STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GLORIA AUSTIN and JO HESLIN,	)	
	)	
Petitioners,	)	
	)	
vs.	)	Case Nos. 06-2003RX
	)	06-2004RX
DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
LIGHTHOUSE WALK, LLC,	)	
	)	
Intervenor.	)	
	)	

SUMMARY FINAL ORDER

These cases are before the undersigned Administrative Law Judge (ALJ) for disposition based upon the parties' cross-motions for summary final order.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue is whether Florida Administrative Code Rule 62B-33.005(3)(a) is an invalid exercise of delegated legislative authority for the reasons alleged by Petitioners.

PRELIMINARY STATEMENT

On June 7, 2006, Gloria Austin (Austin) and Jo Heslin (Heslin) (collectively "Petitioners") filed separate Petitions for Determination of Invalidity of Existing Rules with the Division of Administrative Hearings (DOAH). The petitions alleged that Florida Administrative Code Rules 62B-41.002(19)(a) and (b) and 62B-33.005(3)(a) are invalid exercises of delegated legislative authority.

The petitions were given DOAH Case Nos. 06-2003RX and 06-2004RX and assigned to the undersigned ALJ. The cases were consolidated by Order dated June 16, 2006.

Lighthouse Walk, LLC (Lighthouse), petitioned to intervene in each case in support of the validity of the challenged rules.

Lighthouse's unopposed petition to intervene was granted by Order dated June 16, 2006.

The final hearing was scheduled for July 7, 2006, but on July 5, 2006, Petitioners filed an unopposed motion to cancel the hearing. The motion was discussed at a telephonic hearing on July 6, 2006, and again immediately prior to the final hearing on July 7, 2006.

The parties represented at the hearings on the motion that there are no material facts in dispute and that these cases can be decided as a matter of law based upon a set of stipulated facts pursuant to the parties' cross-motions for summary final order. As a result, the final hearing was cancelled and a schedule was established for the filing of the stipulated facts and legal memoranda/proposed final orders. See Order dated July 7, 2006.

Lighthouse filed a Motion for Summary Final Order on June 26, 2006. Through a filing on June 30, 2006, the Department advised that it "fully supports and agrees with the arguments presented [in Lighthouse's Motion for Summary Final Order]." Petitioners filed a Motion for Summary Final Order on July 10, 2006.

On July 11, 2006, Petitioners filed a Notice of Voluntary Withdrawal, which stated that "Petitioners . . . hereby withdraw their challenge to Rule 41.002(19)(a) and (b), Fla. Admin.

Code." Thus, those rules are no longer at issue in this proceeding.

On July 11, 2006, the parties filed an Amended Joint Stipulation, which sets forth the stipulated facts agreed to by the parties. On July 21, 2006, Lighthouse and the Department filed a Joint Memorandum of Law in support of Lighthouse's Motion for Summary Final Order, and Petitioners filed a Proposed Final Order (PFO). The parties' legal arguments have been given due consideration.

FINDINGS OF FACT[1]

1. Austin is the owner of real property located at 1580 Indian Pass Road, Port St. Joe, Florida.

2. Heslin is the owner of real property located at 1530 Indian Pass Road, Port St. Joe, Florida.

3. Lighthouse is the applicant for a coastal construction control line (CCCL) permit for structures and activities proposed to occur on property located adjacent to Austin's property. Heslin's property is located within 500 feet of the proposed project site.

4. The property for which the CCCL permit is sought is located landward of the mean high water line (MHWL).

5. On January 31, 2006, the Department gave notice of issuance of a CCCL permit to Lighthouse. The proposed permit authorizes activities 228 feet seaward of the CCCL,

specifically, the construction of a subdivision roadway/cul-de-sac including asphalt and limerock foundation, excavation of soil, filling of soil, ornamental street lights, stormwater management swales, below grade utilities, and dune enhancement plantings.

6. Lighthouse obtained a subdivision plat for the site from Gulf County, Florida, on June 28, 2005, which includes 12 platted lots seaward of the CCCL, each approximately one quarter acre in size.

7. When issuing the CCCL permit, the Department did not consider the platted subdivision that will be serviced by the permitted roadway project.

8. Austin filed a petition challenging the issuance of the CCCL permit to Lighthouse. The challenge is styled Gloria Austin v. Lighthouse Walk, LLC and Department of Environmental Protection, DOAH Case No. 06-1186 (hereafter "the Permit Challenge"), and is pending before Judge Alexander.

9. Heslin sought and was granted leave to intervene in the Permit Challenge.

10. Paragraphs 6, 10, and 18 of the Petition for Formal Administrative Proceeding (Petition) in the Permit Challenge state as follows:

> 6. The proposed subdivision that is intended to be built by Lighthouse, will result in incompatible high density

residential development seaward of the costal control line and seaward of the Petitioners' homes. The incompatible and inappropriate nature of this subdivision will greatly increase the danger of Petitioners' homes being damages by storm driven debris in the event of a major storm event such as a hurricane occurring in this area.

