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2007 APR -2 A 11: 23
DIVISION OF
ADMINISTRATIVE
HEARINGS

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

ANTHONY PARKINSON, MICHAEL CILURSO, and THOMAS FULLMAN,

Petitioners,

vs.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION and REILY ENTERPRISES, LLC,

Respondents.

OGC Case No. 06-1418
DOAH Case No. 06-2842

FINAL ORDER

On February 12, 2007, the Division of Administrative Hearings ("DOAH"), submitted a Recommended Order ("RO") (attached as Exhibit "A") to the Department of Environmental Protection ("DEP" or the "Department") in this administrative proceeding. Copies of the RO were furnished to the Petitioners, ANTHONY PARKINSON, MICHAEL CILURSO, and THOMAS FULLMAN (collectively, the "Petitioners"). A copy of the RO was also furnished to the Co-Respondent, Reily Enterprises, LLC ("Reily").

Exceptions to the RO were timely filed by Petitioners (34 Exceptions), Reily (6 Exceptions) and DEP (3 Exceptions) on February 27, 2007. On March 9, 2007, Petitioners filed their Responses to DEP's and Reily Exceptions. DEP and Reily filed their Responses to Petitioners' Exceptions on the same date. The matter is now before me for entry of a final order.

BACKGROUND

In June of 2005, Reily filed an application with DEP for an environmental resource permit ("ERP") and request for authorization to use sovereignty submerged lands to construct certain structures on its property (the "Reily Property") located in Martin County and abutting the Indian River Lagoon (an Outstanding Florida Water and Aquatic Preserve) (the "Lagoon"). In the past, DEP had issued an Emergency Field Authorization ("EFA") after Hurricane Jeanne to stabilize the shoreline and restore the contours of the Reily Property with riprap. However, no riprap had been placed on the site as a result of this authorization.

The activities proposed in the 2005 application include (1) a 395 linear foot upland retaining wall, with one 10 linear foot return, located at least five feet landward of the Mean High Water Line ("MHWL"); (2) an 85 linear foot seawall, with one 10 linear foot return, located at the MHWL; and (3) riprap, to be installed at a 2:1 (Horizontal:Vertical) slope along the seawall, and extending out a maximum of four feet waterward of the seawall toe. The Reily Property contains approximately 17.74 acres along Indian River Drive in Jensen Beach, just north of the Jensen Beach causeway. It extends from the Indian River on the east to Skyline Drive on the west.

DEP initially responded to Reily's application by letter dated October 11, 2005, informing Reily that "the proposed seawall is within the Department's jurisdiction." The letter reflected that the Department would "begin processing [the] application as a standard general permit." DEP included a request for additional information ("RAI") regarding the project, in which it asked for (1) justif[ication of] the need for a seawall;" (2) a "detailed explanation" as to why the "use of vegetation and/or riprap is not feasible

at the site" for shoreline stabilization; (3) "a detailed statement describing the existing and proposed upland uses and activities;" (4) "details on the current condition of the shoreline at the site, including the location of mangroves and other wetland vegetation;" and (5) a statement indicating "if any impacts to these resources are proposed."

On or about February 23, 2006, Reily provided its responses to the RAI. As justification for the seawall, Reily stated:

> Recent hurricanes have destroyed any vegetation that existed within the area of the proposed seawall. Shoreline has been lost and the DOT has had to backfill nearby upland areas and repair the roads due to significant erosion. The application is proposing to place riprap along the foot of the proposed seawall. There is no reason to believe that there will not be more storms in the near future and it is the [applicant's] position that the seawall for this area is the only way to assure permanent shoreline stabilization and would be in the public's best interest.

Reily further indicated that "[t]he existing upland use is an R. V. resort complex. The proposed use will remain the same." With respect to the location of, and anticipated impacts to, wetland resources, Reily stated: "Please see plan view drawing sheet 2 of 4 that clearly shows that the proposed retaining wall will be located landward of the existing mangroves." The referenced sheet does not show the location of wetland vegetation. Moreover, plan view drawing sheet 3 of 4 reflects that the proposed retaining wall will be located under the mangrove canopy.

On April 19, 2006, the Department issued Environmental Resource Permit and Sovereignty Submerged Lands Authorization No. 43-0197751-003 (collectively, the "Authorization") to Reily. Thereafter, Petitioners and The Jensen Beach Group timely sought to challenge the Authorization by filing a Petition for Administrative Hearing with the Department. This Petition was dismissed with leave to amend as to The Jensen Beach Group, but was referred, on behalf of the individual Petitioners, to the Division of

Administrative Hearings ("DOAH"). DOAH assigned the matter to Administrative Law Judge ("ALJ") Kent Wetherell, II. On November 22, 2006, Petitioners filed an Amended Motion for Leave to File Second Amended Petition for Administrative Hearing (on behalf of the individual Petitioners, only). See Second Amended Petition at 1 n.1. The Department filed a motion to strike, which was denied. In an order dated November 30, 2006, the ALJ granted Petitioners' motion, and final hearing proceeded on the Second Amended Petition.

At hearing, Reily presented the expert testimony of Bruce Jerner and Don Donaldson. DEP presented the expert testimony of Jennifer Smith. Petitioners testified in their own behalf, and presented the expert testimony of James Egan, and the deposition testimony of Jeffrey Sanger. The following exhibits were received into evidence: Reily's Exhibits 1, 5, 6, 29 and 30; DEP Exhibits 55 through 61; and Petitioners' Exhibits 5, 6, 7-1 through 7-34, 10, 12, 15, 22, 24, 27, 52, 54, 65, and 66.

Both Petitioners and Reily filed a motion for attorney's fees and costs, and responses in opposition were timely filed. The ALJ denied these motions.

RECOMMENDED ORDER

In the RO, the ALJ made the following findings related to Petitioners' standing:

> 7. Petitioner Anthony Parkinson sometimes drives by the property where the permitted activities will be located when he takes his daughter to school; he has had breakfast at Dena's several times; he looks at the property from the causeway; and, on at least one occasion, he and his daughter looked at vegetation in the water adjacent to the Reily property for a school project.
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> 8. Mr. Parkinson testified that the project will negatively affect his quality of life because he "came to Jensen Beach because of the natural shoreline and the protection that it afforded to residents in terms of natural beauty" and that, in his view, the project "just adds to the incredible bulk

that we have here in the property in terms of building in our natural shoreline."

9. Petitioner Michael Cilurso drives by the property where the permitted activities will be located on a fairly regular basis. He goes onto the property "occasionally" to "look around." He has waded in the water adjacent to the property and has seen blue crabs, small fish, and underwater vegetation.

10. Mr. Cilurso testified that the project will affect him in two ways: first, he will no longer be able to "go from the road and just walk down and wade around in [the river] and enjoy the natural resources;" and second, the proposed development of the overall Reily property will affect his "quality of life" because "the density [is] going to be more than what we thought would be a fit for our community."

11. Petitioner Thomas Fullman can see the Indian River from his house across the Reily property. He and his family have "spent time down at the causeway," and they have "enjoyed the river immensely with all of its amenities" over the years. He is concerned that the project will affect his "quality of life" and "have effects on the environment and aquatic preserve [that he and his family] have learned to appreciate."

Based on these findings, the ALJ concluded that none of the Petitioners had demonstrated standing to initiate administrative proceedings in this matter. (RO: 29-31, ¶¶ 90-96.) Specifically, in Conclusions of Law 92-96, he concluded:

92. Petitioners did not prove their standing.

93. First, the general "quality of life" concerns raised by Petitioners relate more to the Pitchford's Landing development than to the permitted activities. Issues related to the density of the Pitchford's Landing development and its impact on the Jensen Beach community are beyond the scope of this proceeding.

94. Second, Petitioners have no legal right to go across the Reily property in order to "look around" or otherwise use and enjoy the shoreline along the river or the adjacent submerged lands. Thus, the extent to which the construction of the seawall and retaining wall will preclude Petitioners from doing so in the future does not give them standing to challenge the permit.

95. Third, even though the shoreline along the Reily property is largely undeveloped, it is far from pristine and is not in a natural condition. The

evidence was not persuasive that the aesthetic values of the existing shoreline enjoyed by Petitioners from afar will be materially diminished by the permitted activities, particularly since the permit prohibits impacts to the mangrove stands on the property.

96. In sum, the evidence fails to establish that the project will affect Petitioners' use or enjoyment of the water resources in the vicinity of the Reily property or the aquatic preserve as a whole.

Despite having reached this legal conclusion regarding Petitioners' lack of standing, the ALJ, "in an abundance of caution," proceeded to address the merits of Reily's application in the RO. (See RO: 21, ¶ 97.) In so doing, the ALJ made these additional significant determinations:

1. The Operating Agreement Concerning Regulation Under Part IV, Chapter 373, F.S., and Aquaculture General Permits Under Section 403.814, F.S., between South Florida Water Management District and Department of Environmental Protection, dated October 27, 1998 ("the Operating Agreement") delineates the respective authority of the two agencies to act on ERP permit applications. (RO: 24-25, ¶¶ 79-83.) The record in this case supports the conclusion that Reily's application was properly reviewed by the Department.

2. "[T]he project" or "the permitted activities" refer to the proposed seawall, retaining wall, and the riprap. (RO: 5; ¶ 2; 45, n.3) Specifically, in Part D(1) of the Conclusions of Law, the ALJ rejected the argument that "the only aspect of the project subject to the Department's jurisdiction is the riprap." (RO: 31, ¶ 98; 45, n.3.)

3. The evidence establishes that there are wetlands landward of the MHWL; the wetlands (including areas under the mangrove canopy) may extend into the areas that will be backfilled behind the seawall and/or retaining wall; and the potential impacts of the project on the water resources cannot be fully determined without a more precise delineation of the wetland boundaries than was provided in the testimony of Mr. Jerner and Ms. Smith. (RO: 42, ¶ 133.)

