2002 could not be approved by the Department because the dwelling was to be situated on the frontal dune (the natural frontal dune). This view was memorialized in the DEP memo of January 8, 2002, in evidence as Petitioners' Exhibit 22 wherein it was provided: "staff advised the applicant representatives that review of its recent submittals it still considered the proposed structure as being not landward of the frontal dune, and therefore ineligible for a permit." In order to attempt to comply with the statutory requirements that the proposed dwelling be sited landward of the frontal dune, the applicant constructed the man-made dune seaward of the natural frontal dune, at the suggestion of the DEP administrator and ultimately with a DEP permit authorizing such construction.

"Significant Adverse Impact" Assessment
Rule 62B-33.005(3)(A), Florida Administrative Code

42. The location of the proposed house appears to be an elevation of 12 to 13 feet above sea level. In 10 years when the proposed structure will be completely stranded in the water with no dune under it, 10 feet of the sand supporting the pilings will be gone. That will adversely affect the structural integrity of the house and the septic system will inoperable and exposed, possibly contaminating the surrounding beach-dune system.

Vegetation Issue Rule 62B-33.005(4)(A),
Florida Administrative Code

43. Construction of the house will require removal of most of the dense vegetation atop the true frontal dune to make way for a concrete slab which will provide a parking area under the proposed home. The vegetation presently deters wind-borne erosion. A loss of vegetation and displacement of part of the dune by grading for the slab and the house will tend to destabilize the dune and diminish its protective ability for adjacent upland structures and property, including the Petitioners' property and residence.

44. The natural frontal dune and related vegetation is what protected the Petitioners' townhouse during Hurricane Opal. Because construction of the proposed house will remove substantial vegetation and sand to make way for the slab, even

if the sand is retained on the project site, in order to provide for under story parking, the protection presently afforded by the natural frontal dune will be diminished.

Disturbance Of In Situ Sandy Soils
Rule 62B-33.005(4)(B)(C),
Florida Administrative Code

45. The proposed house will be built on the highest point on the property which is presently at about 14 to 15 feet above sea level. Construction of the home will provide displacement or excavation of a portion of the sand atop the natural frontal dune in order to make way for the parking garage concrete slab under the home.

Structure-Induced Scour Rule 62B-33.005(4)(D),
Florida Administrative Code

46. Subsequent to the recession of the shoreline the house may act similar to a groin feature, thereby somewhat accelerating localized erosion, particular upon the dune upon which it will be built. As the slab under the house is undermined its debris will increase the erosive impact of wave action on the beach system and nearby upland structures.

Wind And Water-Borne-Missiles
Rule 62B-33.005(4)(E),
Florida Administrative Code

47. When the existing shoreline recedes and the proposed home is on the active beach, it will pose a risk to upland structures, including the Petitioners' townhomes. The proposed

home will then be only about 50 or 60 feet from the Petitioners' upland townhomes. The dune upon which the house would be built is the only natural feature which presently provides protection to the Petitioners' homes.

48. During storms, portions of the structured part of the proposed home could be blown into upland structures. The air-borne missiles will include such things as stairways, garage doors and lower walls all of which are designed to be expendable.

49. The proposed home was certified to withstand a 100 year storm. Consequently, that might dictate that with the wind loading it is certified to withstand, wind-borne missiles might be unlikely. However, the 100-year storm certification assumed that the home would be located on the upland at or above elevations of plus 10 feet and not on the active beach. The forces of the 100-year storm would be exaggerated when the dune is eroded away and the house is on the active beach. As the shoreline of the property recedes, deeper water will be below the proposed home, thereby creating a greater freeboard for storm surge elevation and more damage to the home from the higher waves. The size of a storm wave is proportional to the depth of water below the structure during the 100-year storm event.

50. During and after Hurricane Opal in 1996, debris from the house that formerly was 200 to 300 feet seaward of the applicants' proposed home damaged the Petitioners' townhome and other units in that complex. The Petitioners' have had to pick up debris from that home for six to seven years following Hurricane Opal. The same thing will happen with projectiles or parts from the applicants' proposed home, but even more damage is likely since the home will be constructed only 50 to 60 feet away from the Petitioner's townhomes and directly seaward of them.

