STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

BARBARA RITCH JACKSON; TIGER JOINT VENTURES; LANIKAI INVESTMENTS, LLC; W. SHOUPPE HOWELL; and MURL B. HOWELL; Petitioners, vs. DEPARTMENT OF ENVIRONMENTAL PROTECTION, Respondent, and CARIBBEAN CONSERVATION CORPORATION, INC., d/b/a SEA TURTLE SURVIVOR LEAGUE, Intervenor.	OGC CASE NO. 06-2252 DOAH CASE NO. 06-4508

FINAL ORDER

On August 21, 2008, an Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH") submitted to the Department of Environmental Protection ("DEP" or "Department") his Recommended Order ("RO") in the above captioned administrative proceeding. A copy of the RO is attached hereto as Exhibit A. The RO indicated that copies were provided to counsel for the Petitioners, Barbara Ritch Jackson, W. Shouppe Howell and Murl B. Howell; to counsel for the Petitioner, Lanikai Investments, LLC; and to counsel for the Petitioner Tiger Joint Ventures. Copies were also provided to counsel for the Department and counsel for the

Intervenor, Caribbean Conservation Corporation, Inc., d/b/a Sea Turtle Survivor League ("CCC"). On September 26, 2008, Petitioners Jackson, Howells, and Lanikai, the Department and the Intervenor CCC filed Exceptions to the Recommended Order.[1] On October 13, 2008, the Petitioners Jackson and Howells responded to the Department's and the Intervenor CCC's Exceptions. The Department responded to the Petitioners' and the Intervenor CCC's Exceptions on October 13, 2008. On the same date the Intervenor CCC responded to the Petitioners Jackson, Howells, and Lanikai's Exceptions. This matter is now before the agency for final agency action.

BACKGROUND

On October 16, 2006, the Department issued notice of its intent to deny Petitioners' application for an after-the-fact permit for a coastal armoring structure. On November 1, 2006, Petitioners timely filed a petition for formal hearing challenging the proposed denial. The matter was referred to DOAH and in December 2006, the CCC filed a petition for leave to intervene that was granted "subject to proof of the allegations relating to standing at the final hearing." Intervenor CCC opposed the issuance of the permit, and was aligned with the Department.

Petitioners Jackson and the Howells own single-family residences located at 210 Winston Lane and 220 Winston Lane, respectively, in the Inlet Beach area of south Walton County, just to the east of Rosemary Beach. The Petitioner Lanikai owns an undeveloped lot immediately to the east of the Howells' property. The Petitioner Tiger owns an undeveloped lot immediately to the east of the lot owned by Lanikai. Together,

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[1] The Department entered two orders granting unopposed motions for extension of time to file exceptions. Thus, the parties' exceptions were filed on September 26, 2008; responses to exceptions were due on or before October 13, 2008; and by agreement, the Final Order deadline was extended to December 3, 2008.

the Lanikai and Tiger lots are less than 75 feet wide. In April 2004, the dune on Petitioners' properties extended approximately fifty feet seaward of the Jackson and Howell residences. The dune was severely damaged by a series of hurricanes in 2004 and 2005. In July 2005, after Hurricane Dennis, the dune extended only six feet seaward of the Jackson and Howell residences. Shortly after Hurricane Dennis, the Petitioners Jackson and Howells placed a significant volume of sand-fill immediately seaward of their homes adjacent to the post-Hurricane Dennis toe-of-dune as an emergency protection measure.