4. Reily failed to provide reasonable assurances that the other aspects of the project (which are also subject to the Department's regulatory authority) are clearly in the public interest as required by section 373.414, Florida Statutes, because the evidence establishes that there may be wetlands in some of the areas landward of the MHWL that will be

> backfilled behind the retaining wall and seawall, and that the impacts to those areas have not been appropriately quantified or assessed. On this issue, Reily failed to meet its initial burden to present credible and credited evidence regarding the non-existence of wetlands in the areas to be impacted by the project, determining, specifically, that "the testimony of Mr. Jerner and Ms. Smith on that issue was not persuasive." (RO: 43, ¶ 135.)
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> 5. Except for this issue [regarding wetlands], Reily provided reasonable assurances that the project is clearly in the public interest based upon the standards in Section 373.414(1)(a), Florida Statutes, and the implementing rules. Thus, if it had been shown through more persuasive evidence than the testimony of Mr. Jerner and Ms. Smith that the upland aspects of the project will be located outside of the mangrove canopy and any other wetland areas landward of the MHWL, then the permit could have been approved.

Based on these key findings and conclusions, the ALJ recommended:

> [It is] RECOMMENDED that the Department issue a final order dismissing Petitioners' challenge to the permit/authorization for a lack of standing, but if the Department determines that Petitioners have standing, it should issue a final order denying permit/authorization No. 43-017751-003 absent an additional condition requiring an appropriate wetland delineation to show that the upland aspects of the project will occur outside of the mangrove canopy and any other wetland areas landward of the MHWL.

(RO: 16, ¶ 44) (Emphasis added).

STANDARDS OF REVIEW OF DOAH RECOMMENDED ORDERS

Section 120.57(1)(l), Florida Statutes, prescribes that an agency reviewing a recommended order may not reject or modify the findings of fact of an administrative law judge, "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value or weight of the evidence. Rather, "competent substantial evidence" refers to the existence of some

evidence (quantity) as to each essential element and as to its admissibility under legal rules of evidence. See Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm'n, 671 So. 2d 287, 289 n.3 (Fla. 5th DCA 1996).

A reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. See Belleau v. Dep't of Envtl. Protection, 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997); Dunham v. Highlands County School Bd., 652 So. 2d 894 (Fla. 2d DCA 1995). These evidentiary-related matters are the prerogative of the ALJ, as "fact-finder" in these administrative proceedings. See Heifetz v. Dep't of Business Regulation, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). Also, the ALJ's decision to accept the testimony of one expert witness over another expert's testimony is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. See Collier Medical Center v. Dep't of HRS, 462 So. 2d 83, 85 (Fla. 1st DCA 1985); Florida Chapter of Sierra Club v. Orlando Utilities Comm'n, 436 So. 2d 383, 389 (Fla. 5th DCA 1983).

A reviewing agency thus has no authority to evaluate the quantity and quality of the evidence presented at a DOAH formal hearing, beyond making a determination that the evidence is competent and substantial. See Brogan v. Carter, 671 So. 2d 822, 823 (Fla. 1st DCA 1996). If the DOAH record discloses any competent substantial evidence supporting a challenged factual finding of the ALJ, I am bound by such factual finding. See Florida Dep't of Corrections v. Bradley, 510 So. 2d 1122, 1123 (Fla. 1st DCA 1987). In addition, an agency head has no authority to make independent or supplemental findings of fact in the course of reviewing a DOAH recommended order.

See North Port, Fla. v. Consolidated Minerals, 645 So. 2d 485, 487 (Fla. 2d DCA 1994).

Section 120.57(1)(l), Florida Statutes, also authorizes an agency to reject or modify an administrative law judge's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." If an administrative law judge improperly labels a conclusion of law as a finding of fact, the label should be disregarded, and the item treated as though it were actually a conclusion of law. See Battaglia Properties v. Fla. Land and Adjudicatory Comm'n, 629 So. 2d 161, 168 (Fla. 5th DCA 1994).

Lastly, an agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction and expertise. See Public Employees Relations Comm'n v. Dade County Police Benevolent Ass'n, 467 So. 2d 987, 989 (Fla. 1985); Fla. Public Employee Council, 79 v. Daniels, 646 So. 2d 813, 816 (Fla. 1st DCA 1994). Considerable deference should be accorded to these agency interpretations of statutes and rules within their regulatory jurisdiction, which should not be overturned unless "clearly erroneous." Falk v. Beard, 614 So. 2d 1086, 1089 (Fla. 1993); Dep't of Envtl. Regulation v. Goldring, 477 So. 2d 532, 534 (Fla. 1985). Further, such agency interpretations do not have to be the only reasonable interpretations; it is enough if they are "permissible" ones. See Suddath Van Lines, Inc. v. Dep't of Envtl. Protection, 668 So. 2d 209, 212 (Fla. 1st DCA 1996).

RULINGS ON EXCEPTIONS TO THE RO

I. PETITIONERS' EXCEPTIONS (34 EXCEPTIONS)

Exception 1 (Attorney's Fees)

In Exception 1, Petitioners contest the ALJ's denial of their motion for attorney's fees and costs. DEP's substantive jurisdiction encompasses matters relating to environmental issues, and not issues arising under statutory provisions regarding awards of attorney's fees. See G.E.L. Corp. v. Dep't of Envtl. Protection, 875 So. 2d 1257, 1264 (Fla. 5th DCA 2004) (concluding that DEP was correct in holding "that its substantive jurisdiction extends over matters relating to environmental issues and not technical matters of law concerning jurisdictional issues that arise under statutory provisions relating to awards of attorney's fees"); Doyle v. Dep't of Bus. Regulation, 794 So. 2d 686 (Fla. 1st DCA 2001) (holding that an award of attorney's fees under a particular statute does not fall within an agency's field of expertise). Therefore, Petitioner's first Exception is denied on this ground.

Exceptions 3-7; 22-27 (Petitioners' Standing)

These Exceptions dispute the correctness of the ALJ's factual findings establishing the factual basis on which Petitioners relied in asserting standing, and legal conclusions that such evidence was insufficient to support their claims of standing. I conclude, at the outset, that the issue of whether a party's "substantial environmental interests" have been affected or determined by a proposed DEP permitting action so as to confer standing to participate as a party in an administrative proceeding challenging such action is a matter within DEP's "substantive jurisdiction" under section 120.57(1)(l), Florida Statutes. This conclusion is warranted because, in applying the "zone of

interest" or "type or nature of injury" standing test set forth in Agrico v. Dep't of Envtl. Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981), rev. denied, 415 So. 2d 478 (Fla. 1982), it is necessary to look beyond the Administrative Procedure Act to the "regulatory statutes or other pertinent substantive law" implicated. Sickon v. Alachua County School Board, 719 So. 2d 360, 363 (Fla. 1st DCA 1998) (citations omitted); accord, Dilliard & Assoc. Consulting Engineers v. Dep't of Envtl. Protection, 893 So. 2d 702, 704 (Fla. 1st DCA 2005).

In Exceptions 3-7, Petitioners dispute the adequacy of Findings of Fact 7-11, and request that factual findings be added regarding Petitioners' "familiarity with the property" and environmental concerns. These contested factual findings are supported by competent substantial record evidence. (See T2: 322-23; 326; T3: 361-62; 377.) Moreover, an agency head has no authority to make supplemental findings of fact. See Consolidated Minerals, 645 So. 2d at 487. Therefore, Petitioners' Exceptions 3-7 are denied.

It does not necessarily follow, however, that these Findings of Fact are legally insufficient to demonstrate the standing of any of the Petitioners. In Exceptions 22-27, Petitioners challenge Conclusions of Law 92-97, in which the ALJ determined that none of the Petitioners had established standing. Contrary to part of the ALJ's ultimate legal conclusions in this regard, I conclude that Dr. Fullman did establish his standing to contest the Authorization in this proceeding. [1]

In making this threshold standing determination, I must first examine the petition to determine whether third-party Petitioners have alleged actual or imminent injury to

[1] I find that my interpretation of the Agrico test as applied to Dr. Fullman is more reasonable than the ALJ's interpretation, which is rejected.

interests protected under the pertinent substantive law. Sickon, 719 So. 2d at 363, n.3 ("[T]he 'zone of interest' test...requires analysis of regulatory statutes or other pertinent substantive law, to ascertain a party's substantial interests"); Agrico, 406 So. 2d at 482 (reflecting that substantial interest involves injury in fact of sufficient immediacy and a type "which the proceeding is designed to protect"); see also § 403.412(5), Fla. Stat. (2006) ("A sufficient demonstration of a substantial interest may be made by a petitioner who establishes that the proposed activity...to be...permitted affects the petitioner's use or enjoyment of air, water, or natural resources protected by this chapter.").

In determining, in Conclusions of Law 92-97, that Petitioners did not prove their standing, the ALJ correctly concluded that certain non-environmental interests asserted by Petitioners are not protected by the laws administered by DEP in this administrative proceeding. Thus, asserted injuries related to non-environmental impacts to property (see Conclusion of Law 93), such as increased housing "density" (Finding of Fact 10, referring to Cilurso testimony, T3: 361) or increased development "bulk" (Finding of Fact 8, referring to Parkinson testimony, T2: 327) are not specific injuries to environmental interests protected by the administrative programs implicated in these proceedings. Cf. Miller v. Dep't of Envtl. Regulation, 504 So. 2d 1325, 1327 (Fla. 1st DCA 1987) ("[A]gencies would not, by their nature, ordinarily have jurisdiction to decide issues of law inherent in evaluation of private property impacts."). Nor are views of the natural resource unrelated to an adjoining upland owner's riparian ingress and egress[2] (see Conclusion of Law 95) protected by the environmental program involved. Cf. Hayes v.