Line Of Construction Rule 62B-33.005(7), Florida Administrative Code

51. There is not a uniform and continuous line of construction associated with the siting of the proposed home.

Impact To Marine Turtles Issue

52. Adult female loggerhead and green turtles nest on the beaches of Cape San Blas. The vast majority of nesting adults are loggerheads.

53. The marine turtle nesting season begins about May 1st of each year and ends October 31st. Female turtles come on the beach between the beginning of May and the middle of August to lay eggs. The eggs hatch between July and October.

54. The Department approved the lighting plan for the Wentz dwelling designed to protect against adverse effects on

marine turtles when they are nesting at night. That plan meets applicable rule requirements. Exterior lighting associated with the dwelling will not adversely affect marine turtles.

55. The area where the dwelling will be located is not precisely marine turtle nesting habitat. There is no evidence that the area landward of the location of the present artificial dune has been used for nesting. Nesting data for the 2000, 2001, and 2002, nesting seasons for a six-mile beach segment, including the beach adjacent to the subject property, indicates that only one nest (nest number 51) was laid immediately adjacent to the property over that three-year period (not directly on the property). It was laid seaward and near the western end of the man-made dune.

56. It is highly unlikely that a turtle would nest in the area of the dwelling. The area landward of the scarp of the man-made dune, which includes the location of the dwelling, is not viable marine turtle nesting habitat. This is primarily because it is currently a vegetative area and turtles do not typically venture to any extent into a vegetative area to dig their nest and lay eggs. It is landward of the scarp or bluff on the man-made dune, which is difficult for turtles to climb over. The scarp on the seaward face of the man-made dune varies between 9 and 14 feet in height, dropping off to essentially no scarp or one and one-half feet on its northward end. It would

largely prevent marine turtles climbing over and nesting landward of the man-made dune scarp with the possible exception of the gap, referenced above, at the northward end of the man-made dune on or about the property boundary. The boardwalk which goes seaward from the Petitioners' townhomes at that point, would, however, to a great extent prevent sea turtles from migrating landward of the line of the artificial dune scarp.

57. Based on the 2000-2002 nesting data for Cape San Blas, the vast majority of Marine turtle nests are laid waterward of the vegetation line. More specifically, 48.4 percent of the nest were laid within the area 10 seaward of the vegetation line near the toe of the frontal dune, while another 37.5 percent were laid further waterward of the frontal dune. Thus approximately 85 percent of the nests are waterward of the vegetation line. Consequently, the vast majority of any nests that might be laid on the property in question would be seaward of the vegetation line and the toe of the man-made dune (or scarp-face) and not in the upland vegetated area of the dune system where the house would be located. The dwelling is well landward of that vegetation line.

58. In terms of survival, the best place and the location preferred by marine turtles, for the placement of eggs is at or near the toe of the frontal dune. The survivorship of nests

landward of the vegetation line is low, due in part to predation. The likelihood that a marine turtle will nest within the 65-foot wide property is very low. Based on nesting density data for Cape San Blas and the width of this property, only 0.52 nests within the 65-foot wide property would be expected on a yearly basis. That translates to about one nest every two years.

59. The likelihood that a nest would be laid within the property boundaries and landward of the vegetation line is considerably lower. Based on the same nesting data and the fact that 86 percent of the nests are laid waterward of the vegetation line, a nest landward of the vegetation line on the property would be expected statistically only about once every 13.5 years. Based on nesting data only one green turtle nest every 100 years would statistically be expected to be on the property.

60. Even though the northwest end of the man-made dune is much lower than the remainder of the dune, it is unlikely a nesting adult would be able to nest in the area of the proposed dwelling by gaining access through this lower area. Approximately 91.4 percent emerging nesting adult turtles follow a straight path up the beach. Thus, turtles emerging on either side of that low spot would not veer to that low spot to seek a place to nest. Furthermore the boardwalk is located at the low

spot and would act as a barrier that would prevent turtles from nesting landward of the man-made dune in the area of the low spot.

61. The area behind the man-made dune is insignificant in comparison to the nesting habitat on Cape San Blas generally, within the nest survey area encompassed by the Petitioners' witness Martha Pridgeon. There are more than 3,168,000 square feet of nesting habitat within the Cape San Blas survey area, while the area on the property behind the man-made dune is approximately 3,900 square feet, which is well less than 0.1 percent of the nesting habitat within the survey area.

