STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

MANASOTA-88, INC. and ROY R. LEWIS, III,	
Petitioners,	
vs.	**OGC CASE NO. 06-1536**
	DOAH CASE NO. 06-3288
DEPARTMENT OF ENVIRONMENTAL PROTECTION and MANATEE COUNTY PORT AUTHORITY,	
Respondents.	

FINAL ORDER

On February 6, 2007, the Division of Administrative Hearings ("DOAH") submitted a Recommended Order ("RO") to the Department of Environmental Protection ("DEP") in this administrative proceeding, a copy of which is attached hereto as Exhibit A. Copies of the RO were furnished to the Petitioners, Manasota-88, Inc. and Roy R. Lewis, III (the "Petitioners"), and the Respondent, Manatee County Port Authority (the "Port"). The Port filed Exceptions to the RO on February 21, 2007. The Petitioners and the DEP filed their Responses to the Port's Exceptions on March 5, 2007. The matter is now before the DEP Secretary for final agency action.

BACKGROUND

The Port operates and sets policy for Port Manatee, a public deepwater commercial seaport located in the northern part of Manatee County on Tampa Bay. In August 1994, the Port began the permitting process for a substantial expansion of Port Manatee by applying to the DEP for authorization for dredging and filling and other

activities in the coastal waters and wetlands around Port Manatee.

In December 1999, the Board of Trustees of the Internal Improvement Trust Fund and DEP issued Environmental Resource Permit (ERP) No. 0129291-001-EC, a "Conceptual Permit" for enlargement of the main access channel at the entrance to Port Manatee, construction of a ship turning basin, expansion of Berth 5, and construction of new Berths 4 and 12 (Phase II) at Port Manatee (the Expansion Project). The Expansion Project is between two aquatic preserves, Cockroach Bay Aquatic Preserve to the north and Terra Ceia Aquatic Preserve to the south, waterward of the Cockroach Bay State Buffer Preserve, and includes several types of seagrass as well as a relatively productive benthic community, supporting a wide array of corals, worms, crabs, fish, invertebrates, and dolphins.

The Conceptual Permit provided that the Port would have to obtain individual ERPs for the various conceptually approved activities. The Conceptual Permit summarized that the Port proposed to offset 12.7 acres of seagrass habitat impacts by transplanting the existing seagrass and by creating, restoring, and enhancing seagrass habitat in Tampa Bay. The Conceptual Permit specified that DEP had to deem the seagrass mitigation to be successful before the Port could initiate dredging.

The requirement to achieve 12.7 seagrass mitigation success credits was specified in ERP No. 0129291-002-EI (the "Seagrass Mitigation Permit"), which was issued to the Port on August 29, 2000. Procedures for documenting seagrass mitigation success are included in the Seagrass Mitigation Permit and an attached July 2000 Seagrass Mitigation Plan, authored principally by Robin Lewis, which authorized and described all of the seagrass mitigation requirements for the Expansion Project.

The Seagrass Mitigation Plan required the Port to map the specific types of seagrasses found in the Impact Areas and describes the details for the seagrass mitigation effort, including on page 11 that "All turtlegrass in areas A and B to be dredged will be transplanted to mitigation Sites 1, 2, and 3." The Seagrass Mitigation Plan describes the remedial actions required for transplantation failure, requiring remedial planting if seagrass transplanted to Sites 1, 2, and 3 was not successful due to bioturbation or excessive currents. The Seagrass Mitigation Plan includes a Success Assessment Methodology Summary that explains in relevant part:

> If the mitigation is not successful, remedial action will be taken to ensure success. Reasonable assurance of success is provided by advanced transplanting, the mitigation ratios, over-design of mitigation opportunities, and a remedial action plan.

In furtherance of the conceptually approved Expansion Project, on December 17, 2002, the Port obtained ERP No. 0129291-003-EI authorizing the requested construction activities. Subsequently, ERP No. 0129291-003-EI was the subject of an application for a major modification to authorize more dredging for enlargement of the channel wideners, which resulted in issuance of ERP No. 0129291-009-EM (the Construction Permit) on June 10, 2004.

Specific Condition (SC) No. 5 of the Construction Permit identified the seagrass mitigation criteria and specific seagrass acreage DEP would require to determine the seagrass mitigation successful for purposes of authorizing dredging (referred to as "initial success" or "dredging success"), and established a second threshold of seagrass mitigation success necessary for authorization to use the new facilities: "The final success determination, showing 12.7 credits have been achieved, must be documented

prior to opening of Berths 4, 5, and Phase II of Berth 12 to shipping."

By letter dated February 7, 2005, the Port requested a minor modification of the Seagrass Mitigation Permit to extend the mitigation construction deadline five years, to August 29, 2010, "to be on the safe side." On May 11, 2005, this minor modification was granted as ERP 0129291-011-EI.

On February 10, 2005, the Port filed the instant application to modify the Construction Permit by eliminating the last sentence of SC 5 so that the Port could open and begin beneficial use of the new berths it had constructed before DEP's "final success determination" concerning the Port's related seagrass mitigation. DEP twice requested additional information relating to how the Port would provide reasonable assurance with respect to the requested permit modification, and the Port responded with additional information that was reviewed by DEP.