[2] See, e.g., RO: 6, Finding of Fact 7 (reflecting that Parkinson "sometimes drives by the property" and "looks at the property from the causeway"); id. at 7, Finding of Fact 9 (reflecting that Cilurso "drives by the property"); id., Finding of Fact 11 (reflecting that Fullman "can see the Indian River from his house across the Reily property").

Bowman, 91 So. 2d 795, 801 (Fla. 1957) ("It is true as appellants allege that they will be deprived of a view of the 'bright, white tower of Stetson Law School which shines as a beacon of learning on the eastern horizon.' We are nonetheless impelled to the thought that a view of that splendid institution of learning, so ably headed now by a former member of this Court, is not a special riparian right guaranteed to appellants and those similarly conditioned.") Further, any impairment of non-riparian access to the sovereignty submerged lands directly across the Reily Property as a business invitee of Dena's restaurant (located onsite) similarly falls outside the zone of interests protected by the statutes and rules implicated here. (See RO: 7, Finding of Fact 10, reflecting, in part, that Cilurso "will no longer be able to "go from the road and just walk down and wade around in [the river] and enjoy the natural resources;" see also Parkinson testimony at T2: 326 ("Looking at growth in the water, this was a very convenient and easy place for us to go down.") On this record, Petitioners have not demonstrated a protected, legal right of access to the Lagoon directly across the Reily Property. (See RO: 30, ¶ 94.) Additionally, the first sentence of Conclusion of Law 95, which reflects that "[m]ost of the shoreline along the Reily property is a gently sloping sandy beach that has been previously disturbed, and is largely barren of vegetation," is supported by competent, substantial record evidence. (See, e.g., T2: 234-35; 258).

However, in paragraph "d" of the Second Amended Petition, Petitioners have also described their environmental interests in these proceedings. Thus, they allege that they frequently fish or walk past the site where the seawall will be constructed. Second Amended Petition at 8, ¶ (d). They allege, inter alia, that the proposed construction of the seawall and retaining wall on the Reily Property will injure these

interests by causing "adverse impacts to aquatic life, adversely impact[ing] the biodiversity of the preserve, caus[ing] erosion, and harm[ing] the food chain." Id. I conclude that these allegations in the Second Amended Petition assert a potential injury to Petitioners' substantial environmental interests under the Agrico rationale sufficient to support the filing of a petition for administrative hearing challenging the proposed project activities here.

However, the standing inquiry does not end there. If the standing of third-party petitioners is challenged in formal administrative proceedings, and the petitioners are "then unable to produce evidence to show that their substantial environmental interests will be affected by the permit grant, the agency must deny standing and proceed on the permit directly with the applicant." Agrico, 406 So. 2d at 482. Here, Reily maintained its challenge to Petitioners' standing throughout these proceedings.[3]

At final hearing, each of the Petitioners testified regarding the project's asserted impacts to their environmental enjoyment of the Indian River Lagoon. When asked how the proposed activities would affect them, Parkinson and Cilurso stated:

> Mr. Parkinson, how will the proposed construction of the seawall and the retaining wall on this property, how will that affect you?
>
> Well, me personally, we have a project at school where my daughter has been involved with looking at vegetation. I can't call it sea grass because

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[3] In Agrico, 406 So. 2d at 481 n.2, the court observed that the hearing officer had conducted a "mini-trial' on the standing issue before taking testimony on the substantive technical issues. Here, no similar preliminary evidentiary hearing was held.

While Petitioners here argued, in their Proposed Recommended Order, that Respondents had "waived any challenge they may have asserted to the standing of Petitioners to bring this proceeding" by not raising the issue in the pre-hearing stipulation, this argument was squarely rejected by the ALJ, who also observed that "the issue was effectively tried by consent at the final hearing because each of the Petitioners was asked on direct examination how he will be affected by the project, which goes to the issue of standing." (RO: 45 n.6.)

> I'm not an expert. She might be an expert shortly. Looking at growth in the water, this was a very convenient and easy place for us to go down. She's seven years old. (T2: 326) (Emphasis added).
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> * * *
>
> How does the propose[d] seawall and retaining wall project, how does that affect you, Mr. Cilurso?
>
> Like I stated in my deposition, there is two, it's twofold. The first one is the environmental issue. It's going to make that water--you're not going to be able [to] go from the road and just walk down and wade around in it and enjoy the natural resources..... (T3: 361) (Emphasis added).
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> * * *

It is thus not clearly established, by this testimony, that Parkinson and Cilurso have asserted an environmental injury which is separable from the inconvenience they will suffer if they can no longer access the Indian River Lagoon directly from Reily's property. On that basis, Petitioners' Exceptions 3-6 and 22-27, as applied to Parkinson and Cilurso, are denied.

Dr. Fullman, in contrast, testified to asserted environmental injury unrelated to any prospective limitation of access directly across the Reily Property. When asked if he ever "[made] use of the water out there for recreational or relaxation or other purposes," Dr. Fullman replied:

> I have been in Jensen Beach for many years. First coming to Jensen Beach in 1986, and have lived on Skyline Drive for about 18 of the past 20 years. So of course, I raised my family there, and if you have children, you know, you're going to spend time down at the causeway at some point in time with those children. Also because there is an environmental center on Indian River Drive that we send our children to, it becomes, as you grow up in Jensen Beach as a local, you get to experience many of the amenities of the river. And we chose to educate our children environmentally, you know, through that process. And of course, over the years we have enjoyed the river immensely with all of its amenities; and we feel very fortunate that we are able to live in an area that we're able to do that without obstruction.

(T3: 372) (Emphasis added). When further asked, "if the seawall and retaining wall are constructed as authorized by the DEP permit, how will that affect you?", Dr. Fullman answered:

> As I said, we have enjoyed the river, we have been educated to understand the importance of mangroves over the years. I want to mention that this is the only time that I lived close to the river. In my early days here in Fort Pierce -- I first came here when I was 17. And I spent most of my married life, I've spent near or by the river. And so I've always, although I'm not an exper[t] in that area, I've also enjoyed and understood the importance of the environment. I'm not an expert, but I do know that this would affect my family, myself and my family because it will have effects on the environment and the aquatic preserve in which myself and my children have learned to appreciate.
>
> I also want to say that it absolutely affects the quality of life, personally, because every day for many years now, I have enjoyed the river. And that my concern I pretty much is that my quality of life, which includes many intangibles, such as, you know, my ability to enjoy my property and enjoy my area in which I live, will be changed for the rest of my life.

(T3: 376-77) (Emphasis added).

This testimony supports Finding of Fact 11, which reflects, in pertinent part, that "Petitioner Thomas Fullman...and his family have...'enjoyed the river immensely with all of its amenities" over the years," and that "[h]e is concerned that the project will affect his 'quality of life" and 'have effects on the environment and aquatic preserve [that he and his family] have learned to appreciate.'"

I have accepted this Finding of Fact as correct. Nonetheless, I have authority, in interpreting and applying the Agrico test, to substitute my judgment concerning the ultimate legal conclusion as to whether the underlying facts set forth in Finding of Fact 11 establish Dr. Fullman's standing. I conclude that they do, and specifically, that Dr.

Fullman has shown that his "substantial environmental interests will be affected" by Reily's proposed activities.[4]

As reflected in the ALJ's Finding of Fact 12, the proposed project includes "the construction of an 85-foot-long seawall and a 395-foot-long retaining wall on the Reily property and the placement of riprap on the sovereignty submerged lands adjacent to the seawall." Thus, approval of Reily's application would authorize both the seawall at or on the mean high water line, and placement of riprap in the foreshore area otherwise available to the public--including Dr. Fullman--for enjoyment of the Indian River Lagoon. See Art. X, § 11, Fla. Const. ("The title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people."); cf also Brannon v. Boldt, --- So.2d ----, 2007 WL 162166, *3, 32 Fla. L. Weekly D288 (Fla. 2d DCA 2007) ("Like so many other seawalls, this wall kept the sea out, but it also tended to erode the beach available to the public below the mean high-water mark.... At this time, there is little, if any, public beach below the mean high-water mark at the edge of the easement where any normal person would choose to fish....")

In addition to direct obstruction of the public beach right of way which would be caused (at the very least) by placement of the riprap,[5] in the Second Amended Petition,

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[4] See note 1, supra.

[5] (See, e.g., Reily Exhibit 1, at REILY00003 ("Riprap shall be installed at a 2:1 Horizontal:Vertical) slope along the 85 linear foot seawall, and will extend out a maximum of 4-feet waterward of the toe of the new seawall."); DEP Exhibit 52 ("Construct a 395' +/- Upland Retaining Wall" and "Construct an 85' +/- Seawall lined with 13 cubic yards of riprap"); see also T:3, 456 ("Most of [the riprap] is emergent. It's not underwater at high tide, mean high tide.")