62. Turtle nesting densities in southeast Florida are 64 times greater than on the beaches of northwest Florida, including Gulf County. Turtle nesting in northwest Florida is a relatively minor component of statewide nesting density.

63. In the 1999 nesting season, there was approximately 81,000 loggerhead nests in Florida. Based on average clutch size, that would mean approximately 9,480,000 eggs were laid in Florida that year, by loggerheads at least. Given that only one nest would be anticipated on this property every two years, the number of eggs that might be laid on the property is inconsequential.

64. Even if a nesting turtle encounters the dwelling, the encounter may well result in a false crawl. However,

approximately 48 percent of nesting emergences by turtles result in false crawls. False crawls do not injure the turtle and are considered normal behavior. If eggs were deposited near the dwelling, any alteration of sex ratios in the hatchlings due to shading of the nest would be inconsequential in view of the 9,000,000 eggs laid in Florida each year. Moreover, if a nest was deposited near the dwelling it could be relocated to avoid any potential harm since nests are routinely, successfully moved to avoid harmful conditions.

65. Adverse impacts to turtle eggs do not play a critical role in turtle survival. Rather, the nesting female is the critical link. Egg mortality is naturally very high. The survival strategy of marine turtles is to lay a large number of eggs. Even if the dwelling caused the loss of one nest every two years that loss would be insignificant. The loss of nests due to natural conditions on Cape San Blas is not unexpected or unusual. For example all remaining nests, at least 21, were destroyed during the 2002 nesting season by Tropical Storm Isadore. In that same year, at least six nests were destroyed by predators on Cape San Blas in the area of the subject property.

66. Construction and use of the dwelling would not actually kill or injure a marine turtle, nor would it impair essential behavioral patterns of marine turtles. Construction

and use of the dwelling would not impair the feeding or sheltering of marine turtles. Construction and use of the dwelling would not impair turtle breeding.

67. Construction and use of the dwelling would not cause significant habitat modification or degradation that would actually kill or injure a marine turtle. In summary, the preponderant evidence does not establish that a take of marine turtles caused by significant habitat modification, degradation or any of the other reasons found above will occur.

CONCLUSIONS OF LAW

68. The Division of Administrative Hearings has jurisdiction of the parties to and the subject matter of this proceeding. Section 120.569 and 120.57(1), Florida Statutes.

69. The applicant bears the burden of establishing entitlement to the permit at issue. D.O.T. v. JWC Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). Pursuant to Section 161.053(5)(a)(3), Florida Statutes, and Rule 62B-33.005(4)(a), Florida Administrative Code, the applicants must "clearly justify" that all relevant regulatory conditions are satisfied in order for the permit to be granted.

70. Section 161.053(6)(b), Florida Statutes, prohibits a structure like the proposed dwelling from being constructed seaward of the predicted seasonal high water line within 30 years (also known as the 30-year erosion control line or 30-year

erosion projection). That section states pertinently as follows:

> After October 1, 1985, and notwithstanding any other provision of this part, the Department, . . . shall not issue any permit for any structure [subject to exceptions not relevant to this case] which is proposed for a location which, based on the Department's projection of erosion in the area, will be seaward of the seasonal high-water line within 30 years after the date of application for such permit. . .

71. Section 161.053(6)(c), Florida Statutes, then provides an exception to the construction prohibition quoted above in Section 161.053(6)(b). This exception in (6)(c) applies only to single-family dwellings which are seaward of the 30 year erosion control line, the construction of which satisfies <u>each</u> of the four condition quoted below. Unless all four statutory conditions are met an applicant is not eligible for a coastal construction control line permit. Section 161.053(6)(c) states as follows:

> Where the application of paragraph (b) would preclude the construction of a structure, the Department may issue a permit for a single-family dwelling for the parcel for so long as:
> (1) The parcel for which the single-family dwelling is proposed was platted or subdivided by metes and bounds before the effective date of this section;

> (2) The owner of the parcel for which the single-family dwelling is proposed does not own another parcel immediately adjacent to and landward of the parcel for which the dwelling is proposed;
>
> (3) The proposed single-family dwelling is locating landward of the frontal dune structure; and
>
> (4) The proposed single-family dwelling will be as far landward on its parcel as is practicable without being located seaward of or on the frontal dune.