* * *

10. The area in question on Cape San Blas is presently developed in very low density single family home sites. The proposed development would create high density development seaward of the coastal construction control line for which construction is totally unnecessary and could easily be greatly minimized. The parcel in question could accommodate a residential subdivision without encroaching seaward of the present coastal construction and control line. In light of the above, it is clear the project violates Rule 62B-33.005(3), Florida Administrative Code.

* * *

18. The proposed permit would create a high density subdivision which would create a multitude of small single family lots on this site. By granting the permit for this site development, the Department is condoning the intended construction of a multitude of single family residences which are totally inappropriate for the beach dune system in this area. The combined effect of the construction of single family residences on the proposed plat seaward of the coastal construction control line will maximize impacts to the beach dune system, not minimize the impact as required by the Department's rules in Chapter 62B-33, Florida Administrative Code.

11. Lighthouse moved to dismiss the Petition in the Permit Challenge, to strike certain allegations, and for an Order in limine in that case. The Department filed a memorandum of law in support of Lighthouse's motion, stating, in part:

> 6. Contrary to Petitioner's argument in paragraph 2(b), the Department's rule contains a standard for determination of "cumulative effects." Rule 62B-33.005(3)(a), F.A.C., provides that "[I]n assessing the cumulative effects of a proposed activity, the Department shall consider the short-term and long-term impacts and the direct and indirect impacts the activity would cause in combination with existing structures in the area and any other similar activities already permitted or for which a permit application is pending within the same fixed coastal cell." The Department's rules also contain a regulatory definition of "impacts" (not "cumulative impacts" as argued by the Petitioner). Therefore, consideration of future applications not yet pending with the Department is outside the scope of the Department's permitting jurisdiction under the rule.
>
> 7. Contrary to the arguments made by Petitioner in paragraph 2(c) and (d) construction of a "residential subdivision" is not a foregone conclusion. First, in Rule 62B-33.005(3)(a), F.A.C., it states that "[e]ach 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. Second, use by an applicant of the single family home general permit authorized by Section 161.053(19), F.S., and existing in Rule 62B-34.070, F.A.C., is not governed by the principle that a general

> permit is authorized without additional agency action. The concept of a general permit adopted by rule exists in many different permitting programs of the Department. The different permitting programs are created and governed by their organic statutes, and only those statutes (and rules promulgated under them) should be looked to for the legal principles that apply in the permitting program. (See paragraph 4. above). The case law cited by Petitioner in paragraph 2(c) of her response refers to general permits established under Chapter 403, F.S., specifically authorized by Section 408.814, F.S. Section 403.814(1) provides for use of a general permit 30 days after giving notice to the department "without any agency action by the department." See § 403.814(1), Fla. Stat. (2005). No similar provision appears in Section 161.053(19), F.S. In addition, Section 403.814, F.S. provides for administrative review of the use of a general permit where the Department publishes or requires the applicant to publish notice of its intent to use a general permit. See § 403.814(3), Fla. Stat. (2005); Hamilton County Bd. of County Comm'rs v. State, Department of Environmental Regulation, 587 So.2d 1378 (Fla. 1st DCA 1991) and City of Jacksonville v. Department of Environmental Protection, 24 F.A.L.R. 938 (Fla. DEP 2001).

12. By Order dated May 23, 2006, Judge Alexander struck paragraphs 6, 10, and 18 of the Petition in the Permit Challenge, holding, in part:

> Second, the Motion to Strike is granted in part, and paragraphs 6, 10, and 18 are stricken. The Motion to Strike paragraphs 9 and 19 is denied since paragraph 9 simply tracks the language in Florida Administrative Code Rule 62B-33.005(3)(a), and neither paragraph makes specific

> reference to impacts from the proposed construction of a residential subdivision. Although paragraphs 5 and 13 refer to alleged impacts to "wildlife habitat," "drainage," and "wind and water borne missiles during a storm," which might arguably include matters unrelated to this action, the granting of the Motion in Limine below precludes Petitioner from introducing evidence regarding impacts to habitat other than sea turtles, the stormwater exemption, and wind and water borne missiles caused by the proposed construction of a residential subdivision.
>
> Finally, the Motion in Limine is granted, and Petitioner (and Intervenor) shall be precluded from introducing evidence in support of allegations relating to cumulative impacts caused by the proposed construction of a residential subdivision, debris and wind and water borne missiles from the proposed construction of a residential subdivision, the exemption of swales from stormwater discharge permit requirements, and any habitat impacts unrelated to sea turtles. See § 161.053, Fla. Stat. (2005); Fla. Admin. Code R. 62B-33.005, 62B-33.007, and 62-25.030(1)(c).