On April 7, 2006, DEP gave notice of its intent to approve the requested modification and issued a draft permit modification that also included modifications to the related Seagrass Mitigation Permit that were not requested by the Port. After DEP extended the time for the Port to file a petition, DEP and the Port met on July 5, 2006, and DEP issued a revised Notice of Intent (NOI) and revised draft permit modification that granted the Port's application without the additional modifications.

On July 19, 2006, Manasota-88, Inc., and Roy R. Lewis, III (Robin Lewis) timely petitioned for a formal administrative hearing challenging the NOI and revised draft permit modification and seeking to reinstate the NOI and draft permit modification issued in April. DEP dismissed the petition with leave to amend and on August 21, 2006, Petitioners filed an Amended Petition for Formal Administrative Proceeding

(Petition), which DEP referred to DOAH.

Several pre-hearing motions were filed by the parties and ruled on by the ALJ including a motion to expedite the final hearing that was granted, and a motion in limine that was denied at the beginning of the hearing. The Port also filed a Motion for Attorney's Fees that was partially ruled on by the ALJ in the RO. The final hearing was conducted on October 30-31 and November 1, 2006. In addition, the Petitioners filed a Motion for SLAPP Fees and a Response to the Port's Motion for Attorney's Fees. On January 2, 2007, the Port filed a Response in Opposition to Petitioners" Motion for SLAPP Fees and on February 6, 2007, DOAH entered a separate Order Denying Attorney's Fees.

After the filings of the final hearing transcript and the parties' post-hearing submittals, the ALJ entered the RO now on agency review.

THE RECOMMENDED ORDER

In the RO the ALJ concluded that reasonable assurance of successful mitigation for the impacts of the Expansion Project was predicated on four factors identified in the Seagrass Mitigation Plan: the upfront transplantation of seagrass; the mitigation ratios; the credits available in the program; and the remedial action requirements. (RO Finding of Fact 67). The ALJ found that the purpose of the last sentence of Construction Permit SC 5—making the opening and use of the new facilities contingent on documentation of the "final success determination, showing 12.7 credits have been achieved"—was to provide DEP reasonable assurance that the loss of seagrasses would be successfully mitigated in a timely manner by establishing a strong incentive for the permittee to complete the mitigation promptly. (RO Finding of Fact 68).

The ALJ found that the Port's mitigation project is trending towards continued success in terms of credits, and it is not unreasonable to expect 12.7 credits to be achieved in the near future due to natural processes alone. For these reasons, the ALJ concluded that the permit modification requested by the Port would not delay achievement of 12.7 credits. (RO Finding of Fact 69). However, the ALJ held that it was unclear whether the permit modification would delay the "final success determination," including remediation of the Turtle Grass component of the upfront transplantation, which could include planting Turtle Grass. (RO Finding of Fact 70).

More specifically, the ALJ expressed concern that the Port would take the position that the "final success determination" occurs when 12.7 credits are documented regardless of the failure of the Turtle Grass transplantation. (RO Finding of Fact 70). SC 5 of the Construction Permit provided an important incentive for the Port to timely remediate the failure of the Turtle Grass transplantation and it should not be modified without clarification at least as to the remediation required for the failure of the Turtle Grass transplantation. (RO Finding of Fact 70).

Accordingly, the ALJ recommended that if the requested permit modification is to be granted, it should be conditioned on the Port submitting a Remedial Action Plan within 60 days in accordance with and as set forth in amended SC 14 proposed by DEP in the April 7, 2006, proposed agency action. (RO Conclusion of Law 86 and Recommendation).

STANDARDS OF ADMINISTRATIVE REVIEW

The following rulings on the Exceptions to Recommended Order are made in light of the standards governing the administrative review of DOAH recommended

orders by agencies having the authority and duty to enter final orders in formal administrative proceedings. Section 120.57(1)(l), Florida Statutes, 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."

An agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction and expertise. Public Employees Relations Commission v. Dade County Police Benevolent Association, 467 So.2d 987, 989 (Fla. 1985); Florida Public Employee Council, 79 v. Daniels, 646 So.2d 813, 816 (Fla. 1st DCA 1994). Great deference should be accorded to these agency interpretations of statutes and rules within their regulatory jurisdiction, and such agency interpretations should not be overturned unless "clearly erroneous." See, e.g., Dept. of Environmental Regulation v. Goldring, 477 So.2d 532, 534 (Fla. 1985). Furthermore, agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be the only reasonable interpretations. It is enough if such agency interpretations are "permissible" ones. See, e.g., Suddath Van Lines, Inc. v. Dept. of Environmental Protection, 668 So.2d 209, 212 (Fla. 1st DCA 1996).

Section 120.57(1)(l) also 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." However, if a finding of fact in a recommended order is improperly labeled by an administrative law judge, the label should be disregarded and the item treated as though it were properly labeled as a conclusion of law. See

Battaglia Properties v. Fla. Land and Adjudicatory Commission, 629 So.2d 161, 168 (Fla. 5th DCA 1994).