72. Rule 62B-33.00(8), Florida Administrative Code, in turn provides "in considering applications for single-family dwellings proposed to be located seaward of the 30-year erosion projection pursuant to Section 161.053(6), Florida Statutes, the Department shall require structures to meet criteria in Section 161.053(6)(c), Florida Statutes, and all other siting and design criteria established in this chapter" (emphasis supplied).

73. Section 161.053(6)(a)1 defines the term "frontal dune" referenced in the above cited and quoted statue as follows:

> "frontal dune" means the first natural or man-made mound or bluff of sand which is located landward of the beach and which has sufficient vegetation, height, continuity and configuration to offer protective value (emphasis supplied).

74. The applicant must establish by preponderant evidence that it satisfies each relevant regulatory requirement. One of the most significant requirements is that the proposed structure be landward of the frontal dune as set forth in Section

161.053(6)(c)(3), Florida Statutes. A frontal dune must have some degree of stability and longevity in order to provide protection or "protective value." If its life span is very brief it will have no true protective value. A frontal dune must have sufficient vegetation height, continuity with surrounding dune structures and be of a proper configuration to offer protective value and thus to have some degree of stability and longevity so that real protection can be provided by it.

75. The preponderant evidence culminating in the above findings of fact in this regard show that the man-made dune does not comply in these respects with the definition of "frontal dune". The record showed that the man-made dune was half destroyed within six months after it was constructed, by wave action induced by storm which actually made land-fall approximately 200 miles to the westward. The testimony of witness Olson, which is accepted, establishes that the dune will likely not exist at all by the time construction on the proposed house is finished. In summary for the reasons elicited in the above findings of fact, the artificial dune does not comply with the definitional characteristics of a frontal dune and it is concluded that it is not a frontal dune.

76. Section 161.053(6)(c), Florida Statutes, allows construction of a single-family dwelling seaward of the 30-year erosion control line if four requirements are met. One of these

is that the dwelling be located landward of the frontal dune structure. Section 161.053(6)(c)(3), Florida Statues. Another condition is that the "proposed single family dwelling will be as far landward on its parcel as is practicable without being located seaward of or on the frontal dune." Section 161.053(6)(c)(4), Florida Statutes.

77. The applicant, as shown in the findings of fact, has not satisfied Section 161.053(6)(c)(3) and (4), Florida Statutes, for the following reasons. First, the man-made dune, half of which Tropical Storm Isadore removed in late September 2002 is not a "frontal dune". Secondly, the proposed dwelling is on the true frontal dune at the site. Accordingly, the application is not eligible for further permit consideration because it fails to meet the conditions in Section 161.053(6)(c)(3), Florida Statutes. Additionally, the proposed dwelling can not be moved any further landward than its proposed location because of the county's 20-foot set-back line; consequently its location, which is clearly on what is the true frontal dune, can never satisfy Section 161.053(6)(c)(4), Florida Statues. The existing natural dune on which the proposed house would be located, if permitted, is a frontal dune because it has substantial, even woody vegetation cover, is of sufficient height and configuration to offer significant protective value to the upland property landward of it; and

indeed, during an actual hurricane in 1996 (Hurricane Opal), it in fact offered significant protection to the upland property landward of it. Thus, the natural dune upon which the home is proposed to be construction is, in essence, the true frontal dune at the project site.

78. In a similar case, Young v. DEP et. al., 18 FALR 1738 (DEP 1996), the proposed home in question in that case was seaward of the 30-year erosion control line and was not landward of the natural frontal dune. See Young at 1741 and 1753 (paragraph 74). Like the case at hand, the applicant in Young submitted an application immediately after purchasing the land in question and did not propose construction of an artificial dune in the original application. Also, as in the instant case, a DEP memorandum in the Young case stated that the proposed home was ineligible for a coastal construction control line permit because the proposed structure would be sited on the natural frontal dune. Young at page 1745 (paragraph seven and fifteen). Petitioner's exhibit 22 in evidence.

79. In order to satisfy the requirements of Section 161.053(6)(c)(3) and (4), Florida Statutes, the applicant in the Young case, like the applicant in the case at bar, proposed, over a year after its original application, to create a "dune" seaward of the natural frontal dune and contended that DEP

should consider this reconstruction to be the "frontal dune." DEP then proposed to issue the subject permit.