The Petitioner Jackson received a building permit from Walton County on July 22, 2005, to construct a "temporary seawall" on her property. At that time, Walton County was authorized to issue emergency permits for temporary armoring structures under Section 161.085(3), Florida Statutes (2005). On September 6, 2005, Walton County issued a building permit for a "temp[orary] retaining wall" for the properties at 210, 220, and 240 Winston Lane. Attached to the permit was a rough sketch of a cross-section of a "Protech [sic] Tube" with a 27-foot width. The property at 240 Winston Lane is owned by the Carnrites and is immediately to the east of the undeveloped lot owned by the Petitioner Tiger. There is a single-family residence on the Carnrite property, which like the Jackson and Howell residences, is an "eligible" and "vulnerable" structure under the Department's coastal armoring rules. After Hurricane Dennis, the Carnrites installed a vertical wooden retaining wall seaward of their residence. The wall was still in place as of the date of the final hearing, but it has not been permitted by the Department. The Department denied the Carnrites' application for an after-the-fact permit for the wall, therefore, the Department does not consider the wall on the Carnrite

property to be an "existing coastal armoring structure" because it is not authorized by a permit and is not grandfathered. Although, neither of the building permits issued to the Petitioners by Walton County mentioned the Lanikai or Tiger lots, the Petitioners proceeded with construction of a temporary armoring structure on those lots because the permit encompassed the properties to the east and west of the lots.

On November 23, 2005, the Department sent letters to the Petitioners Jackson and Howells inquiring about the status of the temporary armoring structures authorized by the Walton County permits. At that point, construction had not commenced on the ProTec Tube system at issue in this case ("the Project"). The letters advised that Department permits were required for permanent armoring structures, and "urged" them to meet with the Department prior to installation of any structure. On December 26, 2005, Petitioner Jackson sent a letter to the Department stating that she had "read every word of the Florida codes," that there was "no way we could build anything 'temporary'," and that she had "joined with three neighbors to install Pro-Tect [sic] Tubes" that "will cost more than our house is worth." The Department did not respond to this letter. Construction on the Project started in January 2006, and was completed in February or March 2006. The Department was aware that the Petitioners were installing a geotextile tube system. The Department's staff photographed the installation of the system as part of their weekly monitoring of the projects being constructed pursuant to permits issued by Walton County after Hurricane Dennis. In May 2006, the Petitioners applied for an after-the-fact permit for the Project. The application was designated File No. WL-914 AR ATF, and was deemed complete as of July 20, 2006. On October 16, 2006, the Department gave notice of its intent to deny the permit

application and ordered the Petitioners to remove the Project and restore the area to the condition that existed prior to the placement of the structure.

At DOAH, the final hearing was originally scheduled to begin on February 6, 2007, but was continued six times at the request of the parties. The final hearing was held over a period of six days, starting on October 1, 2007, and concluding on January 18, 2008. Post hearing filings included the hearing transcript and proposed recommended orders. Subsequently, the ALJ entered his RO on August 21, 2008.

RECOMMENDED ORDER

The ALJ recommended that the Department's final order deny the Petitioners' after-the-fact permit application (File No. WL-914 AR ATF). He concluded that it is undisputed that the Petitioners Jackson and Howells are entitled to install some type of armoring seaward of their residences, which are defined by Department rule as eligible and vulnerable structures. (RO ¶¶ 19, 102). However, he determined that they failed to meet all the permitting criteria applicable to the Project. (RO ¶¶ 103, 104, 105). For example, because of the Project's seaward extent, adverse impacts were not adequately minimized and the Project was likely to result in significant adverse impacts to the beach-dune system. (RO ¶¶ 59 – 66, 104). In addition, although the Project was sited as far landward as practical for the geotextile tube system that was installed, the ALJ found that an alternative armoring structure could have been installed to minimize the extent to which the armoring protruded onto the active beach and into sea turtle habitat, thereby minimizing impacts on the beach-dune system. (RO ¶¶ 50 – 66, 75, 78, 105).

The Petitioners Lanikai and Tiger own undeveloped lots, with less than 75 feet of shoreline, between the Howell residence and the Carnrite residence. (RO ¶¶ 4 -6, 106). The ALJ found that it is undisputed that the Carnrite residence is an eligible and vulnerable structure, but the Carnrites' after-the-fact permit application for a temporary wall they installed after Hurricane Dennis, was denied by the Department. (RO ¶¶ 19, 20, 21). The main reason for denial was that the wall was not sited as far landward as practical. (RO ¶ 21 - 22). The ALJ concluded that the portion of the Project on the Lanikai and Tiger undeveloped lots extended significantly further seaward than the wall on the Carnrite property. (RO ¶ 109). In addition, the Project did meet the permitting criteria, as outlined above. (RO ¶¶ 104, 105, 109).