A reviewing agency may not reweigh the evidence presented at a DOAH formal hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. These evidentiary matters are within the province of the administrative law judges, as the triers of the facts in formal proceedings. See, e.g., Belleau v. Dept. of Environmental Protection, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); Dunham v. Highlands County School Board, 652 So.2d 894 (Fla. 2d. DCA 1995); Florida Dept. of Corrections v. Bradley, 510 So.2d 1122 (Fla. 1st DCA 1987).

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. Brogan v. Carter, 671 So.2d 822, 823 (Fla. 1st DCA 1996). Therefore, if the DOAH record in this case discloses any competent substantial evidence supporting a challenged factual finding of the ALJ, I am bound by such finding in this Final Order. Bradley, 510 So.2d at 1123. In addition, a reviewing agency has no authority to make independent or supplemental findings of fact in construing the recommended order on review. See, e.g., North Port, Fla. v. Con. Minerals, 645 So.2d 485, 487 (Fla. 2d DCA 1994).

RULINGS ON EXCEPTIONS TO THE RECOMMENDED ORDER

THE PORT'S EXCEPTIONS TO FINDINGS OF FACT

Exception No. 1

In Finding of Fact 10 the ALJ summarizes the Conceptual Permit's Activity Description section on page 1. (Petitioners' Exhibit 3). The Port takes exception to the

finding of fact on the basis that in his summary the ALJ uses the phrase "seagrass habitat impacts" instead of directly quoting the exact language in the Conceptual Permit. In particular, the Port's exception points out that the ALJ's impact description refers to "seagrass habitat," as opposed to the Conceptual Permit's impact description on page 1 of "seagrass beds." The Port's Exception does not explain why the ALJ's summary is incorrect. I conclude that Finding of Fact 10 appears to be a reasonable inference drawn by the ALJ from competent substantial evidence. (Petitioners' Exhibit 3).

The Department and the Petitioners correctly observe in responding to the Port's Exception that "seagrass beds" and "seagrass habitat" have been used interchangeably to refer to the 12.70 acres of seagrass habitat impacts that were estimated at the time of application for the Conceptual Permit. (Petitioners' Exhibit 3, p. 1, Sheet 10 of 25 and Sheet 15 of 25; Port Exhibit 15, p. 2, p. 6 SC 2). It appears that the purpose of the Port's Exception was to bring attention to a "noteworthy" fact that although actual seagrass impacts were less than originally estimated, the Port is required to achieve success for at least 12.70 mitigation credits. Although this may be the case, the ALJ's finding of fact that simply summarizes the Conceptual Permit's Activity Description is supported by the competent substantial evidence of record. Consequently, the Port's Exception to Finding of Fact 10 is denied.

Exception No. 2

The Port takes exception to Finding of Fact 19 stating that it should be rejected as not based on competent substantial evidence. In Finding of Fact 19 the ALJ refers to information contained in the Port's Exhibits 4 and 5 and Petitioners' Exhibit 64, which were accepted into evidence at the hearing. Therefore, I conclude that the ALJ's finding

is supported by competent substantial evidence.

In its Exception the Port also argues that the ALJ "has mistakenly intertwined statements from various letters between the Port Authority and the DEP during March and April of 2005." The Port also argues that the ALJ "erroneously connects the DEP's request for a remedial action plan under the Mitigation Permit with the Port Authority's request to modify a single condition of the Construction Permit." These arguments are rejected. As noted in the Port's Exception, the 2003/2004 seagrass monitoring report and credit request was pending at the same time as the request to modify SC 5 of the Construction Permit. The two pending requests were "connected" and "intertwined" because the Port cited the 2003/2004 seagrass monitoring report and credit request as its reasonable assurance for entitlement to the request to modify SC 5 of the Construction Permit. (Port Exhibit 4). The Port's Exception to Finding of Fact 19 is denied.

Exception No. 3

The Port takes exception to Finding of Fact 25 on the basis that it is an inaccurate characterization of the DEP's April 7, 2006, proposed agency action. (Petitioners' Exhibit 26). I conclude that Finding of Fact 25 is a reasonable inference drawn by the ALJ from competent substantial evidence. The Port's Exception to Finding of Fact 25 is denied.

Exception No. 4

The Port takes exception to Finding of Fact 27 on the bases that the finding should be rejected as irrelevant to the modification of the Construction Permit and that it is not supported by competent substantial evidence. The Port more particularly objects

to the ALJ's finding that "[m]s. Miller, Mr. Deis and Martin Seeling, Environmental Administrator for DEP's Bureau of Beaches and Coastal Systems continue to support the April 7, 2006, proposed agency action and do not consider it to 'raise the bar'." This finding is supported by the deposition testimony of these individuals that was accepted into evidence. (Petitioners' Exhibit 118, p. 70 line 5 to p. 76, p. 80 line 12 to p. 81 line 7; Petitioners' Exhibit 117, p. 42 line 18 to p. 44 line 21, p. 49 lines 18-21, and p. 56 line 10 to p. 57 line 22; Port Exhibit 18, p. 38 lines 2-5 and p. 60 lines 16-21).