80. The issue in the Young case, like that in this case is whether the man-made dune met the Section 161.053(6)(a)(1), Florida Statutes, definition of a frontal dune. The administrative law judge in the Young case determined that it did not, finding as follows:

> Applicant has failed to prove that the proposed man-made dune has "sufficient vegetation, height, continuity and configuration to offer protective value." The proposed man-made dune is to thin, discontinuous, and short to provide protective value to protect the property landward of the proposed dune or, after the addition of the proposed home, the beach-dune system and public beach access.

81. The Department adopted the findings and conclusions of the administrative law judge in toto. In order to satisfy the statutory definition of a "frontal dune," the applicants' man-made dune must provide protection to upland property and structures. The preponderant evidence culminating in the above findings of fact, however, shows that will not be the case. The man-made dune at issue lacks the height, continuity, configuration, and sufficient vegetation to provide any significant protective value to the upland structures, including the Petitioners' townhome and the beach-dune system. The remaining half of the berm not already washed away will not

provide protection to the proposed home, because it will be destroyed by wave action of even a storm of a type which commonly occurs at least once every two years at the site.

82. The coastal area in which this berm or dune was constructed is so highly erosive that the berm will be gone in zero to two years from the time of the December 2002 hearing. The 15-foot natural dune located at the same location as this man-made dune was washed away in 1996 by Hurricane Opal and never naturally reconstructed. Dunes along this portion of the coast or beach of Cape San Blas typically do not reconstruct because the erosion rate is constant. There are no intervening periods of accretion to this portion of the coastline or beach. The remainder of the artificial berm or dune at issue will have the same fate.

83. The Department noted in the Young final order that "strictly speaking, the question is not whether the proposed man-made dune would qualify as a frontal dune, but whether the site of the proposed structure would be landward of 'the frontal dune.'" Similarly, what is at issue in this case is whether the proposed house will be on the first frontal dune.

84. The man-made dune is vulnerable to constant erosion and storm events. The vulnerability was confirmed when the tropical storm destroyed half of the berm just six months after it was built. Based upon reliable data taken from DEP's

monument R-94, the erosion and storm events will continue to impact this beach system such that the man-made dune will soon wash away. Under these circumstances, the applicant has not proven that the dune meets the statutory criteria in order to be classified as a frontal dune.

85. If it were to approve the applicants' permit the Department would ignore the inevitable erosion and storm events that will quickly destroy the artificial dune. Given the high erosion and dune recession rates for this beach-dune system, of which the property is a part, replication of a dune of yesteryear is an exercise in futility. The earliest possible time the applicant could start construction is November 2003, after the 2003 turtle nesting season. See Section 370.12(1), Florida Statutes, and Rule 62-33B.005(4)(g), Florida Administrative Code. Coastal engineering projections in evidence reliably establish that the berm will be gone before the construction of the home can be completed.

86. The heavily vegetated dune on which the proposed house would be constructed protected the townhomes landward of it during Hurricane Opal in 1996. Only this natural dune meets the definition of a frontal dune at this site. The proposed home then is located on the only frontal dune on the property, that being the natural frontal dune. In addition, the proposed home is not landward of the natural frontal dune and can not be moved

further landward because of the county set-back requirement. In view of the above, the proposed structure is ineligible to be considered by the Department for a coastal construction control line permit because it does not satisfy the mandatory statutory criteria in Section 161.053(6)(c), Florida Statutes.

87. The precedent established by the Young decision can not be ignored. That decision compels consideration of what "protective value" a man-made dune or berm would provide to upland property and the beach-dune system after a house is built. Young, 18 FALR at 1753 (paragraph 75).

88. Among other things the DEP final order in the Young case made specific findings adopting the ALJ's recommended order. Those findings demonstrate that the circumstances in the Young case were substantially identical to those in the case at bar. Paragraph 48 of the Recommended Order contained this specific finding:

> There are two major risks to the natural or man-made dune: constant erosion and storm events. The proposed man-made dune would not offer any protection from constant erosion.

89. In the following paragraph, the Young Final Order states:

> Using DEP calculations for determining the location of the ECL, the man-made dune would be completely eroded in seven years. Using the more likely and recently erosion rate of four feet annually, the man-made dune would

> be completely eroded in five and one half years . . . a man-made dune not more than 100 feet long would not resist constant erosion at this location.