13. Petitioners have alleged in this case that Rule 62B-33.005(3)(a) is an invalid exercise of delegated legislative authority. Lighthouse has disputed that allegation in its Motion for Summary Final Order, which is fully supported by the Department.

14. Section 161.053(5)(a), Florida Statutes, was first adopted by the Legislature in 1983. The statute was amended without any substantive changes to its text in 1987.

15. Section 161.053(5)(a)3., Florida Statutes (2005),[2] currently states in pertinent part:

> (5) Except in those areas where local zoning and building codes have been established pursuant to subsection (4), a permit to alter, excavate, or construct on property seaward of established coastal construction control lines may be granted by the department as follows:
>
> (a) The department may authorize an excavation or erection of a structure at any coastal location as described in subsection (1) upon receipt of an application from a property and/or riparian owner and upon the consideration of facts and circumstances, including:
>
> * * *
>
> 3. Potential impacts of the location of such structures or activities, including potential cumulative effects of any proposed structures or activities upon such beach-dune system, which, in the opinion of the department, clearly justify such a permit.

16. Rule 62B-33.005(3)(a) was amended in 1996 as follows:

> (3) After reviewing all information required pursuant to this 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. In assessing the cumulative effects of a proposed activity, the Department shall consider the short-term and long-term impacts and the direct and indirect impacts the activity would cause in combination with existing structures in the area and any other activities proposed within the same fixed coastal cell. 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.

* * *

~~(7) An individual structure or activity may not have an adverse impact on the beach or dune system at a specific site, however, a number of similar structures or activities along the coast may have a significant cumulative impact resulting in the general degradation of the beach or dune system along that segment of shoreline. The Department may not authorize any construction or activity whose cumulative impact will threaten the beach or dune system or its recovery potential following a major storm event. An exception to this policy may be made with regard to those activities undertaken pursuant to Subsections 16B-33.005(3)(d) and 16B-33.006(2), Florida Administrative Code.~~

17. Rule 62B-33.005(3)(a) was amended in 2000, as follows:

(3) After reviewing all information required pursuant to this 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. In assessing the cumulative effects of a proposed activity, the Department shall consider the short-term and long-term impacts and the direct and indirect impacts the activity would cause in combination with

> existing structures in the area and any other similar activities already permitted or for which a permit application is pending within the same fixed coastal cell. 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.

18. Rule 62B-33.005(3)(a) currently appears as set forth in the preceding paragraph, but without the underlining.

19. One of the provisions in Rule 62B-33.005(3)(a) that is being challenged in these cases states that the Department shall:

> [d]eny any application for an activity which either individually or cumulatively would result in a significant adverse impact including potential cumulative effects. In assessing the cumulative effects of a proposed activity, the Department shall consider the short-term and long-term impacts and the direct and indirect impacts the activity would cause in combination with existing structures in the area and any other similar activities already permitted or for which a permit application is pending within the same fixed coastal cell. The impact assessment shall include the anticipated effects of the construction on the coastal system and marine turtles.

20. This provision was first added to Rule 62B-33.005 in 1996. It was amended on August 27, 2000.

21. The other provision in Rule 62B-33.005(3)(a) that is being challenged in these cases is the requirement that:

> [e]ach 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.

22. This provision was first added to Rule 62B-33.005 in 1996.

23. Rule 62B-33.005 is intended by the Department to implement Section 161.053(5)(a)3., Florida Statutes.

24. Rule 62B-33.005(3)(a) reflects the Department's construction of the phrase "potential cumulative effects of any proposed structures or activities," as that phrase appears in Section 161.053(5)(a)3., Florida Statutes. Petitioners disagree with the Department's construction of the statute.

25. Rule 62B-41.002 was first developed on August 23, 1992, as part of the newly enacted Rule Chapter 16B-41, which was later designated as Rule Chapter 62B-41.

26. Rule 62B-41.002(28), first developed in 1992, is the precursor to Rules 62B-41.002(19)(a) and (b), which were added on October 23, 2001.

27. Rule 62B-41.002 is intended by the Department to implement Section 161.041, Florida Statutes.

28. Rule 62B-41.002(19)(b) reflects the Department's construction of the phrase "potential cumulative effects of any proposed structures or activities," as that phrase appears in Section 161.041(2)(c), Florida Statutes. Petitioners disagree with the Department's construction of the Statute.

29. The current language of Section 161.041(2), Florida Statutes, was adopted by the Legislature in 1987, as follows:

> (2) The department may authorize an excavation or erection of a structure at any coastal location upon receipt of an application from a property or riparian owner and upon consideration of facts and circumstances, including:
>
> (a) Adequate engineering data concerning inlet and shoreline stability and storm tides related to shoreline topography;
>
> (b) Design features of the proposed structures or activities; and
>
> (c) Potential impacts of the location of such structures or activities, including potential cumulative effects of any proposed structures or activities upon such beach-dune system or coastal inlet, which, in the opinion of the department, clearly justify such a permit.