Petitioners (including Dr. Fullman) alleged that construction of the proposed project on the Reily Property will cause "adverse impacts to aquatic life, adversely impact the biodiversity of the preserve, cause erosion, and harm the food chain." Consistent with these allegations, at hearing, Petitioners presented testimony to support their claims that the proposed project would adversely affect recreational values provided by natural habitat; (see T:3, 397 ("By destroying the natural habitat for birds and fish provided by a native shoreline, these armoring methods also eliminated recreational resources as well.")); cause scour (see T:3, 412 ("When you put a seawall right into bedrock, the wave energy is so great that it has scoured even the bedrock itself.")); create erosion (see T:3, 415 ("Another aspect associated with seawalls is that because of the refraction of energy around the edges, you have a tendency to create erosion where the seawall ends."); see also id. at 420-21; 462); displace valuable natural habitat (see T:3, 460 ("Without being planted and with the wrong type of rock, the habitat that is being displaced, the shallow water habitat that is being displaced, being that's naturally that way in the Indian River Lagoon and has been that way for thousands of years, that would, under ordinary circumstances would be much more valuable than the placement of rock."); see also id. at 471; 474-75); potentially damage mangroves (see T:3, 462 ("And that erosion taking place at the toe will be potentially problematic for the mangroves because it will actually be eroding behind the mangroves, which is typically a place where you get deposition. This could potentially damage the mangroves, potentially even undermine the mangroves.")) and harm seagrasses (see T:3, 472 ("And with that turbidity we also reduce sunlight. As we lose sunlight we impact the sea grasses, and in impacting the sea grasses we also impact the listed manatee that utilize

the sea grass, as well as the sea grass is very, very important as a habitat for all the fish species in the Indian River Lagoon."); see also id. at 493.). While the ALJ ultimately concluded that the more persuasive record evidence supported his factual finding (see RO: 22-23, ¶ 69) and legal conclusions (see RO: 36-37, ¶ 116; 39, ¶ 126) that these asserted impacts, if any, were not substantial and were outweighed by resulting environmental and other benefits, this evidence is still germane to evaluation of Petitioners' standing.

Based on the foregoing, I conclude (contrary to part of the ALJ's determination included in Conclusion of Law 93) that the general "quality of life" concerns raised by Dr. Fullman relate to the permitted activities, and not "more to the Pitchford's Landing development."[6] I conclude further--and contrary to part of the ALJ's legal determination included in Conclusion of Law 94--that, applying the Agrico test, "the extent to which the construction of the seawall," including its appurtenant riprap (see RO: 7, ¶ 12) will preclude Dr. Fullman, in future, from "us[ing] and enjoy[ing] the shoreline along the river or the adjacent submerged lands" does "give [him] standing to challenge the permit."[7] I also conclude that issues related to the density of the Pitchford's Landing development[8] and its impact on the Jensen Beach community are beyond the scope of this proceeding.

For the above reasons, Petitioners' Exceptions 22 and 26-27 are granted in part, to the limited extent that Dr. Fullman is found to have standing based upon his asserted

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6 See note 1, supra

7 Id.

8 To the extent they are inconsistent, I find that my interpretation regarding the legal significance of issues related to Pitchford's Landing development is more reasonable than the ALJ's interpretation, which is rejected.

environmental interests related to the proceedings at issue, as specifically discussed above, and Conclusions of Law 92-93 and 96-97 are modified accordingly. In all other aspects, Petitioner's Exceptions 22-27 are denied. In view of this ruling, the merits of Reily's application are addressed below.

Exception 2 (Width of Reily Property)

In this Exception, Petitioners contest the accuracy of the ALJ's Finding of Fact (Ro: 6, ¶ 5) reflecting that "more than half the [Reily] property is less than 68 feet wide." This finding is based on competent substantial record evidence (see Reily Exhibit 29); therefore, Petitioners' Exception 2 is denied.

Exception 8 ("Not yet built seawall" on Dutcher property)

In this Exception, Petitioners contest the accuracy of the ALJ's Finding of Fact (Ro: 9, ¶ 17) reflecting that "[t]he seawall will connect to the approved, but not yet built seawall on the Dutcher property immediately to the south of the Reily property." This finding is based on competent substantial record evidence (see T2: 253-55; 269); therefore, Petitioners' Exception 8 is denied.

Exception 9 (Whether "Pitchford's Landing" Will Require SFWMD permits)

In this Exception, Petitioners contest the accuracy of the ALJ's statement, characterized as a Finding of Fact (RO: 9, ¶ 38), that "it cannot be inferred from that evidence alone, however, that the Pitchford's Landing development will require permits from [the South Florida Water Management District ("SFWMD")] under Part IV of Chapter 373, Florida Statutes." This determination appears to be a mixed finding of fact and conclusion of law whose legal significance requires analysis regarding the substantive impact--if any--of the Operating Agreement Concerning Regulation Under

Part IV, Chapter 373, F.S., and Aquaculture General Permits Under Section 403.814, F.S., between South Florida Water Management District and Department of Environmental Protection, dated October 27, 1998 ("the Operating Agreement")[9] on the Department's authority to consider Reily's permit application. That analysis renders legally irrelevant the question of whether Pitchford's Landing development will require South Florida Water Management District permits.

Specifically, Petitioners assert that the proposed project--being part of the planned Pitchford's Landing development--will require South Florida Water Management District permits, and thus, pursuant to the Operating Agreement, must be reviewed by the water management district, rather than DEP. See Petitioners' Exception 9, challenging Finding of Fact 38 (RO: 14, ¶ 38); see also Petitioners' Exceptions 19 and 20, challenging Findings of Fact 82-83 (RO: 27, ¶ ¶ 82-83). Reily counters, in Reily Exception 3 (challenging Conclusions of Law 76-78, RO: 25-26, ¶¶ 76-78), that "the Operating Agreement cannot act in contradiction [to] the Legislative delegation of authority contained in Florida Statutes, which clearly provides the Department and the SFWMD with concurrent jurisdiction over applications such as the one at issue in this proceeding."

Preliminarily, I conclude that the legal import of the Operating Agreement and applicable statutory and administrative rule provisions governing implementation of both the ERP program and the sovereignty submerged lands authorization program--particularly, as these provisions might affect the Department's authority to review and act upon Reily's application in this case--are matters within DEP's "substantive

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[9] The ALJ took official recognition of this agreement. (RO: 4.)

jurisdiction" under section 120.57(1)(k), Florida Statutes. The Operating Agreement is made part of the rules within DEP's regulatory jurisdiction and expertise through its express incorporation by reference in rule 62-113.100(3)(e) of the Florida Administrative Code. DEP thus has primary responsibility for interpreting not only the statutory and administrative rule provisions governing the ERP and sovereignty submerged lands authorization programs implicated, but also the Operating Agreement. DEP's interpretations of these provisions should be accorded considerable deference. See Beard, 614 So. 2d at 1089; Goldring, 477 So. 2d at 534; Dade County Police Benevolent Ass'n, 467 So. 2d at 989. Further, DEP's interpretation need not be the only reasonable interpretation; it is enough if such interpretation is a "permissible" one. See Suddath Van Lines, Inc., 668 So. 2d at 212.

As evidenced by the authorities of which the ALJ took official recognition,[10] the Authorization in this case implicates both regulatory and proprietary statutory and administrative code provisions. First, activities located on sovereignty submerged lands require a proprietary authorization for such use under chapter 253, Florida Statutes. The program is structured so that applicants who ultimately fail to qualify for both the

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[10] "Official recognition was taken of Sections 177.28(1), 253.002, 258.39(9), 373.414, Florida Statutes (2006); Florida Administrative Code Rules 18-20.002, 18-20.003, 18-20.004, 18-20.006, 18-21.003, 18-21.004, 18-21.0051, 62-301.400, Chapter 62-330, 40E-4.021, 40E-4.301, 62-343.050, and 62-340.100 through 62.340.600; the Indian River Lagoon Aquatic Preserves Management Plan, Vero Beach to Ft. Pierce and Jensen Beach to Jupiter Inlet, adopted January 22, 1985, which is incorporated by reference in Florida Administrative Code Rule 18-20.004(7) (hereafter "the Management Plan"); the Operating Agreement Concerning Regulation Under Part IV, Chapter 373, F.S., and Aquaculture General Permits Under Section 403.814, F.S., between South Florida Water Management District and Department of Environmental Protection, dated October 27, 1998 (hereafter "the Operating Agreement"); and the ERP rules of the South Florida Water Management District (SFWMD), which have been adopted by reference by the Department." (RO: 3-4) (footnote omitted).

regulatory permit and the proprietary authorization cannot receive either the permit or the sovereignty submerged lands authorization. See Fla. Admin. Code R. 62-373.075(2) ("No application under this section shall be approved until all the requirements of applicable provisions of Part IV of Chapter 373, F.S., and proprietary authorization under Chapters 253 or 258, F.S., and rules adopted thereunder for both the individual or stand general environmental resource permit and the proprietary authorization are met."); see generally § 373.427, Fla. Stat. (2006) (setting forth the requirements for a consolidated ERP and sovereignty submerged lands authorization).

Sovereignty submerged lands generally extend waterward from the mean high water line of tidal waters. See § 177.28(1), Fla. Stat. (2006). If such lands (as here) are located within a designated Outstanding Florida Water, the applicant must provide the Department with reasonable assurances that the proposed activity will be "clearly in the public interest." See § 373.414(1), Fla. Stat. (2006).

Second, the proposed activities are regulated under the ERP program, which addresses dredging and filling in wetlands and other surface waters. See Ch. 373, Part IV, Fla. Stat. (2006). Additionally, it regulates stormwater runoff[11] quality (i.e., stormwater treatment) and quantity (i.e., stormwater attenuation and flooding of other

[11] In this case, Reily's expert, Mr. Jerner, testified that--although it was not shown on the Authorization--"the Martin County Growth Management requires a 12-inch swale landward of the seawall cap ...." (T1: 91-92.) He clarified further that, even if Martin County did not require that swale, the riprap and seawall together would "creat[e] somewhat of a dry retention area where there [are] no dry retention areas." Id. at 92. Thus, the ALJ specifically found that "[t]he areas landward of the seawall and retaining wall will be backfilled to the level of Indian River Drive. There will be swales and/or dry retention areas in the backfilled areas to capture storm water and/or direct it away from the river." (RO: 8-9, ¶ 16) (Emphasis added). While these structures were not included in the Authorization (see T1: 91-92; Reily Exhibit 1 at REILY00003), they are subject to DEP's regulatory jurisdiction under the ERP program.

properties), including such effects caused by alterations of uplands. Id. Issuance of an ERP authorization also constitutes a water quality certification or waiver (as applicable) under section 401 of the Clean Water Act, 33 U.S.C. 1341. See Reily Exhibit 1 at REILY00003. Further, issuance of an ERP authorization in coastal counties constitutes a finding of consistency with the Florida Coastal Zone Management Program, as required by section 307 of the Coastal Zone Management Act. See id.