90. It is undisputed in this case that during average years, the man-made dune the applicant and DEP have postulated as the new "frontal dune" will not survive longer than one or two years at the most. This is insufficient to qualify this man-made dune as a bona fide frontal dune, as defined in the above authority contained in Chapter 161, Florida Statutes. DEP's Final Order in the Young case rejects the contention that a man-made dune, which would be completely eroded in five and one-half years could qualify as being a frontal dune. If the man-made dune in the Young case was inadequate with the five and one-half year expected life, then a predicted life of two years for the man-made dune or berm in the instant case is even more inadequate.

91. There can be no doubt, when considering the record in this case and comparing it to the DEP Final Order in the Young case, that the man-made dune placed upon the applicants' property at this location, which is now already one-half eroded away, cannot qualify to be considered a legitimate frontal dune in terms of the definitional qualities or characteristics for a frontal dune contained in the above-cited and quoted statute. If it were considered to be a frontal dune under these

circumstances one would have to totally ignore the decision in the Young case. Thus for these reasons alone the application must be denied.

Other Beach-Dune System Impacts

92. Another issue relates to the "uniform line" of continuous construction. There are both statutory and rule provisions in that regard; however, neither of these provisions precludes construction of a dwelling seaward of a reasonably continuous and uniform construction line, assuming there is one. See Section 161.053(5)(b), Florida Statutes, which provides, in part:

> (b) If in the immediate contiguous or adjacent area a number of existing structures have established a reasonably continuous and uniform construction line closer to the line of mean high water than the foregoing, and if the existing structures have not been unduly affected by erosion, a proposed structure may, at the discretion of the Department, be permitted along such line on written authorization from the Department if such structure is also approved by the Department. . .

93. In turn, Rule 62B-33.005, Florida Administrative Code, states:

> (7) If in the immediate area a number of existing major structures have established a reasonably continuous and uniform construction line and if the existing structures have not been unduly affected by erosion, except where not allowed by the requirements of Section 161.053(6), Florida Statutes, and this Chapter, the Department

> shall issue a permit for the construction of a similar structure up to that line, unless such construction would be inconsistent with Sections (3), (4), (6) or (8) of this rule.

94. The Department takes the position that when the 30-year, seasonal, high-water line provision comes into play, it controls the location of the dwelling as opposed to the reasonably continuous and uniform construction line. The Department's position is supported by the above rule which provides that Section 161.053(6), Florida Statutes, is an exception to the continuous line of construction. See Rule 62B-33.005(7), Florida Administrative Code. Nevertheless, there is no reasonably continuous and uniform construction line in the immediate area of the dwelling with which this case is concerned. The Department has not permitted nor denied a structure within 2400 feet on either side of the dwelling. Hence, there are no structures seaward of the coastal construction control line in the area. Also the Department does not take into account structures landward of the coastal construction control line because it has no jurisdiction landward of that line. Thus, it must be concluded that such structures cannot be considered.

95. Other than and in addition to the specific provision in Section 161.053(6), Florida Statutes, related to the 30-year seasonal high water line (erosion projection) and the line of

continuous and uniform construction, Rule 62B-33, Florida Administrative Code, establishes the specific criteria the Department uses to review permit applications. The applicable Rule provisions, in relevant part, are set forth as follows:

> 62B-33.005(4), Florida Administrative Code. 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, Florida Statutes, and this 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 the 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 result in the net excavation of the in situ sandy soils seaward of the control line or 50-foot setback;
>
> (d) 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;

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

* * *

(g) The construction will not cause a significant adverse impact to marine turtles, immediately adjacent properties or the coastal system unless otherwise specifically authorized in this chapter.

(5) Sandy material excavated seaward of the control line or 50-foot setback shall remain seaward of the control line or set back and be placed in the immediate area of construction unless otherwise specifically authorized by the permit.

(6) Major structures shall be located a sufficient distance landward of the beach and frontal dune to permit natural shoreline fluctuations, to preserve and protect beach and dune system stability and to allow natural recovery to occur following storm-induced erosion.