30. Rule 62B-41.002(19) was amended to its current form in 2001, as follows:

> (28) Renumbered as (19)
>
> * * *
>
> (a) "Adverse Impacts" are those impacts to the active portion of the coastal system resulting from coastal construction. Such

impacts are caused by coastal construction which has a reasonable potential of causing a measurable interference with the natural functioning of the coastal system. The active portion of the coastal system extends offshore to the seaward limit of sediment transport and includes ebb tidal shoals and offshore bars.

(b) "Cumulative Impacts" are impacts resulting from the short-term and long-term impacts and the direct and indirect impacts the activity would cause in combination with existing structures in the area and any other similar activities already permitted or for which a permit application is pending within the same fixed coastal cell. 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 ~~individual coastal construction which, if permitted as a general practice on other coastal properties in the same general area, or if added to the adverse impacts from existing coastal construction are expected to result in an adverse impact.~~

31. The scope of the "cumulative impact" review under the Environmental Resource Permit (ERP) program is described in the “Basis of Review” used by the South Florida Water Management District, St. Johns River Water Management District, and Southwest Florida Water Management.

32. Under the “Basis of Review,” cumulative impacts are considered unacceptable when the proposed system, considered in

conjunction with the past, present, and future activities, would result in a violation of state water quality standards or significant adverse impacts to functions of wetlands or other surface waters. The cumulative impact evaluation is conducted using an assumption that reasonably expected future applications with like impacts will be sought, thus necessitating equitable distribution of acceptable impacts among future applications. In reviewing impacts of a current ERP project application, the agency will review impacts from pending projects and extrapolate from those impacts to see what impacts future projects could contribute, using objective criteria, such as comprehensive plans, plats on file with local governments, or applicable land use restrictions and regulations.

33. Tony McNeal, the administrator of the Department's CCCL permitting program, acknowledged in his deposition testimony that the last sentence of Rule 62B-33.005(3)(a) "is a way of saying that the Department is not going to be bound by its prior actions in similar cases." However, he also explained that the sentence does not allow the Department to act inconsistently because the Department "consistently applies the same rules" to each project that comes before it and "[t]he only thing that changes are the facts surrounding the project."

CONCLUSIONS OF LAW

34. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to Section 120.56, Florida Statutes.

35. A summary final order is appropriate where, as here, DOAH has final order authority and the parties agree that there is "no genuine issue as to any material fact." § 120.57(1)(h), Fla. Stat.

36. Section 120.56(1)(a), Florida Statutes, provides that "[a]ny person substantially affected by a rule . . . may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority." See also § 120.56(3)(a), Fla. Stat.

37. The parties stipulated that Petitioners have standing to challenge the validity of Rule 62B-33.005(3)(a).

38. The purpose of a rule challenge proceeding is "to determine the facial validity of [the challenged rules], not to determine their validity as applied to specific facts, or whether the agency has placed an erroneous construction on them." Fairfield Communities v. Florida Land and Water Adjudicatory Comm'n, 522 So. 2d 1012, 1014 (Fla. 1st DCA 1988).

39. Petitioners have the burden to prove by a preponderance of the evidence in this de novo proceeding that Rule 62B-33.005(3)(a) is an invalid exercise of delegated

legislative authority. § 120.56(3)(a), Fla. Stat.; Dept. of Health v. Merritt, 919 So. 2d 561 (Fla. 1st DCA 2006).

40. Rule 62B-33.005(3)(a) is entitled to a presumption of validity. See St. Johns River Water Management Dist. v. Consolidated-Tomoka Land Co., 717 So. 2d 72, 76 (Fla. 1st DCA 1998) ("Before the 1996 revision of the Administrative Procedure Act, the courts had held that a rule was presumed to be valid, and that the party challenging a rule has the burden of establishing that it is invalid. [T]hese principles continue to apply in a proceeding to challenge an existing rule . . . ." (Citations omitted)).

41. A rule is an invalid exercise of delegated legislative authority if any one of the following applies:

> (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
>
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;
>
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;
>
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
>
> (e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is

> capricious if it is adopted without thought or reason or is irrational; or
>
> (f) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.
>
> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.

§ 120.52(8), Fla. Stat. See also § 120.536(1), Fla. Stat. (repeating the "flush-left" paragraph found at the end of Section 120.52(8), Florida Statutes).

42. Petitioners contend that Rule 62B-33.005(3)(a) is invalid under paragraphs (b), (c), (d), and/or (e) of Section 120.52(8), Florida Statutes.