The Department and the water management districts have concurrent jurisdiction to implement the ERP program. See § 373.016(5), Fla. Stat. (2006) ("The department may exercise any power herein authorized to be exercised by a water management district; however, to the greatest extent practicable, such power should be delegated to the governing board of a water management district.") (Emphasis added). The ERP program is implemented jointly by the Department and four water management districts in accordance with the terms of operating agreements, which identify the respective workload division of "responsibilities." See § 373.046(4), Fla. Stat. (2006) (through which the Legislature recognizes and confirms "the division of responsibilities between the department and the water management districts") (emphasis added). Essentially the same rules and statutory provisions are applied by each agency in implementing the program. See note 10, supra. As Reily correctly observes (see Reily Exception 3), the Operating Agreement provides for a division of responsibilities in implementing these programs--not a split of jurisdictional authority.[12]

Based upon the foregoing, I concur with the ALJ's ultimate legal conclusion that "Reily's permit application was properly reviewed by the Department." (RO: 27, part of

[12] I find that my interpretation of the legal effect of the Operating Agreement is more reasonable than the ALJ's interpretation, which is rejected.

the first sentence of ¶ 83.) Having determined (above) that the Operating Agreement does not divest the Department of its concurrent jurisdiction to act on an ERP permit application submitted to it and not sent to the water management district for further review,[13] it is unnecessary, as serving no practical purpose, to decide whether the proposed project might have been transferred for handling to the water management district, had it initially been presented as part of the larger Pitchford's Landing development.

Based on the foregoing, I decline to adopt, as nonessential to the final disposition of this case, RO Finding of Fact 38 (RO: 14, ¶ 38), reflecting that "[i]t cannot be inferred from that evidence alone, however, that the Pitchford's Landing development will require permits from SFWMD under Part IV of Chapter 373, Florida Statutes." For the reasons stated above, Petitioners' Exception 9 is denied.

Exception 10 (Condition of Reily Property)

In this Exception, Petitioners contest the accuracy of the ALJ's Finding of Fact (Ro: 16, ¶ 45), that "[m]ost of the shoreline along the Reily property ...has been previously disturbed, and is largely barren of vegetation." This finding is based on competent substantial record evidence (see, e.g., T1: 79; 122; T2: 179; 257; 260); therefore, Petitioners' Exception 10 is denied.

Exception 11 (Location of Seagrasses)

In this Exception, Petitioners contest the accuracy of the Finding of Fact 48 (RO: 17, ¶ 48), that "[t]here are seagrasses in the vicinity of the Reily property... 30 to 50 feet from the shoreline." Because this finding is based on competent substantial record

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[13] See note 12, supra.

evidence (see T1: 135-36; T2: 198), Petitioners' Exception 11 is denied.

Exception 12 (Protection from Erosion)

In this Exception, Petitioners contest the ALJ's Finding of Fact (RO: 18, ¶ 54), that "[t]he project will, however, have [the] beneficial effects [of protecting Indian River Drive and the upland property from erosion]." This finding is based on competent substantial record evidence (see T1: 146-48); thus, Petitioners' Exception 11 is denied.

Exception 13 (Use and Effects of Riprap)

In this Exception, Petitioners assert that the ALJ's Finding of Fact regarding the use and effects of riprap (RO: 20, ¶ 60) "is "not supported by the record," focusing on the first two sentences of Finding of Fact 60, which reflect:

> Riprap is a better method of shoreline stabilization than a vertical seawall without riprap. The riprap helps to prevent shoaling by absorbing wave energy, and it also provides habitat for benthic organisms, crustaceans, and small fish.....

These disputed findings are based on competent substantial record evidence (see T1: 85; 88-89; T2: 224). Therefore, Petitioners' Exception 13 is denied.

Exception 14 (Vegetation Alone Not Effective)

In this Exception, Petitioners assert that the ALJ's Finding of Fact reflecting that "[t]he use of native vegetation to provide shoreline stabilization along the Reily property is not a reasonable alternative under the circumstances" and stating the factual bases for such finding (RO: 20, ¶ 61) "is "not supported by the record." Finding of Fact 61 is supported by competent substantial record evidence (see T1: 78-79; 85; 88-89; 140; T2: 183; 218-19; 224; 256). Therefore, Petitioners' Exception 14 is denied.

Exception 15 (Riprap Provides Benefit)

In this Exception, Petitioners dispute the ALJ's Finding of Fact that "[t]he project will not adversely affect the conservation of fish and wildlife and, to the contrary, the riprap will provide a benefit to fish and wildlife by providing shelter and habitat for benthic organisms, crustaceans, and small fish." (RO: 21, ¶ 63.) This finding is supported by competent substantial record evidence (see T1: 82-85; 89-91). Therefore, Petitioners' Exception 15 is denied.

Exception 16 (Project Will Not Cause Shoaling or Erosion)

In this Exception, Petitioners dispute the ALJ's Finding of Fact that "[t]he project will not cause harmful erosion or shoaling or adversely affect water quality in the area," and related findings. (RO: 22, ¶ 67.) These findings are supported by competent substantial record evidence (see T1: 88; 86; 91-92; 140; T2: 200-01; 207–08; 220.) Therefore, Petitioners' Exception 16 is denied.

Exceptions 17-18; 21 (Hardened Shorelines of Neighboring Properties)

In these Exceptions, Petitioners dispute the ALJ's statements, contained in Findings of Fact 68 and 69, that "[t]he adjacent properties already have hardened shorelines" (RO: 22, ¶ 68) and that the Reily Property is located "between two hardened shorelines (RO: 22, ¶ 69.) There is competent substantial record evidence supporting the finding that the property to the north of the Reily Property (where Conchy Joe's restaurant is located) already has a hardened shoreline, and that the property to the south (the Dutcher property) has an existing permit for construction of a seawall with riprap. (see T1: 83; 86; T2: 202; 209; 255; 269; T3: 496.) A review of the entire record reflects no evidence that shoreline hardening currently exists on the Dutcher property.

However, Smith testified that, in her environmental assessment, she doesn't "go under the assumption that [a seawall is] not going to go in once it's permitted." (T2: 253.) Therefore, the analysis of secondary and cumulative impacts, and of impacts on the aquatic preserve and the Indian River Lagoon system as a whole, remains unchanged. Based on the foregoing, Petitioners' Exception 16 is granted to the extent that the second sentence of Finding of Fact 68 is modified to reflect: "The adjacent property to the north already has a hardened shoreline, and the adjacent property to the south has an existing permit for construction of a seawall with riprap." Petitioners' Exceptions 17 and 21 are granted to the extent that Finding of Fact 69 is modified to reflect that the project is located "near a man-made causeway and between an adjacent property to the north which already has a hardened shoreline, and an adjacent property to the south which has an existing permit for construction of a seawall with riprap." In all other respects, Petitioners' Exceptions 17, and 21 are denied; see also further discussion of Petitioners' Exception 18 below.

Exception 18 ("De Minimus" Impact)

In this Exception, Petitioners also dispute the ALJ's Finding of Fact that "[a]ny impact (either positive or negative) of the project on the aquatic preserve and the Indian River Lagoon system as a whole will be de minimus in light of [the] size of the system in comparison to the small size of the project and its location [near a man-made causeway and between an adjacent property to the north which already has a hardened shoreline, and an adjacent property to the south which has an existing permit for construction of a seawall with riprap]." (RO: 22, ¶ 69; as modified, above.) In context, the ALJ appears to have intended to use the phrase "de minimus" to convey its generally accepted

meaning, rather than as a legal term of art. Cf. § 373.406(6), Fla. Stat. (2006) ("Any district or the department may exempt from regulation under this part those activities that the district or department determines will have only minimal or insignificant individual or cumulative adverse impacts on the water resources of the district.").

Accordingly, Finding of Fact 69 is modified to substitute the phrase "will not be substantial" for the phrase "will be de minimus."[14] As so modified, there is competent, substantial record evidence to support Finding of Fact 69. (See T1: 123-24; T2: 255; 269; Respondent Reily Exhibit 29 (reflecting Jensen Beach Causeway to the south of the Reily and Dutcher properties). Therefore, except to the extent that Finding of Fact 69 has been modified, Petitioners' Exception 18 is denied.

Exceptions 19-20 (Need for SFWMD Permit)

In these Exceptions, Petitioners contend that the second sentence of Conclusion of Law 82, and Conclusion of Law 83 in its entirety, are not supported by the record. These conclusions reflect that "no credible evidence was presented that the Pitchford's Landing development has received a permit under Part IV of Chapter 373, Florida Statutes, or that it will require such a permit," and that "Reily's permit application was properly reviewed by the Department under the Operating Agreement because Petitioners failed to prove that the larger Pitchford's Landing development...has received or will require permits under Part IV of Chapter 373, Florida Statutes." This determination appears to be a mixed finding of fact and conclusion of law whose legal significance is affected by the analysis, supra at pp. 20-25, regarding the substantive

[14] To the extent such modification of the phrase "de minimus" might be construed as a change in legal interpretation, I conclude that my interpretation is more reasonable than the ALJ's interpretation, which is rejected.

impact--if any--of the Operating Agreement on the Department's jurisdiction to consider Reily's permit application in this case.