In the proceeding, the Petitioners invoked the doctrine of equitable estoppel and argued that the Department was estopped from denying the after-the-fact permit application. (RO ¶ 110). The ALJ concluded that the Petitioners failed to demonstrate that the Department made any affirmative representations upon which the Petitioners reasonably relied to their detriment. (RO ¶¶ 113 – 117). First, the Department actually "urged" the Petitioners who were identified in the temporary emergency permits issued by Walton County, to meet with the Department prior to construction so that the Department could evaluate whether their preferred structure could be permitted. (RO ¶¶ 24 – 26, 115). Second, there was no evidence that the Petitioners relied on or changed their positions based on any Department representation. (RO ¶¶ 28, 29, 116). The ALJ determined that the

> Petitioners decided on their own to install a geotextile tube system based upon their subjective belief that the system met the Department's permitting criteria. The Department played no role in Petitioners' selection of the geotextile tube

> system over some other type of armoring, and despite the Department's letters advising Petitioners (at least those who[se] *sic* were identified in the Walton County permits) that they would have to get permits for the system to remain, Petitioners proceeded with the installation of the system without discussing the issue with the Department.

(RO ¶ 116).

The ALJ found that the parties did not dispute that the Project must be removed if the Department denies the after-the-fact permit application. (RO ¶ 120). Thus, the ALJ found reasonable, the remedy ordered by the Department's intent to deny giving the Petitioners a period of 60 days to remove the Project subject to coordination with the marine turtle permit holder for the subject beach segment. (RO ¶¶ 121 -123). Otherwise, removal shall occur after October 31 and before March 1 (i.e., outside of marine turtle nesting season). (RO ¶ 122).

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 ALJ, "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." § 120.57(1)(l), Fla. Stat. (2008); *Wills v. Fla. Elections Comm'n*, 955 So.2d 61 (Fla. 1st DCA 2007). 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 e.g., 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 e.g., Rogers v. Dep't of Health,* 920 So.2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep't of Envtl. Prot.,* 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands County Sch. Bd.,* 652 So.2d 894 (Fla. 2d. DCA 1995). These evidentiary-related matters are within the province of the ALJ, as the "fact-finder" in these administrative proceedings. *See e.g., Tedder v. Fla. Parole Comm'n,* 842 So.2d 1022, 1025 (Fla. 1st DCA 2003); *Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Also, the ALJ's decision to accept the testimony of one expert witness over that of another expert 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 e.g., Collier Med. Ctr. v. State, Dep't of HRS*, 462 So.2d 83, 85 (Fla. 1st DCA 1985); *Fla. Chapter of Sierra Club v. Orlando Utils. Comm'n*, 436 So.2d 383, 389 (Fla. 5th DCA 1983). An agency has no authority to make independent or supplemental findings of fact. *See, e.g., North Port, Fla. v. Consol. Minerals*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994).

Section 120.57(1)(l), Florida Statutes, authorizes an agency to reject or modify an ALJ's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." An agency's review of legal conclusions in a recommended order, are restricted to those that concern matters within the agency's field of expertise. *See, e.g., G.E.L. Corp. v. Dep't of Envtl. Prot.*, 875 So. 2d 1257, 1264 (Fla. 5th DCA 2004). An agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction and expertise. *See, e.g., Pub. 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, and such agency interpretations should not be overturned unless "clearly erroneous." *See, e.g., Falk v. Beard*, 614 So.2d 1086, 1089 (Fla. 1993); *Dep't of Envtl. 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. Dep't of Envtl. Prot.,* 668 So.2d 209, 212 (Fla. 1st DCA 1996).