43. Section 120.52(8)(b), Florida Statutes "pertains to the adequacy of the grant of rulemaking authority,"

Consolidated-Tomoka, 717 So. 2d at 81, and prohibits an agency from adopting rules on a subject that the Legislature has not given the agency specific statutory authority to regulate. See Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Ass'n, Inc., 794 So. 2d 696, 700 (Fla. 1st DCA 2001) ("[A]gencies have rulemaking authority only where the Legislature has enacted a specific statute, and authorized the agency to implement it, and then only if the . . . rule implements or interprets specific powers or duties, as opposed to improvising in an area that can be said to fall only generally within some class of powers or duties the Legislature has conferred on the agency.").

44. The authority for a rule

> is not a matter of degree. The question is whether the statute contains a specific grant of legislative authority for the rule, not whether the grant of authority is specific enough. Either the enabling statute authorizes the rule at issue or it does not. [T]his question is one that must be determined on a case-by-case basis.

Southwest Florida Water Management Dist. v. Save the Manatee Club, Inc., 773 So. 2d 594, 599 (Fla. 1st DCA 2000) (emphasis in original).

45. Rule 62B-33.005(3)(a) does not exceed the rulemaking authority granted to the Department in Section 161.053, Florida Statutes. The rule falls squarely within the authority granted

to the Department to establish a permitting program for construction seaward of the CCCL, see § 161.053(21), Fla. Stat. ("The department is authorized to adopt rules related to . . . activities seaward of the coastal construction control line [and] . . . permitting programs . . . ."), and the rule interprets and implements the specific statutory powers and duties delegated to the Department by the statute. See § 161.053(5)(a), Fla. Stat. (authorizing the Department to permit construction seaward of the CCCL upon receipt of an application and upon consideration of facts and circumstances including the potential impacts of the location of the structure and the potential cumulative impacts of any proposed structures on the beach-dune system).

46. Thus, Rule 62B-33.005(3)(a) is not an invalid exercise of delegated legislative authority under Section 120.52(8)(b), Florida Statutes.

47. Section 120.52(8)(c), Florida Statutes "relates to the limitations imposed by the grant of rulemaking authority," Consolidated-Tomoka, 717 So. 2d at 81, and prohibits an agency from adopting rules that go beyond -- "enlarges" -- or conflict with -- "modifies or contravenes" -- the statute being implemented. See, e.g., Day Cruise Ass'n, 794 So. at 701 (invalidating proposed rule that had the effect of prohibiting so-called "cruises to nowhere" because, among other things, the

statute expressly prohibited the adoption of rules that interfere with commerce); Save the Manatee Club, 773 So. 2d at 600 (invalidating rule that grandfathered projects based upon their prior approvals because the statute only authorized exemptions based upon environmental impacts).

48. Rule 62B-33.005(3)(a) does not enlarge the statute being implemented by the Department. Indeed, the crux of Petitioners' argument as to the invalidity of the rule is that the Department is undertaking less of a cumulative impact analysis than is required by Section 161.053, Florida Statutes. See Petitioners' PFO, at 7 ("The central question in this case is whether the Department exceeded its rulemaking powers by limiting the legislatively mandated [cumulative impact] analysis to the consideration of only existing structures or activities or [those] which a permit has been issued by, or is pending before, the Department.") (emphasis in original).

49. As more fully discussed below, Rule 62B-33.005(3)(a) does not modify or contravene Section 161.053(5)(a)3., Florida Statutes, which the parties agree is the primary statute being interpreted and implemented by the rule.

50. Section 161.053(5)(a)3., Florida Statutes, requires that prior to permitting structures or activities seaward of the CCCL, the Department must consider the "[p]otential impacts of the location of such structures or activities, including

potential cumulative impacts of any proposed structures or activities upon the beach-dune system, ..." (Emphasis supplied).

51. "Cumulative impacts" are generally understood to be the potential impacts of future similar projects in the vicinity of the project under review, see generally Caloosa Property Owners' Association, Inc. v. Department of Environmental Regulation, 462 So. 2d 523, 526-27 (Fla. 1st DCA 1985), and they are required to be assessed in various environmental permitting programs. The extent of the assessment depends upon the statute governing the permitting program. See, e.g., Sierra Club v. St. Johns River Water Management Dist., 816 So. 2d 687 (Fla. 5th DCA 2002) (discussing statutory and rule amendments that "short-circuited" the cumulative impact analysis under the ERP program where the project's impacts have been fully mitigated within the drainage basin). The dispute in this case involves the scope of the cumulative impact analysis required by Section 161.053(5)(a)3., Florida Statutes.