The Port also excepts to the ALJ's finding that "[t]he current seagrass mitigation supervisor Thomas Ries supported most the permit modifications proposed by DEP and thought they were necessary." I conclude that there is support in the record for this finding therefore it is based on competent substantial evidence. (Port Exhibit 18, p. 60 line 24 to p. 64 line 4). Consequently, the Port's Exception to Finding of Fact 27 is denied.

Exception No. 5

The Port takes exception to Findings of Fact 27 and 32 to the extent that the ALJ has characterized the modifications to the Seagrass Mitigation Permit that were included in the DEP's April 7, 2006, proposed agency action as "minor." I conclude that the ALJ's finding is based on competent substantial evidence found in the testimony of Janet Llewellyn and Cheryl Miller. (Port Exhibit 17, p. 34 line 25; Petitioners' Exhibit 118, p.73 line 12 to p. 74 line 22). The Port's Exception to Findings of Fact 27 and 32 is denied.

Exception No. 6

In Finding of Fact 30 the ALJ summarizes an agreement reached between DEP

and the Port at a meeting that followed the DEP's April 7, 2006, proposed agency action. In Finding of Fact 33 the ALJ states that the Port has not acted on the agreement and continued to characterize DEP's requirement for a Remedial Action Plan addressing the temporal loss of Turtle Grass as "raising the bar." The Port takes exception to these findings of fact on the basis that they are not supported by competent substantial evidence. However, after reviewing the record I conclude that Finding of Fact 30 and Finding of Fact 33 are based on competent substantial evidence. (Port Exhibit 17, p. 32 line 1 to p. 36 line 16, p. 37 lines 5-15, p. 38 line 18 to p. 39 line 6; Port Exhibit 18, p. 38 and p. 59 line 24 to p. 60 line 21; TR 150-155; Petitioners' Exhibit 93). The Port's Exception to Findings of Fact 30 and 33 is denied.

Exception No. 7

The Port takes exception to Finding of Fact 39 on the basis that the ALJ's finding that the "loss of approximately 3 acres of Turtle Grass represented a substantial loss of habitat," has no context. The ALJ stated in Finding of Fact 35 that "[a]pproximately 3 acres of Turtle Grass and 2.33 acres of Shoal Grass were transplanted from the Impact Areas." This statement is supported by the evidence including the Port's own statement in the Exception that in the end its activities "only impact[ed] 5.33 acres of seagrass." (Port Exhibit 15, Seagrass Mitigation Plan, p. 10; Petitioners' Exhibit 3, Sheet 10 of 25). The Port also contends that Finding of Fact 39 is not "adequately" supported by the evidence. However, as the Petitioners point out in their response to the Port's Exceptions, competent substantial evidence is such record evidence as will establish a substantial basis of fact from which the fact at issue can reasonably be inferred or that a reasonable mind would accept as adequate to support these conclusions. Duval Utility

Company v. Florida Public Service Commission, 380 So.2d 1028, 1031 (Fla. 1980), quoting De Groot v. Sheffield, 95 So.2d 912, 916 (Fla. 1957); see also Heifetz v. Dep't of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). The ALJ's findings are supported by competent substantial evidence. (TR 296, lines 9-14; TR 451-452; TR 542, line 24 – 543, line 22).

The Port's Exception to Finding of Fact No. 39 is denied.

Exception No. 8

The Port takes exception to Finding of Fact 40 where the ALJ references the "NOI issued in conjunction with the Seagrass Mitigation Permit." I agree with the Port that the record shows that the Seagrass Mitigation Permit NOI is not part of the evidence. However, as the DEP's response points out, there is competent substantial evidence in the Seagrass Mitigation Permit itself to support the ALJ's finding that it describes "the Port's proposed seagrass mitigation activities, including specifically that Turtle Grass from the impact area would be transplanted to Mitigation Sites 1, 2, and 3." (Port Exhibit 15, Seagrass Mitigation Plan at p. 11). Therefore, I conclude that the finding is supported by competent substantial evidence and that the reference to the Seagrass Mitigation Permit NOI constitutes harmless error.

The Port's Exception to Finding of Fact 40 is denied in part and granted in part.

Exception No. 9

In Finding of Fact 42 the ALJ summarized permit language from page 16 of the Seagrass Mitigation Permit. (Port Exhibit 15, p. 16). The Port takes exception to this finding on the basis that the ALJ does not directly quote the language in the Seagrass Mitigation Permit. The Port does not explain how the ALJ's summary is incorrect but

instead points out that he fails to describe the success to date of the Port's overall mitigation effort. In fact, the ALJ does recognize that the "mitigation project is trending toward success" in Finding of Fact 69. I conclude that Finding of Fact 42 is supported by competent substantial evidence and is a reasonable inference from the evidence. (Port Exhibit 15, p. 16).

The Port's Exception to Finding of Fact 42 is denied.