However, agencies do not have jurisdiction to modify or reject rulings on the admissibility of evidence. Evidentiary rulings of the ALJ that deal with "factual issues susceptible to ordinary methods of proof that are not infused with [agency] policy considerations," are not matters over which the agency has "substantive jurisdiction." *See Martuccio v. Dep't of Prof'l Regulation*, 622 So.2d 607, 609 (Fla. 1st DCA 1993); *Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985); *Fla. Power & Light Co. v. Fla. Siting Bd.*, 693 So.2d 1025, 1028 (Fla. 1st DCA 1997). Evidentiary rulings are matters within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. *See Martuccio,* 622 So.2d at 609. Agencies do not have the authority to modify or reject conclusions of law that apply general legal concepts typically resolved by judicial or quasi-judicial officers. *See, e.g., Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140, 1142 (Fla. 2d DCA 2001).

Finally, in reviewing a recommended order and any written exceptions, the agency's final order "shall include an explicit ruling on each exception." *See* § 120.57(1)(k), Fla. Stat. (2008). However, the agency need not rule on an exception that "does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." *Id.*

RULINGS ON EXCEPTIONS

The case law of Florida holds that parties to formal administrative proceedings must alert reviewing agencies to any perceived defects in DOAH hearing procedures or in the findings of fact of ALJs by filing exceptions to DOAH recommended orders. *See, e.g., Comm'n on Ethics v. Barker,* 677 So.2d 254, 256 (Fla. 1996); *Henderson v. Dep't of Health, Bd. of Nursing,* 954 So.2d 77 (Fla. 5th DCA 2007); *Fla. Dep't of Corrs. v. Bradley*, 510 So.2d 1122, 1124 (Fla. 1st DCA 1987). Having filed no exceptions to certain findings of fact the party "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Envtl. Coalition of Fla., Inc. v. Broward County*, 586 So.2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Medical Ctr., Inc. v. State of Fla., Agency for Health Care Admin.*, 847 So.2d 540, 542 (Fla. 4th DCA 2003).

EXCEPTIONS OF PETITIONERS JACKSON AND HOWELLS

First Exception

The Petitioners take exception to Finding of Fact ("FOF") 41, where the ALJ found that the slope of the Project "is approximately four-to-one, which is a much flatter profile than the natural dunes in Walton County, including those in the vicinity of

Petitioners' properties." The exception states that this finding "is true, but ultimately misleading and immaterial." Thus, the Petitioners do not contend that the finding lacks evidentiary support. Instead, they contend that the dune profile should be ignored because other aspects of its design "match the preexisting dune structure on the properties." As described in the Department's response, the ALJ's finding is supported by competent substantial evidence in the record of the hearing. (T1016; 1059-1060). In addition, the Petitioners do not cite to any legal authority for the proposition that the dune profile should be ignored when considering whether an armoring structure meets the Department's siting and design criteria. *See, e.g.,* Fla. Admin. Code R. 62B-33.0051. Therefore, the Petitioners' First Exception is denied.

Second and Third Exceptions

The Petitioners take exception to FOF 49 where the ALJ finds that "[t]he drawings show the seaward edge of the Project extending approximately 76 feet seaward of the Jackson and Howell residences, which, as discussed below, is seaward of the pre-hurricane dune on Petitioners' properties." The ALJ then finds "below" in FOF 57, to which Petitioners did not except, that the post-Hurricane Dennis toe-of-dune was only 6 feet from the Jackson residence. Also, in FOF 60, the subject of the Petitioners' Third Exception, the ALJ found that the Project extends further seaward than the natural dune that existed on the Petitioners' properties before the 2004 and 2005 hurricanes, i.e., 20-25 feet seaward of the pre-hurricane dune. These findings (FOFs 49 and 60) and crucial underlying FOFs 10, 11 and 48, to which the Petitioners did not take exception, establish that the pre-2004 natural dune extended approximately 50 feet seaward of the Jackson and Howell residences. (T294; Dept. Ex. 15). The Project as

depicted in the Petitioners' "drawings" extends approximately 76 feet seaward of the residences. (FOF 48; Pet. Exs. 11 and 12; T178-179). Thus, the Project extends approximately 20-25 feet seaward of the pre-2004 ("pre-hurricane") dune on the Petitioners' properties. (Pet. Exs. 11 and 12; T178-179; Dept. Ex. 15; T294; T1194-1196).