52. The cumulative impact analysis described in Rule 62B-33.005(3)(a) includes two components that are to be evaluated in combination with each other. The first component is the various impacts -- i.e., short-term, long-term, direct, and indirect -- of the project under review. The second component is the impacts of other structures and activities -- i.e., existing,

permitted, and proposed -- in the vicinity of the project under review. Petitioners' challenge to the validity of the rule focuses on the rule's failure to include reasonably foreseeable projects as part of the second component of the analysis.[3]

53. Chapter 161, Florida Statutes, does not define the phrase "proposed structures or activities," which is what the cumulative impact analysis is required to address. In the context of Section 163.053(5)(a)3., Florida Statutes, the phrase must be referring to structures and activities other than those in the permit application under review (as the phrase is used elsewhere in Section 161.053, Florida Statutes) because the statute would be illogical if the cumulative impact analysis was limited to the project under review.

54. Petitioners argue that the cumulative impact analysis required by Section 161.053(5)(a)3., Florida Statutes, must include structures and activities that have not been proposed to the Department if they are reasonably expected in the future. The Department and Lighthouse argue that the required cumulative impact analysis is more limited, and includes only structures and activities that are existing, permitted, or have been proposed to the Department. See Fla. Admin. Code R. 62B-33.005(3)(a) (requiring consideration of the various impacts of the project under review in combination with "[1] existing structures in the area and [2] any other similar activities [a]

already permitted or [b] for which a permit application is pending within the same fixed coastal cell").

55. An agency's interpretation of a statute that it is charged with implementing is entitled to deference unless the interpretation is clearly erroneous. See, e.g., Atlantis at Perdido Ass'n, Inc. v. Warner, 2006 Fla. App LEXIS 11210, at *15 (Fla. 1st DCA July 6, 2006); Lakeland Regional Medical Center, Inc. v. Agency for Health Care Admin., 917 So. 2d 1024, 1029 (Fla. 1st DCA 2006). The Department's interpretation of the scope of the cumulative impact analysis required by Section 161.053(5)(a)3., Florida Statutes, is not clearly erroneous.

56. The cases cited by Petitioners in their PFO (e.g., pages 5-7, 17-18, 22-23) for the proposition that a cumulative impact analysis necessarily includes an evaluation of projects that are reasonably foreseeable are distinguishable. Those cases involved permitting programs governed by statutes specifically requiring consideration of other projects that are reasonably expected in the future. See, e.g., Conservancy, Inc. v. A. Vernon Allen Builder, Inc., 580 So. 2d 772 (Fla. 1st DCA 1991) (reversing final order approving dredge and fill permit and remanding for consideration the project's cumulative impacts in accordance with Section 403.919, Florida Statutes, which is now codified in Section 373.414(8)(a), Florida Statutes).

57. Where the Legislature has intended the Department or other permitting agency to consider reasonably foreseeable projects as part of a cumulative impact analysis, it has clearly expressed that intent. See, e.g., § 373.414(8)(a)3., Fla. Stat. (requiring consideration of activities that "may reasonably be expected to be located within surface waters or wetlands . . . in the same drainage basin" in the future as part of the cumulative impact analysis under the ERP program). If the Legislature had intended the cumulative impact analysis required by Section 161.053(5)(a)3., Florida Statutes, to include such projects -- as compared to "proposed structures or activities" -- it presumably would have said so.

58. Thus, Rule 62B-33.005(3)(a) is not an invalid exercise of delegated legislative authority under Section 120.52(8)(c), Florida Statutes.

59. A rule is invalid under Section 120.52(8)(d), Florida Statutes, if it is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency.

60. Rule 62B-33.005(3)(a) is not vague. It does not "require[] performance of an act in terms that are so vague that men of common intelligence must guess at its meaning." Southwest Florida Water Management Dist. v. Charlotte County, 774 So. 2d 903, 915 (Fla. 2nd DCA 2001). See also Cole Vision

Corp. v. Dept. of Business and Professional Reg., 688 So. 2d 404 (Fla. 1st DCA 1997). The rule clearly defines the types of structures and activities that will be considered in the cumulative impact analysis, and other provisions of Rule Chapter 62B-33 enumerate the standards by which each application will be evaluated "on its own merits."

61. Rule 62B-33.005(3)(a) establishes adequate standards for agency decisions. The CCCL permitting standards in Rule Chapter 62B-33 are extremely detailed and contain adequate standards to guide the Department's decision whether or not to issue a CCCL permit. Nothing in Rule 62B-33.005(3)(a) relieves the Department from applying those standards to each CCCL permit application that comes before it, which is what the Department does according to Mr. McNeal's unrebutted deposition testimony.

62. Rule 62B-33.005(3)(a) does not vest unbridled discretion in the Department by stating that each permit application will be evaluated "on its own merits" or by stating that "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." Nothing in those statements relieves the Department from consistently applying the detailed CCCL permitting standards from one project to the next, which is what the Department does according to Mr. McNeal's unrebutted deposition testimony.

63. Rule 62B-33.005(3)(a) does not preclude the Department from looking at or relying upon its precedent in making permit decisions. The rule precludes nothing, and the Department is free to look at/rely on prior permitting decisions. The rule simply explains that the Department's approval of another CCCL permit for similar construction in the vicinity of the project under review is not, in and of itself, a basis for the approval of the project under review.