Exception No. 10

The Port takes exception to Finding of Fact 43, which is the ALJ's summary of the provisions on page 28 of the Seagrass Mitigation Plan. (Port Exhibit 15, Seagrass Mitigation Plan, p. 28). The Port's exception does not explain how the ALJ's summary is incorrect. I conclude that the ALJ's summary is a reasonable inference from the competent substantial evidence. (Port Exhibit 15, Seagrass Mitigation Plan, p. 28). Consequently, the Port's Exception to Finding of Fact 43 is denied.

Exception No. 11

The ALJ concludes in Findings of Fact 67 and 68[1] that reasonable assurance for successful seagrass mitigation for the impacts of the Expansion Project was predicated on four factors in the Seagrass Mitigation Plan; and that the purpose of the last sentence of Construction Permit SC 5 was to provide DEP reasonable assurance that the loss of seagrasses would be successfully mitigated in a timely manner by establishing a strong incentive for the Port to complete the mitigation promptly. He ultimately concludes in Finding of Fact 70 that under the totality of the circumstances of this case, SC 5 should not be modified without requiring remediation for the failed

[1] The Port did not take exception to Findings of Fact No. 67 or Finding of Fact No. 68.

upfront Turtle Grass transplantation. The Port takes exception to Finding of Fact 70 arguing that it should be rejected as not based on competent substantial evidence.

It is undisputed that the Port is required to provide reasonable assurances that the requested major modification meets the relevant conditions of approval. (Conclusions of Law 77 and 79). The ALJ determined that the activities for which permitting is presently sought in this major modification request are removal of the second threshold established in SC 5 of the Construction Permit to allow beneficial use of the new facilities. (Findings of Fact 15, 17; Port Exhibit 11, Notice of Intent page 7 of 15). The ALJ determined that the threshold has the purpose of providing reasonable assurance that the loss of seagrasses would be successfully mitigated in a timely manner by establishing a strong incentive for the Port to complete mitigation promptly. (Finding of Fact 68). The ALJ found that approximately 3 acres of Turtle Grass was transplanted from the construction Impact Areas that did not survive and persist. (Findings of Fact 35, 39, 48, 52). This upfront seagrass transplantation was intended to provide immediate partial mitigation for the seagrass impacts. (Findings of Fact 41, 49). Upfront seagrass transplantation was the first of four factors identified in the Seagrass Mitigation Plan as the basis for successful seagrass mitigation. (Findings of Fact 41, 43, 44, 67). Thus, the ALJ's ultimate finding is supported by his underlying factual determinations to which the Port did not take exception, and my rulings that deny the exceptions to Findings of Fact 39 and 43. Therefore, the Port's Exception to Finding of Fact 70 is denied.

THE PORT'S EXCEPTIONS TO CONCLUSIONS OF LAW

Exception No. 12

In Conclusion of Law 74, the ALJ determines that the "Petitioners have established an immediate injury-in-fact sufficient to allow them to participate as parties, and they have standing to challenge the proposed agency action." The Port takes exception to this mixed statement of fact and law on the basis that there "was no evidence presented by Petitioners to explain how allowing the Port Authority to utilize the newly-constructed berths, prior to achieving final mitigation success, and after all construction impacts have occurred and all seagrass mitigation options have already been performed, could adversely impact Petitioners' use or enjoyment of the waters around Port Manatee." The Port's exception misapprehends the ALJ's application of current administrative standing law under Sections 403.412(5) and (6), Florida Statutes, to the facts established in the hearing and found in the Recommended Order.

Under Section 403.412(5), Florida Statutes, a citizen whose substantial interests will be affected by a proposed agency action may initiate a formal administrative proceeding. The citizen's substantial interests will be considered affected if the party demonstrates it may suffer an injury in fact which is of sufficient immediacy and which is of the type and nature intended to be protected. See § 403.412(5), Fla. Stat. (2006). The ALJ found in Conclusion of Law 73, to which the Port did not take exception, that the Petitioners have a "substantial interest in mitigation of the seagrass habitat impacts of the Expansion Project, " and as "a result, Petitioners have substantial interests that will be affected by the proposed agency action." Conclusion of Law 73 is a mixed statement of fact and law that is supported by the ALJ's factual findings. The Port did

not take exception to many of these critical factual findings.

The ALJ found that the Petitioner Robin Lewis "had been involved in many projects relating to seagrass protection and restoration in Tampa Bay and the areas where the Project is located." (Finding of Fact 6). In fact, Mr. Lewis was the principal author of the July 2000 Seagrass Mitigation Plan which includes procedures for documenting seagrass mitigation success. (Finding of Fact 12). Mr. Lewis was concerned about the fact that upfront transplantation of approximately 3 acres of Turtle Grass failed and has not been remediated. (Findings of Fact 39, 48, 50, 52, 57, 70). Mr. Lewis continues his interest in successful implementation of the seagrass mitigation project. (Finding of Fact 57). Along with Petitioner Manasota-88, his position is that SC 5 of the Construction Permit is an important incentive for the Port to timely remediate the failure of the initial upfront Turtle Grass transplantation. (Finding of Fact 70; TR 666). Thus, the proposed modification of SC 5 of the Construction Permit constitutes an immediate injury-in-fact sufficient to allow him to challenge the proposed agency action.