Subparagraphs (4)(a)(b) & (g), above prohibit "significant adverse impacts," which are defined by rule to mean:

(b) "Significant Adverse Impacts" are adverse impacts of such magnitude that they may:

1. Alter the coastal system by:

a. Measurably affecting the existing shoreline change rate;

b. Significantly interfering with its ability to recover from a coastal storm;

c. Disturbing topography or vegetation such that the system becomes unstable, or suffers catastrophic failure; or

> 2. Cause a take, as defined in Section 370.12(1), Florida Statutes, unless the take is incidental pursuant to Section 370.12(1)(f), Florida Statutes.

96. The preponderant evidence at hearing culminating in the above pertinent findings of fact shows that as to paragraph (a) of the above-quoted Rule, the construction will result in the removal or destruction of native vegetation which may destabilize, in part, the frontal dune or cause a significant adverse impact to the beach-dune system due to increased erosion by wind or water because the house will be constructed on what is really the true frontal dune and vegetation occurring on the dune will be removed to allow for construction of the house. The same consideration is true as to paragraph (b) of the above-quoted Rule because the construction will result in removal or disturbance of in situ sandy soils of that beach-dune system so as to have a potentially, significant, adverse impact on that beach-dune system because it will occur on the protective, true, natural frontal dune and will reduce the ability of the beach dune-system to resist erosion. It will lower existing levels of storm protection to the upland properties and structures the natural frontal dune is supposed to protect. The construction will result in net excavation of sandy soils seaward of the control line in that excavation will have be done for the footprint of the house, particularly for the concrete slab

underlying the house. The preponderant evidence does not show any significant structure-induced scour of such a magnitude during a storm such that scour would result in a significant adverse impact in and of itself. Rather, the preponderant evidence indicates that within 10 years or less the natural frontal dune the house would actually be constructed on will be gone in its entirety, due to wind and waterborne erosive impacts. The construction will not minimize the potential for wind and waterborne missiles during a storm, for purposes of paragraph (e) quoted above, because the structure would be built upon the natural frontal dune which cannot be permitted for the above-referenced reasons and which will result in the proposed house being in very close proximity to landward structures. Because of the dune recession and erosion referenced in the above findings of fact, the house within a few short years will be rendered unstable and literally standing in the water which instability and exposure to the active beach and to wave action, as well as wind in a storm event, will likely result in the construction being a hazard for wind and waterborne missiles which can harm adjacent upland property.

97. It is true that the proposed project will comply with paragraph (5) of the above-quoted Rule because sandy material excavated seaward of the control line will remain seaward of the control line on the lot or construction site itself, in the

immediate area of construction. Rule paragraph (6) quoted above will not be complied with because installation of the dwelling will not be of sufficient distance landward of the frontal dune because it will be on the frontal dune, It will not permit natural shoreline fluctuations and will not serve to preserve and protect the beach dune-system stability nor to allow natural recovery to occur to the beach-dune system following storm induced erosion. In summary, the simple fact that the house would be constructed on what is the true frontal dune renders it unpermittable and, in addition to the reasons referenced above, will render it so because it will pose significant adverse impacts to the beach-dune system and the frontal dune in the particulars mentioned in the above-quoted portions of Rule 62B-33.005(4), Florida Administrative Code, as discussed immediately above.

Effects on Marine Turtles and Habitat

98. The dwelling proposed to be installed will not cause a "take" of marine turtles. The controlling provisions of law are Section 370.12, Florida Statutes, which provides in pertinent part:

> The Department shall recommend denial of a permit application if the activity would result in a 'take' as defined in this subsection (Section 370.12(1)(f), Florida Statutes.)
> 'Take' means an act which 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. (Section 370.12(c)(1), Florida Statutes).

99. Rule 62B-33.005(4)(g), Florida Administrative Code, quoted above, prohibits the take of marine turtles as take is defined in Section 370.12(c)(1), Florida Statutes. The location of the proposed dwelling is not marine turtle nesting habitat at the present time. There is no preponderant evidence that a marine turtle has ever nested in the area of the beach dune system where the dwelling will be located. The dune scarp or artificial berm will prevent marine turtles from nesting in the area of the proposed dwelling as long as the artificial dune or berm lasts. Statistically speaking, the chance that a marine turtle might nest on the property is once every two years. But such nesting is likely to occur for the present at least on the seaward side of the artificial berm or dune scarp as is evidenced by the nest that was laid near the northern end of the scarp, and slightly seaward of it, during the 2002 nesting season as well as the natural propensity of marine turtles to nest seaward of a frontal dune or in this case the artificial dune scarp.