64. Thus, Rule 62B-33.005(3)(a) is not an invalid exercise of delegated legislative authority under Section 120.52(8)(d), Florida Statutes.

65. A rule is invalid under Section 120.52(8)(e), Florida Statutes, if it is arbitrary or capricious.

66. A rule is arbitrary if it is "not supported by logic or the necessary facts," and it is capricious if it is "adopted without thought or reason or is irrational." § 120.52(8)(e), Fla. Stat. See also Board of Medicine v. Florida Academy of Cosmetic Surgery, 808 So. 2d 243, 255 (Fla. 1st DCA 2002); Board of Clinical Laboratory Personnel v. Fla. Ass'n of Blood Banks, 721 So. 2d 317, 318 (Fla. 1st DCA 1998); Agrico Chemical Co. v. Dept. of Environmental Reg., 365 So. 2d 759, 763 (Fla. 1st DCA 1979).

67. It appears that the Department previously interpreted the scope of the cumulative impact analysis required by Section

161.053(5)(a)3., Florida Statutes, in a manner consistent with the interpretation advocated by Petitioners in this case. See, e.g., Machata v. Dept. of Environmental Protection, 1994 Fla. ENV LEXIS 45, at *7 (DEP 1994) (rejecting hearing officer's finding of fact No. 122 regarding the proper application of the Department's cumulative impact analysis, and adopting in lieu thereof the exception reported at 1994 Fla. ENV LEXIS 94, *20, which explained that the predecessor to Rule 62B-33.005(3)(a) "specifically requires the Department to consider whether a number of similar structures or activities along the coast may have a significant cumulative impact").

68. The limited record in this case does not explain why the Department changed its interpretation of Section 161.053(5)(a)3., Florida Statutes, to narrow the scope of the cumulative impact analysis, as it apparently did in 1996 and 2000 when it amended Rule 62B-33.005(3)(a) to its present form. It is possible, however, that the amendments were the result of the invalidation of the rule's predecessor in Machata v. Department of Environmental Protection, 1994 Fla. Div. Adm. Hear. LEXIS 5195 (DOAH 1994) (invalidating Rule 16B-33.005(7) because its reference to "similar structures" and "segment of shoreline" failed to establish adequate standards to guide agency discretion and was arbitrary and capricious (at **21-23, 69-70), and noting (at *27) that the Department "interprets and

implements these terms with little, if any, consistency"), per curiam aff'd, 678 So. 2d 342 (Fla. 1st DCA 1996) (table).[4]

69. The fact that the language of Section 161.053(5)(a)3., Florida Statutes, has remained materially the same since 1983 does not affect the Department's authority to change its interpretation of the statute by amending Rule 62B-33.005. Indeed, as explained in Department of Administration v. Albanese, 445 So. 2d 639 (Fla. 1st DCA 1984),

> an administrative agency is not necessarily bound by its initial construction of a statute evidenced by the adoption of a rule and that an agency may validly adopt subsequent rule changes that give effect to a differing construction of the organic statute so long as this subsequent construction is consistent with a reasonably permissible construction of that statute. Such flexibility is necessary to permit changes in agency policy permissible under a view of the statute broadly conceived in light of subsequent experience.

Id. at 642. See also Cleveland Clinic Florida Hospital v. Agency for Health Care Admin., 679 So. 2d 1237, 1242 (Fla. 1st DCA 1999).

70. The Department is not required in this proceeding to justify its decision to amend Rule 62B-33.005(3)(a) in 1996 or 2000 to narrow the scope of the cumulative impact analysis. See Agency for Health Care Admin. v. Fla. Coalition of Professional Laboratory Organizations, Inc., 718 So. 2d 869, 871-72 (Fla. 1st DCA 1998) ("We find nothing in the 1996 amendments or, indeed,

the entire [Administrative Procedure Act], requiring an agency, in exercising its quasi legislative/administrative rulemaking function, to prove that its existing, unchallenged rule was unwisely, capriciously or arbitrarily adopted, or to offer an explanation of necessity for the repeal or amendment thereof.").

71. Instead, under Section 120.52(8)(e), Florida Statutes, it is Petitioners who have the burden to demonstrate that the Department's current interpretation of Section 161.053(5)(a)3., Florida Statutes, is illogical or irrational. Petitioners failed to do so.

72. The Joint Memorandum of Law filed by the Lighthouse and the Department includes persuasive argument (e.g., pages 12-14) regarding the logic of the Department's current rule.