Section 403.412(5), Florida Statutes, also provides that a petitioner may make a sufficient demonstration of "a substantial interest" by establishing that the proposed agency action "affects the petitioner's use or enjoyment of air, water, or natural resources." Contrary to the Port's assertion, the law does not provide that the petitioner's use or enjoyment be "adversely" impacted, only that it be "affected." See § 403.412(5), Fla. Stat. (2006). The substantial interest of using or enjoying the waters around Port Manatee was also established by Mr. Lewis and determined by the ALJ in Finding of Fact 7, to which the Port did not except.

The ALJ found that the Petitioner Manasota-88 "is a Florida corporation not for

profit that has at least 25 current members residing within Manatee County." (Finding of Fact 3). The ALJ also found that "Manasota-88 was formed, more than one year before the Port filed its application for the permit modification that is the subject of this proceeding, for the purposes of protection of public health and the environment, fish and wildlife resources, and air and water quality." (Finding of Fact 3). Based on these findings Manasota-88 meets the group standing provision of Section 403.412(6), Florida Statutes. See Environmental Confederation of Southwest Florida, Inc. v. IMC Phosphates, Inc., 857 So.2d 207, 208 (Fla. 1st DCA 2003). The ALJ concluded that Section 403.412 "gives Manasota-88 standing to petition to challenge proposed agency action." (Conclusion of Law 72). However, the conclusion refers to subsection (5) of Section 403.412 and not subsection (6). It is clear from the criteria set forth in subsection (6) of the statute that Manasota-88 has standing under subsection (6) because it meets all the criteria as found by the ALJ. Therefore, I conclude that Manasota-88 has standing under Section 403.412(6), Florida Statutes, and the ALJ's conclusion of law simply appears to contain a typographical error.

Based on the above rulings, the Port's Exception to Conclusion of Law 74 is denied.

Exception No. 13

The Port takes exception to the last sentence of Conclusion of Law 80, where the ALJ states that the question to be determined with regard to the Port's requested permit modification "is whether the Port will continue to provide reasonable assurance without the last sentence of SC 5 of the Construction Permit." The Port contends that this question is inaccurate since the proposed permit modification modifies the language of

SC 5 to impose a new deadline for the Port to achieve 12.7 credits and even expands the definition of "full success" beyond achievement of 12.7 mitigation credits. (Port Exhibit 11, Draft Permit pages 9-11 of 27). Essentially, the Port argues that "full mitigation success" now includes "full restoration of seagrass beds impacted by excavation of flushing channels at Mitigation Site No. 7, as specified in Specific Condition 8 of [Seagrass Mitigation Permit]." Also, if the Port fails to achieve 12.7 credits by the new deadline and full restoration of Mitigation Site No. 7, the approved seagrass mitigation contingency plan shall be implemented as required under the Seagrass Mitigation Permit. The Port defines these conditions as "additional reasonable assurances" that were "completely ignored by the ALJ throughout the Recommended Order."

I find the Port's contention without merit since these conditions already exist in the Port's Seagrass Mitigation Permit. In fact, all the requirements of Specific Condition 8 of the Seagrass Mitigation Permit currently exist verbatim in SC 5 of the Construction Permit. (Port Exhibit 11, Draft Permit pages 9-11 of 27; Finding of Fact 15). The Port does not cite to any legal authority for its contention that complying with already existing and enforceable permit obligations constitute "additional reasonable assurances." As the Port points out the ALJ made no such finding, and I have no authority to make independent or supplemental findings of fact in construing the recommended order on administrative review. See, e.g., North Port, Fla. v. Con. Minerals, 645 So.2d 485, 487 (Fla. 2d DCA 1994).

It is clear that the ALJ's question in Conclusion of Law 80 is based on application of the relevant law to his findings of fact regarding the purpose of the sentence that is at

issue in SC 5 of the Construction Permit. (Findings of Fact 22, 44, 67, 68, and 70; Conclusions of Law 77, 78 and 79). The Port is required to provide reasonable assurances that the requested major modification meets the relevant conditions of approval. (Conclusions of Law 77 and 79). The activities for which permitting is presently sought in this major modification request are removal of the second threshold established in SC 5 of the Construction Permit to allow beneficial use of the new facilities. The threshold has the purpose of providing reasonable assurance that the loss of seagrasses would be successfully mitigated in a timely manner by establishing a strong incentive for the Port to complete mitigation promptly. (Finding of Fact 68). The evidence established that approximately 3 acres of Turtle Grass was transplanted from the construction (dredging and filling) impact areas that did not survive and persist. (Findings of Fact 35, 39, 48, 52). This upfront seagrass transplantation was intended to provide immediate partial mitigation for the seagrass impacts. (Findings of Fact 41, 49). Upfront seagrass transplantation was the first of four factors identified in the Seagrass Mitigation Plan as the basis for successful seagrass mitigation. (Findings of Fact 41, 43, 44, 67). Thus, the ALJ ultimately concluded that reasonable assurance for removal of the threshold in SC 5 should include remediation for the failure of the Turtle Grass transplantation.