100. Statistically speaking, the chance that a turtle would nest in a vegetative area behind the dune scarp on the

property in question is about once every 13.5 years. Therefore, it can not be concluded that the proposed dwelling would actually kill or injure a marine turtle or would cause a significant habitat modification or degradation that would kill or injure a marine turtle.

101. Even if it was assumed that the dwelling was located in nesting habitat, as for instance at such time in the immediate or near future when the artificial berm or dune is no longer in existence, the dwelling will still not cause a take. A nesting turtle encountering the dwelling has the option of false crawling and there is no evidence that false crawling injures or harms marine turtles.

102. Even if a nest were laid in harm's way in the vicinity of the dwelling, it could be relocated since nest relocation is an accepted, successful and routine practice. Additionally, the amount of habitat impacted by the dwelling, even if it is nesting habitat, is minuscule and certainly would not constitute significant habitat modification or degradation within the purview of Section 370.12(1)(f), Florida Statutes.

103. Finally, even if erosion of the artificial berm or dune makes the area of property behind it become nesting habitat, the berm being located on the property will not cause significant habitat, modification or degradation, nor will it likely result in killing or injuring marine turtles. The

habitat modification or degradation posed by the dwelling even if the site should become nesting habitat in the future (when the berm is gone) will still be a de minimus impact.

104. Since the definition of "take" in Section 370.12(1)(f), Florida Statutes, is the same as the definition of "take" under the Federal Endangered Species Act (ESA) and its implementing regulations, federal case law is instructive on the issue of speculative take. ESA defines "take" to mean "harm" 16 USC Section 1532(19). The rule definition of "harm" upheld by the United States Supreme Court in Babbitt v. Sweet Homes Chapter of CMTYS. For A Greater Oregon, 515 U.S. 687, 696-700 (1995), is "an act which actually kills or injures wildlife. Such an act may include significant habitat modifications or degradation where its actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding feeding or sheltering. 50 CFR Section 17.3. Habitat modification does not constitute harm, i.e. a take, unless it 'actually kills or injures wildlife.'" Defenders of Wildlife v. Bernal, 204 F.3d 920, 924-925 (9th Circuit 1999). As the United States Supreme Court emphasized, "every term in the regulation's definition of 'harm' is subservient to the phrase 'an act which actually kills or injures wildlife'." Babbitt v. Sweet Homes Chapter of CMTYS for a Greater Oregon, supra. Mere habitat degradation is not sufficient to equal a take. There must be

significant impairment of the species habitat. National Wildlife Federation v. Burlington Northern Railroad, 23 F.3d 1508 (9th Cir. 1994). The possible future habitat impacts of the dwelling are speculative and cannot be interrupted to cause an actual killing or injuring of a marine turtle or to significantly impair marine turtle habitat.

RECOMMENDATION

Having considered the foregoing Findings of Fact and Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and arguments of the parties, it is, therefore,

RECOMMENDED that a final order be entered by the Department of Environmental Protection denying the applicants' application for a permit pursuant to Section 161.053, Florida Statutes, for construction seaward of the coastal construction control line in Gulf County, Florida.

DONE AND ENTERED this 5th day of June, 2003, in Tallahassee, Leon County, Florida.

P. MICHAEL RUFF
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of June, 2003.

COPIES FURNISHED:

Kenneth G. Oertel, Esquire
Patricia A. Renovitch, Esquire
Oertel, Hoffman, Fernandez & Cole, P.A.
301 South Bronough Street, Fifth Floor
Tallahassee, Florida 32301

Charles T. Collette, Esquire
Department of Environmental Protection
Office of General Counsel
3900 Commonwealth Boulevard, Mail Stop-35
Tallahassee, Florida 32399-3000

Thomas G. Tomasello, P.A.
1107 Terrace Street
Tallahassee, Florida 32303

Teri L. Donaldson, General Counsel
Department of Environmental Protection
3900 Commonwealth Boulevard, Mail Stop-35
Tallahassee, Florida 32399-3000

Kathy C. Carter, Agency Clerk
Office of the Attorney General
Department of Environmental Protection
3900 Commonwealth Boulevard, Mail Stop-35
Tallahassee, Florida 32399-3000

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.