73. Specifically, Lighthouse and the Department argue, and the undersigned agrees that it is not illogical or irrational for the Department to limit the scope of the cumulative impact analysis to the other structures and activities for which the Department has specific design and location information –- i.e., "existing structures in the area and any other similar activities already permitted or for which a permit application is pending within the same fixed coastal cell" -– because the Department will have sufficient information about those projects to make a judgment about the combined impact of those projects and the project under review on the beach-dune system. As to

other future projects (whether reasonably foreseeable or not), the Department would be required to guess about their precise location and design and the manner in which they might interact with the project under review and the dynamic beach-dune system, which may result in a cumulative impact analysis that is speculative and, potentially, unreliable or misleading.

74. Thus, Rule 62B-33.005(3)(a) is not an invalid exercise of delegated legislative authority under Section 120.52(8)(e), Florida Statutes.

75. In sum, Petitioners failed to meet their burden to prove by a preponderance of the evidence that Rule 62B-33.005(3)(a), or any portion thereof, is an invalid exercise of delegated legislative authority under Section 120.52(8), Florida Statutes.

76. Petitioners also contend that Rule 62B-33.005(3)(a) is invalid because "it was adopted in derogation of Section 120.68(7)(e)3., Florida Statutes, which requires an agency to follow its own precedent." See Petitioners' PFO, at 20.

77. Section 120.68(7)(e)3., Florida Statutes, does not provide a basis for invalidating a rule. The statute applies in the context of judicial review of the agency's application of a rule to a particular set of facts, not in a rule challenge proceeding under Section 120.56, Florida Statutes.

78. Furthermore, Section 120.68(7)(e)3., Florida Statutes, does not require an agency to blindly follow its prior decisions as Petitioners' argument seems to suggest. Indeed, the statute implicitly allows the agency to deviate from its precedent so long as it explains the deviation. See Martin Memorial Hospital Ass'n v. Dept. of Health & Rehabilitative Servs., 584 So. 2d 39, 40 (Fla. 1st DCA 1991) (citing North Miami General Hospital v. Office of Community Medical Facilities, 355 So. 2d 1272 (Fla. 1st DCA 1978), for the proposition that "agency action which yields inconsistent results based upon similar facts, without reasonable explanation, is improper" (emphasis supplied)).

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that the Petitions for Determination of Invalidity of Existing Rules are dismissed.

DONE AND ORDERED this 8th day of August, 2006, in Tallahassee, Leon County, Florida.

T. KENT WETHERELL, II
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Filed with the Clerk of the
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this 8th day of August, 2006.

ENDNOTES

[1]/ Findings 1 through 32 were taken directly from the Amended Joint Stipulation, filed July 11, 2006; only minor editorial changes were made. Finding 33 is based upon the excerpt of Tony McNeal's deposition filed by Petitioners on July 21, 2006, which was not objected to by the Department or Lighthouse.

[2]/ All statutory references are to the 2005 version of the Florida Statutes unless otherwise indicated.

[3]/ It is difficult to understand how the proposed subdivision would fit into the second component of the analysis because, as explained in Caloosa Property Oweners' Association, 462 So. 2d at 526, the cumulative impact doctrine is concerned with the "precedential value of granting a permit under the assumption that similar future permits will be granted in the same locale" (emphasis supplied). Thus, even if Petitioners were correct regarding the scope of the cumulative impact component of the analysis required by Section 161.053(5)(a)3., Florida Statutes, the analysis would focus on other similar road projects that are reasonably foreseeable in the vicinity of the road at issue in the Permit Challenge and not the houses to be built as part of

the subdivision to be served by the road. That said, it seems to this ALJ that the potential impacts of the platted subdivision to be served by the road at issue in the Permit Challenge could be characterized as secondary (i.e., indirect) impacts of the road project itself and be considered at least in a general sense as part of the first component of the analysis under Rule 62B-33.005(3)(a), particularly since the parties agree that the sole purpose of the road is to serve the subdivision. See Conservancy, supra (explaining that "'secondary' impacts are those that may result from the permitted activity itself, and 'cumulative' impacts are impacts that may result from the addictive effects of many similar projects," and holding that the hearing officer and the Department erred by not considering the impacts of a 75-unit development that would be facilitated by the pipeline under review because those impacts were secondary impacts of the pipeline project). Nevertheless, contrary to Petitioners' argument in their PFO (e.g., page 16), this distinction raises questions about the Department's interpretation and/or application of the rule, not the validity of its interpretation of Section 161.053(5)(a)3., Florida Statutes, in the rule. The reasonableness of the Department's interpretation and/or application of the rule are beyond the scope of this rule challenge proceeding. See Fairfield Communities, 522 So. 2d at 1014.

[4]/ This Machata case involved a challenge to a number of Department rules and unwritten policies, and it appears to have been consolidated for purposes of hearing with the Machata case reported at 1994 Fla. ENV LEXIS 45, which involved the issuance of a CCCL permit. Separate orders were issued by the hearing officer because he had final order authority in the rule challenge case, but not in the permit case.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Summary Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.