I agree with the ALJ's reasonable assurance conclusion, consequently the Port's Exception to Conclusion of Law 80 is denied.

Exception No. 14

The Port takes exception to Conclusion of Law 86 primarily on the basis that this ultimate conclusion is different than the DEP's preliminary position in a letter dated

October 25, 2005, to the Petitioners. (Port Exhibit 20; Finding of Fact 46). This letter pre-dates both the DEP's April 7, 2006, proposed agency action, and the July 5, 2006, revised proposed agency action. As the ALJ states in Conclusion of Law 79 the "test in this case is not whether DEP properly evaluated the original application, but whether the Port provided reasonable assurance that the applicable conditions for issuance of the major modification have been satisfied."

This formal administrative proceeding is not merely a review of prior agency action, but is a *de novo* proceeding intended to formulate final agency action; and the parties are allowed to present additional evidence to the ALJ not included in the permit application and other documents previously submitted to the DEP during the application review process. See, e.g., Hamilton County Commissioners v. State Dept. of Environmental Regulation, 587 So.2d 1378, 1387 (Fla. 1st DCA 1991); Florida Dept. of Transportation v. J.W.C. Company, Inc., 396 So.2d 778, 785 (Fla. 1st DCA 1981). What DEP did or failed to do during the process of the agency review of the Port's application is not the dispositive issue in this *de novo* proceeding. The dispositive issue is whether the evidence presented at the DOAH hearing provides reasonable assurance that the Port's major modification request satisfies the applicable conditions for issuance. See McDonald v. Dept. of Banking and Finance, 346 So.2d 569, 584 (Fla. 1st DCA 1977); Clarke v. Melton, 12 F.A.L.R. 4946, 4949 (Fla. DER 1990).

The Port further argues that Conclusion of Law 86 goes beyond the scope of this proceeding as defined by the DEP's July 5, 2006, proposed agency action. As I've ruled above, the DOAH ALJ is not limited in the *de novo* hearing to what DEP did during the application review process. I view the Port's real objection in this Exception to be

the weight given by the ALJ to the evidence and the manner in which he resolved conflicting expert testimony presented at the final hearing from all the parties. As noted in the Standards of Agency Review above, a reviewing agency has no authority to reweigh the evidence presented at a DOAH formal hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. These evidentiary matters are within the province of the ALJ, as the trier of the facts.

The Port's Exception presents arguments based on its own interpretations and inferences drawn from the evidence of record that are most favorable to its contentions. However, I have no authority to modify the ALJ's findings of fact by interpreting the evidence or drawing inferences there from in a manner proposed by the Port that is different from the reasonable interpretations made and inferences drawn by the ALJ. See, e.g., Heifitz v. Dept. of Business Regulation, 475 So.2d 1277, 1281-82 (Fla. 1st DCA 1985).

In my ruling on Exception No. 13 above, I indicate my agreement with the ALJ's reasonable assurance conclusion regarding the Port's request for a major modification of SC 5 of the Construction Permit, including the additional condition that the Port be required to submit a Remedial Action Plan for the failed Turtle Grass transplantation. (Conclusions of Law 77-86). The final determination of whether the factual findings in the RO on review constitute "reasonable assurance" is a regulatory decision that must ultimately be made by this agency, rather than the ALJ. See, e.g., Putnam County Environmental Council v. Georgia Pacific Corp., 24 FALR 4674, 4685 (Fla. DEP 2002); Miccosukee Tribe of Indians v. South Florida Water Management District, 20 FALR 4482, 4491 (Fla. DEP 1998), *aff'd*, 721 So.2d 389 (Fla. 3d DCA 1998); Save our

Suwannee v. Piechocki, 18 FALR 1467, 1471 (Fla. DEP 1996); Barrininger v. Speer and Associates, 14 FALR 3660, 3667 n.8 (Fla. DER 1992). Nevertheless, I have no authority to modify the ALJ's findings of fact that are based on competent substantial evidence, or make supplemental findings of fact, or reweigh the evidence presented at the *de novo* DOAH hearing. (See Standards of Administrative Review).

The case law of Florida does support the limited authority of this agency to enter a final order containing additional permit conditions suggested by a DOAH administrative law judge in a recommended order. See, e.g., The Conservancy, Inc. v. Dept. of Environmental Regulation, 580 So.2d 772, 774 (Fla. 1st DCA 1991); Hopwood v. Dept. of Environmental Regulation, 402 So.2d 1296 (Fla. 1st DCA 1981). However, the courts caution that "substantial amendments to a permit application in mid-proceedings may well constitute a due process problem of notice to the agency." Id. at 1299.

In this case, the ALJ did suggest in his RO that with the inclusion of the additional permit condition, the Port's major modification can be granted. I conclude that this additional condition does not constitute a proposed substantial amendment to the Port's application that may create "due process" problems if adopted in this Final Order. This additional condition regarding Turtle Grass transplantation remediation was included in the DEP's April 7, 2006, proposed agency action, and was the subject of a large portion of the Petitioners' evidence at the *de novo* hearing.