That analysis renders legally irrelevant the questions of whether Pitchford's Landing development will require South Florida Water Management District permits, or whether Reily's permit application was properly reviewed by the Department "under the Operating Agreement." Accordingly, I decline to adopt Conclusion of Law 82 (RO: 27, ¶ 82), reflecting that "no credible evidence was presented that the Pitchford's Landing development has received a permit under Part IV of Chapter 373, Florida Statutes, or that it will require such a permit" [from the water management district], and modify RO Conclusion of Law 83 (RO: 27, ¶ 83) to delete the phrase, "under the Operating Agreement because Petitioners failed to prove that the larger Pitchford's Landing development (of which the permitted activity is clearly a part) has received or will require permits under Part IV of Chapter 373, Florida Statutes" [from the water management district]. On the above basis, Petitioners' Exceptions 19-20 are denied.[15]

Exceptions 28; 30 (Location of Seawall and Retaining Wall)

Petitioners further contend, in Petitioners' Exceptions 28 and 30 (challenging Conclusions of Law 111 (RO: 34, ¶ 111) and 119 (RO: 37, ¶ 119), respectively) that the ALJ's repeated observation that "[t]he only aspect of the project that will be located on sovereignty submerged lands [or occur in the aquatic preserve] is the riprap; the remainder of the project will occur landward of the MHWL" (emphasis added) is not supported by competent substantial record evidence. Petitioners assert that this

[15] I find that my interpretations regarding the Operating Agreement and the legal bases establishing the Department's authority to act on Reily's application are more reasonable than the ALJ's interpretations regarding these issues, which (to the extent they are inconsistent) are rejected.

sentence should be modified to reflect that "the only aspect of the project that will be located on Sovereignty Submerged Lands is the riprap; the remainder of the project will occur at or landward of [the] MHWL."

The undisputed record evidence establishes that the proposed seawall in this case would be located "at" or "on" the MHWL. See Finding of Fact 13 ("The seawall will be located on the mean high water line (MHWL)."); Reily Exhibit 1 at REILY00003. The MHWL is not "on the Reily property;" rather, it constitutes the boundary between the Reily property and the sovereignty submerged lands. See § 177.28(1), Fla. Stat. (2006) (reflecting that the MHWL along the shores of land immediately bordering on navigable water is the boundary line between private ownership of upland property and the foreshore owned by the state in its sovereign capacity).

Therefore, upon review of the entire record, I conclude that there is no competent, substantial evidence to support the factual statement contained in Conclusion of Law 111, and repeated in Conclusion of Law 119, that "the remainder of the project [other than the riprap] will occur landward of the MHWL." Rather, a correct statement, in each paragraph, would be that the riprap will be located seaward of the MHWL on sovereignty submerged lands; the seawall will be located at or on the MHWL; and the retaining wall will be located landward of the MHWL. Accordingly, Petitioners' Exceptions 28 and 30 are granted, and Conclusions of Law 111 and 119 are hereby modified to reflect the revisions indicated above.

Exception 29 (Riprap Not Contrary to the Public Interest)

In this Exception, Petitioners dispute Conclusion of Law 116, reflecting that "[t]he more persuasive evidence establishes that the riprap authorized by the permit is 'not

contrary to the public interest;'" that it "will have a de minimus impact on fish and wildlife habitat;" and that its "environmental and other benefits...clearly exceed [its] environmental and other costs...." In context, the ALJ appears to have used the phrase "de minimus" to convey its generally accepted meaning, rather than using it as a legal term of art. Accordingly, Conclusion of Law 116 is modified to substitute the phrase "will not have a substantial impact" for the phrase "will have a de minimus impact."[16]

There is competent, substantial record evidence to support Conclusion of Law 116, as so modified. (See T1: 123-24; T2: 255; 269; Respondent Reily Exhibit 29 (reflecting Jensen Beach Causeway to the south of the Reily and Dutcher properties)). Therefore, except as provided for above, Petitioners' Exception 29 is denied.

Exception 31 (Placement of Riprap Only Reasonable Alternative)

In Exception 31, Petitioners dispute Conclusion of Law 126 which reflects that "the placement of the riprap within the aquatic preserve is the only reasonable alternative in light of the location of the seawall on the MHWL," and "will have a de minimus environmental impact on the aquatic preserve, individually and on a cumulative basis..." In context, the ALJ appears to have intended to use the phrase "de minimus" to convey its generally accepted meaning, rather than as a legal term of art.

Accordingly, Conclusion of Law 126 is modified to substitute the phrase "will not have a substantial environmental impact" for the phrase "will have a de minimus

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[16] To the extent such modification of the phrase "de minimus" might be construed as a change in legal interpretation, I conclude that my interpretation is more reasonable than the ALJ's interpretation, which is rejected.

environmental impact."[17] Because this Conclusion of Law, as so modified, is supported by competent, substantial record evidence (see T1: 78-80), except to the extent provided for above, Petitioners' Exception 31 is denied.

Exception 32 (Riprap Not Contrary to the Public Interest)

In Exception 32, Petitioners contest Conclusion of Law 132, which reflects that "[t]he more persuasive evidence establishes that, on balance, the riprap portion of the project is clearly in the public interest based upon the standards in Section 373.414(1)(a), Florida Statutes, and the implementing rules." In this conclusion, the ALJ applied the correct test to the riprap portion of the project, and the factual predicate for his legal conclusion is supported by competent, substantial record evidence. (See T1: 56-95; 88-95; T2: 202-223.) On this basis, Exception 32 is denied.

Exception 33 (Riprap Clearly in the Public Interest)

In Exception 33, Petitioners contend (contrary to Conclusion of Law 134) that Reily did not provide "reasonable assurances that the riprap (which is the only portion of the project subject to the proprietary authorization) is 'not contrary to the public interest' under Florida Administrative Code Rule Chapter 18-21; that the riprap is consistent with the additional standards and criteria in Florida Administrative Code Rule Chapter 18-20; and that the riprap is clearly in the public interest as required by Section 373.414, Florida Statutes." To obtain proprietary authorization for an activity proposed to be located (as here) in an aquatic preserve, the "additional standards and criteria" set forth in chapter 18-20 of the Florida Administrative Code also require, inter alia, that the

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[17] To the extent such modification of the phrase "de minimus" might be construed as a change in legal interpretation, I conclude that my interpretation is more reasonable than the ALJ's interpretation, which is rejected.

activity be "in the public interest," see Fla. Admin. Code Rule 18-20.004(1)(b), and that the benefits clearly exceed the costs. See Fla. Admin. Code Rule 18-20.004(2).

Whether an applicant has provided "reasonable assurances" that a proposed project will comply with applicable environmental criteria and standards is a mixed question of fact and law. See Sierra Club v. Dep't of Envtl. Protection, 18 F.A.L.R. 2257, 2260 (Fla. DEP 1996). I conclude that the legal determination regarding such "reasonable assurances" concerns a matter within DEP's "substantive jurisdiction" under section 120.57(1)(k), Florida Statutes, which, in the final analysis, must be made by DEP. See id.

Here, the ALJ has applied correct legal standards in Conclusion of Law 134, and the factual predicate for his conclusion is supported by competent, substantial record evidence. For this reason, Petitioners' Exception 33 is denied.

Exception 34 (Except for Wetland Impacts, Reasonable Assurances Provided)

In Exception 34, Petitioners challenge Conclusion of Law 136, reflecting that, "[e]xcept for [the issue of wetland impacts], Reily provided reasonable assurances that the project is clearly in the public interest based upon the standards in Section 373.414(1)(a), Florida Statutes, and the implementing rules." As analyzed in discussing Petitioners' Exception 33 above, whether an applicant has provided "reasonable assurances" that a proposed project will comply with applicable environmental criteria and standards is a mixed question of fact and law. The legal issue comprised by such determination is a matter within DEP's "substantive jurisdiction" under section 120.57(1)(k), Florida Statutes.

The ALJ has applied the correct legal standard in Conclusion of Law 136, and the factual basis for his conclusion is supported by competent, substantial record evidence. For this reason, Petitioners' Exception 34 is denied.

II. REILY'S EXCEPTIONS RELATED TO DEP'S AUTHORITY (3 OF 6 EXCEPTIONS)

Reily Exceptions 1; 3; 5 (DEP's Authority to Review Reily's Application)

In these Exceptions, Reily challenges the extent of DEP's authority to review the Reily application and authorize the proposed project activities on the Reily Property. Reily begins by arguing that those portions of the project which are subject to regulation were properly authorized by DEP, rather than the water management district. (See Reily Exception 3, challenging Conclusions of Law 76-78 (RO: 25-26, ¶¶ 76-78), which address the legal effect of the Operating Agreement). In that regard, Reily asserts that "the Operating Agreement cannot act in contradiction with the Legislative delegation of authority contained in Florida Statutes, which clearly provides the Department and the SFWMD with concurrent jurisdiction over applications such as the one at issue in this proceeding," Id. However, Reily also maintains that the seawall and retaining wall are located in uplands wholly outside wetland resources, and are therefore excluded from the Department's regulatory and permitting jurisdiction. See Reily Exception 1 (challenging Finding of Fact 12, RO: 8, ¶ 12) (describing the scope of the authorized project); and Exception 5 (challenging Conclusions of Law 98-102 (RO: 31-32, ¶¶ 98-102), reflecting that DEP has jurisdiction over the entire project, and that Reily is estopped from challenging DEP's position that "the seawall is within the Department's jurisdiction."

With respect to Reily Exception 5, In RO Conclusion of Law 99, the ALJ

determined the estoppel effect of Reily's failure to contest the Department's asserted "position early in the permitting process that 'the seawall is within the Department's jurisdiction." I conclude that the question of whether Reily is estopped to raise this issue is not a matter within DEP's "substantive jurisdiction" under section 120.57(1)(k), Florida Statutes. Cf. Deep Lagoon Boat Club, Ltd. v. Sheridan, 784 So. 2d 1140, 1142 (Fla. 2d DCA 2001) ("Although the Secretary possesses many powers in conjunction with the exercise of the Department's substantive jurisdiction, the power to reverse the ALJ's decision not to apply collateral estoppel is not one of them.").