The Port also argues in this Exception that Conclusion of Law 86 should be rejected because the ALJ "is inappropriately making a determination about what constitutes sufficient mitigation to offset the adverse impacts authorized by the Permit

Modification." However, contrary to the Port's contentions, I do not construe the ALJ's reasonable assurance conclusion as usurping my authority to interpret the mitigative conditions of the Seagrass Mitigation Permit. See, e.g., 1800 Atlantic Developers v. Dept. of Environmental Regulation, 552 So.2d 946 (Fla. 1st DCA 1989); Save Anna Maria, Inc. v. Dept. of Transportation, 700 So.2d 113 (Fla. 2d DCA 1997). The ALJ had already concluded that the "proposed permit modification does not authorize any additional construction activities or any additional impacts." (Conclusion of Law 80). He also concluded that to offset the original dredging impact to approximately 5.33 acres of seagrass, "the Port proposed and agreed to the mitigation required by the Seagrass Mitigation Permit and the Construction Permit, including the requirement the Port seeks to modify in this proceeding." (Conclusion of Law 83).

Based on the above rulings the Port's Exception to Conclusion of Law 86 is denied.

Exception to Recommendation

The Port takes exception to the ALJ's Recommendation by simply summarizing the essence of its previous fourteen Exceptions. Based on my foregoing rulings to the previous fourteen Exceptions, the Port's Exception to the Recommendation is denied.

CONCLUSION

In this case, DEP staff issued, on July 5, 2006, a revised Notice of Intent (NOI) to issue the Port's proposed major modification to the Construction Permit for the Port Manatee Expansion Project. The major modification requested deletion of the last sentence of SC 5, which established a threshold of seagrass mitigation success necessary for authorization to use the newly constructed facilities: "The final success

determination, showing 12.7 credits have been achieved, must be documented prior to opening of Berths 4, 5, and Phase II of Berth 12 to shipping.". Previously, DEP staff had issued, on April 7, 2006, an NOI to issue the proposed major modification that also sought to combine and modify the Construction Permit and the Seagrass Mitigation Permit. The April 7, 2006, NOI explained that additional assurances in the Seagrass Mitigation Permit would be required and that remedial action for the loss of Turtle Grass would also be required. After meeting with the Port, DEP staff agreed to remove the additional permit modifications related to the Seagrass Mitigation Permit, and issued the revised NOI that is the subject of this proceeding.

Petitioners filed challenges to these actions of DEP staff and this formal administrative proceeding ensued. A DOAH formal proceeding is not merely an administrative review of prior preliminary agency action, but is a *de novo* proceeding intended to formulate final agency action. See, e.g., Hamilton County Commissioners v. State Dept. of Environmental Regulation, 587 So.2d 1378, 1387 (Fla. 1st DCA 1991); and McDonald v. Dept. of Banking and Finance, 346 So.2d 569, 584 (Fla. 1st DCA 1977). Thus, the parties were properly allowed to present additional evidence and contentions at the DOAH final hearing not presented to or considered by the DEP staff during the permit review process.

Based on this additional evidence presented to the ALJ, he properly concluded that to demonstrate entitlement to the major modification, the Port is required to provide reasonable assurance that it will meet the ERP conditions of approval. The ALJ also properly concluded that the purpose of the last sentence of Construction Permit SC 5 was to provide DEP reasonable assurance that the loss of seagrasses would be

successfully mitigated in a timely manner by establishing a strong incentive for the Port to complete the mitigation promptly. The ALJ further concluded that under the Seagrass Mitigation Plan the upfront transplantation of seagrass, including approximately 3 acres of Turtle Grass from the Impact Areas, was one of four factors on which reasonable assurance for successful seagrass mitigation was predicated. The evidence established that the upfront transplantation of Turtle Grass failed and had not been remediated as required under the Seagrass Mitigation Plan. Therefore, based on the totality of the circumstances in this case, the ALJ concluded and I agree, that the Port's requested major modification to SC 5 of the Construction Permit should be conditioned with a requirement to submit a Remedial Action Plan within 60 days in accordance with and as set forth in amended SC 14 proposed by DEP in the April 7, 2006, proposed agency action.

It is therefore ORDERED:

A. To the extent that the Recommended Order has not been modified by the above rulings in this Final Order, it is adopted and incorporated herein by reference.

B. The Port's major modification request as proposed in the July 5, 2006, revised Notice of Intent is granted with a condition that the Port submit a Remedial Action Plan within 60 days in accordance with and as set forth in amended SC 14 by DEP on April 7, 2006.

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35,

Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the clerk of the Department.

DONE AND ORDERED this 22nd 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.

Deputy CLERK Sandie Kinsey 3-22-07 DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order has been sent by United States Postal Service to:

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Thomas & Associates, P.A.
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Claudia Llado, Clerk and
J. Lawrence Johnston, Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
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Tallahassee, FL 32399-1550

and by hand delivery to:

W. Douglas Beason, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this 22nd day of March, 2007.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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