Based on the foregoing, I concur with the ALJ's ultimate legal conclusions that "Reily's permit application was properly reviewed by the Department" (RO: 27, part of the first sentence of ¶ 83) and that "the entire project--consisting of the seawall, retaining wall, and riprap--is subject to the Department's jurisdiction" (RO: 32, ¶ 102). Therefore, with the exception of the quoted language from Conclusion of Law 83 above, I decline to adopt RO Conclusions of Law 72-73, 75-78, and 80-83, as inconsistent with my legal interpretations and conclusions above related to the effect of the Operating Agreement on, and the legal bases establishing, the Department's authority to review and act upon Reily's application.

In Reily Exception 1 (challenging Finding of Fact 12), Reily asserts that DEP had no jurisdiction to authorize the seawall and the "retaining wall on the Reily property." (RO: 8, ¶ 12.) Upon review of the entire record, I conclude that--to the extent RO Finding of Fact 12 might be construed to describe the seawall, as well as the retaining wall, as being located "on the Reily property" (RO: 8, ¶ 12)--there is no competent,

substantial evidence to support such finding. See discussion infra at pp. 30-31. Accordingly, Reily Exception 1 is denied.

Moreover, as previously discussed, the Department has proprietary and ERP regulatory jurisdiction over the riprap portion of the proposed project, and ERP regulatory jurisdiction over the remaining project areas and structures (encompassing the seawall and retaining wall). For these reasons, Reily Exception 3 is granted. Reily Exception 5 is denied; however, I decline to adopt RO Conclusion of Law 98 as inconsistent with the legal analysis above.[18] Conclusion of Law 101 is addressed in further detail in Section III, infra.

III. REILY'S EXCEPTIONS (2 OF 6) AND DEP'S EXCEPTIONS (3 EXCEPTIONS) RELATED TO REASONABLE ASSURANCES REGARDING WETLAND RESOURCES

Reily Exceptions 2; 6; and DEP Exceptions 1-3
(~~Reasonable~~ Assurances Regarding Impacts to Wetland Resources)

In these Exceptions, both Reily and DEP dispute the ALJ's factual findings, evidentiary rulings, and legal conclusions culminating in a determination that Reily has not provided reasonable assurances that there are no wetland resources located on the Reily Property landward of the MHWL that will be adversely impacted by the proposed activities approved by the Authorization, and, thus, that such activities are "clearly in the public interest." See DEP Exceptions 1-3, challenging Findings of Fact 18, 20, 56 and 59 and Conclusions of Law 101, 133, 135-36; Reily Exception 2, challenging Findings of Fact 58-59 and Exception 6, challenging Conclusions of Law 133; 135-36. Whether an applicant has provided "reasonable assurances" that a proposed project will comply with

[18] I find that my interpretations regarding the legal bases establishing the Department's authority to act on Reily's application are more reasonable than the ALJ's interpretations regarding these issues, which are rejected to the extent they are inconsistent.

applicable environmental criteria and standards is a mixed question of fact and law. See Sierra Club, 18 F.A.L.R. at 2260. I conclude that the legal determination regarding such "reasonable assurances" concerns a matter within DEP's "substantive jurisdiction" under section 120.57(1)(k), Florida Statutes, which, in the final analysis, I must make.

The crux of the factual component of the "reasonable assurances" determination requires an assessment--based upon review of the entire record, viewed in light of the ALJ's evidentiary rulings regarding the weight and credibility of the testimony presented --of whether there is competent, substantial record evidence to support the ALJ's finding that there "may be wetlands in some of the areas landward of the MHWL that will be backfilled behind the retaining wall and seawall, and that the impacts to those areas have not been appropriately quantified or assessed." (RO: 43, ¶ 135.) With respect to this evaluation, the ALJ first correctly observes:

> 57. The Department's wetland delineation rules in Florida Administrative Code Rule Chapter 62-340 contain a detailed quantitative methodology to be used in making formal wetland boundary delineations. That methodology is to be used only where the wetland boundaries cannot be delineated through a visual on-site inspection (with particular attention to the vegetative communities and soil conditions) or aerial photointerpretation in combination with ground truthing. Thus, the Department's failure to do a formal wetland delineation (with soil sampling, etc.) in the project area was not per se inappropriate, as Mr. Egan seemed to suggest.

(Emphasis added).

In this case, pursuant to rule 62-340.300 of the Florida Administrative Code (Delineation of Wetlands), the Department conducted repeated visual on-site inspections. See DEP Exhibits 55; 57; (see also T2: 197; 212). In DEP Exception 2, the Department argues that part of the ALJ's Finding of Fact 56, which reflects (in pertinent part) that Smith acknowledged that she did not "ground-truth" the wetland

boundaries, is not supported by competent, substantial record evidence. While the ALJ states, in Finding of Fact 56, that the "Department's witness, Jennifer Smith... acknowledged that she did not ground-truth the wetland boundaries," this appears to be an inadvertent misstatement of Smith's testimony confirming that she did not do any aerial photointerpretation, which is part of the "aerial photointerpretation in combination with ground truthing" test. (T2: 233.) The only record evidence regarding Smith's activities on the Reily Property reflects that she conducted a site visit on November 12, 2005. (Id. at 197; 212); see also Fla. Admin. Code R. 62-340.200(7) ("'Ground truthing' means verification on the ground of conditions on a site."). Therefore, DEP Exception 2 is granted in part, insofar as, upon review of the entire record, I conclude there is no competent, substantial record evidence to support the conclusion that Ms. Smith "acknowledged" that she did not "ground-truth" the Reily project site; in all other respects, DEP Exception 2 is denied.

Additionally, other on-site inspections were conducted by field staff on at least two separate occasions, and reports memorializing the results of those visual inspections were admitted into evidence without objection. See DEP Exhibits 55; 57.[19] Thus, in determining the extent of wetland resources present on the Reily Property, the Department implemented that part of rule 62-340.300 which provides for delineation of the wetland boundary "through a visual on-site inspection (with particular attention to the

[19] In an administrative proceeding, hearsay evidence may be used as the sole basis to support a determination if it would be admissible in court pursuant to a recognized hearsay exception. See Harris v. Game and Fresh Water Fish Comm'n, 495 So. 2d 806, 808 (Fla. 1st DCA 1986); § 120.57(1)(c), Fla. Stat. (2006). Here, the business records exception applies to DEP Exhibits 55 and 57, which were site inspection reports prepared in the ordinary course of business and admitted into evidence without objection. See 90.803(6)(a), Fla. Stat. (2006); (T2: 190; 221-22).

vegetative communities and soil conditions)."

Petitioners' expert, Mr. Jerner, and DEP's expert, Ms. Smith, both testified regarding the extent of wetland resources observed on the Reily Property. However, the ALJ did not find their testimony in this regard to be persuasive. Specifically, the ALJ made the following related Findings of Fact:

> 55. No formal wetland delineation was done in the areas landward of the MHWL or the areas that will be backfilled behind the proposed seawall and retaining wall and, as noted above, Reily did not identify the location of wetland vegetation and any impacts to such vegetation in response to the RAI.
>
> 56. Mr. Jerner testified that, in his opinion, there are no wetlands landward of the MHWL in the area of the seawall, and that any wetlands in the area of the retaining wall are waterward of that wall, which will be at least five feet landward of the MHWL. The Department's witness, Jennifer Smith, testified that it was her understanding that the wetlands did not extend into the areas behind the seawall or retaining walls, but she acknowledged that she did not ground-truth the wetland boundaries and that wetland vegetation appeared to extend into areas that will be backfilled. Petitioners' expert, James Egan, testified that the wetlands likely extended into areas that will be backfilled based upon the topography of the shoreline and the wetland vegetation that he observed, but he made no effort to delineate the extent of the wetlands in those areas and he testified that he would defer to the Department's wetland delineation if one had been done.
>
> * * *
>
> 58. That said, the more persuasive evidence fails to establish that Reily made an appropriate effort to delineate the landward extent of the wetlands in the project area. No delineation of the wetland areas was provided in response to the RAI, and Ms. Smith's testimony raises more questions than it answers regarding the correctness of Mr. Jerner's conclusory opinion that the wetland boundary is waterward of the retaining wall.
>
> 59. Without an appropriate delineation of the wetland boundaries, it cannot be determined with certainty whether or not there are wetlands in the areas that will be backfilled. The evidence establishes there may be wetlands in those areas; and if there are, the impacts to those wetlands have not been assessed or mitigated.

Importantly, in assessing the weight and credibility to be accorded the expert testimony of Jerner and Smith, the ALJ determined:

> 135. Reily failed to provide reasonable assurances that the other aspects of the project (which are also subject to the Department's regulatory authority) are clearly in the public interest as required by Section 373.414, Florida Statutes, because the evidence establishes that there may be wetlands in some of the areas landward of the MHWL that will be backfilled behind the retaining wall and seawall, and that the impacts to those areas have not been appropriately quantified or assessed. On this issue, Reily failed to meet its initial burden to present credible and credited evidence regarding the non-existence of wetlands in the areas to be impacted by the project; the testimony of Mr. Jerner and Ms. Smith on that issue was not persuasive.

(RO: 43, ¶ 135) (Emphasis added). For this reason, the ALJ concluded:

> 133. The evidence establishes that there are wetlands landward of the MHWL and that the wetlands (including areas under the mangrove canopy) may extend into the areas that will be backfilled behind the seawall and/or retaining wall. The boundaries of the wetland areas were not delineated by Reily, and no mitigation was required by the Department for any impacts to those areas. The potential impacts of the project on the water resources cannot be fully determined without a more precise delineation of the wetland boundaries than was provided in the testimony of Mr. Jerner and Ms. Smith. As a result, Reily failed to provide reasonable assurances that that the project as a whole is clearly in the public interest.

(RO: 42, ¶ 133) (Emphasis added).

In their Exceptions, both DEP and Reily argue that there is no competent, substantial record evidence to support the ALJ's determinations (1) that there are wetlands landward of the MHWL which "may extend into areas that will be backfilled," and (2) that Reily has failed to provide reasonable assurances that no on-site wetland resources would be impacted by the project activities. (See, e.g., T2: 198-99; 234.) However, the expert testimony of Jerner and Smith was specifically determined by the ALJ to be unpersuasive. (RO: 43, ¶ 135.) The decision to accept one expert's

testimony over another's is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. See Collier Medical Center, 446 So. 2d at 85. Further, any deficiency in the factual predicate on which an expert's opinion is based relates to the weight of the evidence, a matter also within the ALJ's province, as the trier of fact. See Gershanik v. Dep't of Prof'l Regulation, 458 So. 2d 302, 305 (Fla. 3rd DCA 1984).

As applied here, I conclude that the ALJ's determination that there are wetlands landward of the MHWL and that the wetlands (including areas under the mangrove canopy) may extend into the areas that will be backfilled behind the retaining wall (RO: 32, ¶ 101; 42, ¶ 133) is supported by competent, substantial record evidence. I base this conclusion on the site inspection reports that were submitted into evidence as DEP Exhibits 55 and 57.[20] While the initial staff report prepared by the original permit processor (DEP Exhibit 55) reflects that "[t]he upland retaining wall has been located to avoid any impacts to mangroves and surface waters," a later site inspection report by the same field staff (DEP Exhibit 57) contains the notation: "Cross-section shows wall at a closer distance to mangrove roots – check for the Avicennia germinans pneumatophores, make sure they are [at] a distance from those, if present." At hearing, when Smith was asked the question, "How far do [the mangrove branches] go from the roots?", she replied: "From the roots, I did not take a measurement from the roots as far as how far the mangrove branches extend." (T2: 234) (Emphasis added). Therefore, while the record reflects that the on-site inspection procedure authorized by rule 62-340.300 of the Florida Administrative Code was followed in this case, it fails to establish

[20] See note 19, supra.

that an appropriate delineation of the boundary of the wetlands on the Reily Property--as required by rule 62-340.300(1), and most particularly, in conjunction with ensuring that the retaining wall would be located "at a distance from" the mangrove roots (as specified in the latter site inspection report)--was actually accomplished.

On this basis, I conclude that there is competent, substantial evidence to support the ALJ's finding and conclusions in RO Conclusion of Law 133 that (1) "The evidence establishes that there are wetlands landward of the MHWL and that the wetlands (including areas under the mangrove canopy) may extend into the areas that will be backfilled behind" the "retaining wall;" (2) "The boundaries of the wetland areas were not delineated by Reily, and no mitigation was required by the Department for any impacts to those areas;" and (3) "The potential impacts of the project on the water resources cannot be fully determined without a more precise delineation of the wetland boundaries than was provided in the testimony of Mr. Jerner and Ms. Smith." Further, there is competent, substantial record evidence to support the ALJ's determination in Conclusion of Law 135 that "Reily failed to meet its initial burden to present credible and credited evidence regarding the non-existence of wetlands in the areas to be impacted by the project." However, based on the same analysis, and the discussion which immediately follows, I decline to adopt the remaining portions of RO ¶ ¶ 133 and 135 (not quoted in the above paragraph) in this Final Order, and ¶ 101 is modified to delete the phrase "the seawall."

With respect to the ALJ's conclusions related to the mangrove canopy, having reviewed the entire record, I find that there is no competent, substantial record evidence to conclude that the on-site wetland resources in this case will necessarily be

coextensive with the limits of the mangrove canopy. (T2: 179; 232.) To the extent that such a determination might be implied from the Recommendation,[21] any Findings of Fact,[22] or Conclusions of Law, [23] upon review of the entire record, it is specifically rejected as unsupported by any competent, substantial record evidence. (See id.)[24]

Based on the foregoing, Reily Exception 2 is denied. Reily Exception 6 is granted to the extent that I have determined, upon review of the entire record, that there is no competent, substantial evidence to support a conclusion that the boundary of the wetland resources on the Reily property is necessarily coextensive with the mangrove fringe canopy or that there "may be" wetlands located behind the seawall;[25] in all other respects, Reily Exception 6 is denied.

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[21] (See RO: 16, ¶ 45, Recommendation) ("RECOMMENDED that the Department issue a final order dismissing Petitioners' challenge to the permit/authorization for a lack of standing, but if the Department determines that Petitioners have standing, it should issue a final order denying permit/authorization No. 43-017751-003 absent an additional condition requiring an appropriate wetland delineation to show that the upland aspects of the project will occur outside of the mangrove canopy and any other wetland areas landward of the MHWL.") (Emphasis added).

[22] (See, e.g., RO: 11, ¶ 24) ("The sheet referenced in the response to the RAI...is also inconsistent with other drawings submitted by Reily (e.g., sheet 3 of 4), which show that the proposed retaining wall will be located under the mangrove canopy, not landward of the existing mangroves.") (Emphasis added).

[23] (See, e.g., RO: 42, ¶ 133) ("Thus, if it had been shown through a formal wetland delineation (or more persuasive evidence than the testimony of Mr. Jerner and Ms. Smith) that the upland aspects of the project will be located outside of the mangrove canopy and any other wetland areas landward of the MHWL, then the permit could have been approved.") (Emphasis added).

[24] Additionally, my legal interpretation regarding whether the wetland boundary on the Reily property will necessarily coincide with the limits of the mangrove fringe canopy is found to be more reasonable than the ALJ's interpretation, which is rejected.

[25] (See testimony of Petitioner's Expert, Mr. Egan, T3: 455) ("My point wasn't to establish that there was wetlands on the site. I didn't visit the site and I wasn't attempting to prove that there was wetlands there.")

For the same reasons, DEP Exception 1 is granted in part, only insofar as I have determined, upon review of the entire record, that there is no competent, substantial evidence to support a conclusion that the boundary of the wetland resources on the Reily property is necessarily coextensive with the mangrove fringe canopy or that there "may be" wetlands located behind the seawall;[26] in all other respects, DEP Exception 1 is denied. DEP Exception 3 is granted to the extent that, as discussed above, any statement or implication that such wetland boundaries would necessarily include the full extent of the mangrove fringe canopy has been rejected; in all other respects, DEP Exception 3 is denied.

IV. REMAINING EXCEPTIONS

Reily Exception 4 (Petitioners' Standing Claims Speculative)

In Reily Exception 4, Reily contends that the ALJ should have concluded that the Petitioners' lacked standing on the additional basis that their claimed injuries were speculative. However, Dr. Fullman testified that he had enjoyed the river "every day for many years now," and that his concern was that his "quality of life, which includes many intangibles, such as, you know, my ability to enjoy my property and enjoy my area in which I live, will be changed for the rest of [his] life." Therefore, as to Dr. Fullman, the record does not support the argument that his alleged injuries are "speculative." With respect to the injuries claimed by Parkinson and Cilurso, I have no authority to make independent or supplemental findings of fact to support the requested legal conclusion that their injuries were "speculative." For these reasons, Reily Exception 4 is denied.

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[26] See note 25, supra.

RO Typographical Errors

Lastly, the following typographical errors in the RO are corrected: Finding of Fact 34: "Fuller" is changed to "Fullman" (13, ¶ 34) (see Petitioners' Exceptions at 9, ¶ 9, and Reily's Exceptions, Clarification 1, which are granted); Conclusion of Law 112: extra "to" is deleted (RO: 35, ¶ 112) (see Petitioners' Exceptions at 26, ¶ 30, which is granted); Conclusion of Law 133: extra "that" is deleted (RO: 42, ¶ 133) (see Reily's Exceptions, Clarification 2, which is granted); (RO: 18, ¶ 53): "riprip" in the first sentence is changed to "riprap" (no Exception was filed regarding this obvious scrivener's error).

It is therefore ORDERED:

A. All of the Administrative Law Judge's findings of fact and conclusions of law not expressly modified or rejected herein are adopted and incorporated by reference.

B. Reily's application for Environmental Resource Permit and Sovereignty Submerged Lands Authorization No. 43-0197751-003 is hereby DENIED, without prejudice to Reily's right to submit a new application for permit/authorization which complies with all applicable statutory and rule requirements.

Any party adversely affected by these proceedings has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the clerk of the Department.

DONE AND ORDERED this 29th day of March, 2007, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

MICHAEL W. SOLE
Secretary

Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

FILED ON THIS DATE PURSUANT TO § 120.52, FLORIDA STATUTES, WITH THE DESIGNATED DEPARTMENT CLERK, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.

Sandie Kinsey
Deputy Clerk

3.29.07
CLERK DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order has been sent by U.S. Mail to:

Brian M. Seymour, Esquire Gunster, Yoakley & Stewart, P.A. 777 South Flagler Drive, Suite 500E West Palm Beach, Florida 33401-6121	Virginia P. Sherlock, Esquire Littman, Sherlock & Heims, P.A. Post Office Box 1197 Stuart, Florida 34995-1197
Thomas Spencer Crowley, Esquire Gunster Yoakley & Stewart, P.A. 2 South Biscayne Boulevard, Suite 3400 Miami, Florida 33131	
Claudia Llado, Clerk, and T. Kent Wetherell, II, Administrative Law Judge Division of Administrative Hearings The DeSoto Building 1230 Apalachee Parkway Tallahassee, FL 32399-1550	

and by Hand Delivery to:

Francine M. Ffolkes, Esquire
Adam G. Schwartz, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., MS 35
Tallahassee, FL 32399-3000

this 30th day of March, 2007.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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