The ALJ's FOFs 49 and 60 are supported by competent substantial evidence in the record including the testimony of the Petitioners' expert witness and Petitioners' own exhibits. (Pet. Exs. 11 and 12; T178-179; Dept. Ex. 15; T294). The other arguments in Petitioners' Second and Third Exceptions fail to address any legal basis for modification or rejection of FOFs 49 and 60. Therefore, the Petitioners' Second and Third Exceptions are denied.

Fourth Exception

The Petitioners take exception to FOF 61 on the bases that it is "irrelevant and misleading," and that the record contains no explanation "whatsoever" as to why other beach restoration efforts are important. The ALJ found that "[t]he Project also extends 10 to 20 feet further seaward than the restored dunes in Rosemary Beach to the west of Petitioners' properties." The ALJ also found that these dunes at Rosemary Beach were restored after Hurricane Dennis. The ALJ's finding is based on competent substantial evidence in the record and is a reasonable inference from the record evidence (see my rulings on DEP's Exception No. 10 and CCC's Exception No. 4 below). In addition, the Department's Program Administrator testified in the hearing that adjoining shoreline and adjacent parcels are considered when reviewing an application for armoring. (T1080). This is important when reviewing the application for compliance with the siting and

design criteria in Rule 62B-33.0051(2), Florida Administrative Code. Therefore, the Petitioners' Fourth Exception is denied.

Fifth Exception

The Petitioners take exception to the third sentence in FOF 62, where the ALJ found that "[s]imilar scarping has not been observed on adjacent properties, which is another indication that the Project extends too far seaward." The ALJ's reference to "similar" scarping is more specifically described in FOF 62's first two sentences, where he found that "persistent" scarping has occurred along the Petitioners' properties at "two to three feet in height in some areas." The ALJ's finding is supported by competent substantial evidence in the record. (Dept. Exs. 49-80 through 49-85; T888 – 889; T722 – 723). The Petitioners' argue that I should reweigh the evidence that was considered by the ALJ and reach a different conclusion. This is an evidentiary-related matter within the province of the ALJ, as the "fact-finder" in this administrative proceeding. *See e.g., Tedder v. Fla. Parole Comm'n,* 842 So.2d 1022, 1025 (Fla. 1st DCA 2003); *Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Also, the ALJ's decision to accept the testimony of one expert witness over that of another expert 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 e.g., Collier Med. Ctr. v. State, Dep't of HRS*, 462 So.2d 83, 85 (Fla. 1st DCA 1985); *Fla. Chapter of Sierra Club v. Orlando Utils. Comm'n*, 436 So.2d 383, 389 (Fla. 5th DCA 1983). Therefore, the Petitioners' Fifth Exception is denied.

Sixth Exception

In this exception the Petitioners contend that the ALJ's findings (FOFs 49, 60, 61, 62) that the Project is sited "too far seaward" conflicts with his endnote number 9 on page 42 of the RO. However, the ALJ's endnote no. 9 relates to his conclusions, in FOF 72 through FOF 78, regarding the impact of the Project on sea turtle nesting habitat and the reasonableness of the Florida Fish and Wildlife Conservation Commission's ("FWCC") "take" analysis. As indicated in the Department's response, the Petitioners are attempting to relate endnote no. 9 to the ALJ's findings regarding other siting criteria in Rule 62B-33.0051, Florida Administrative Code. In particular, the rule requires that "[t]o minimize adverse impacts to the beach and dune system, adjacent properties, and marine turtles, the shore-normal extent of armoring which protrudes seaward of the dune escarpment, vegetation line, or onto the active beach shall be limited to minimize encroachment on the beach." Fla. Admin. Code R. 62B-33.0051(2)(b)2. In addition, the Petitioners' other arguments fail to present any legal basis for modification or rejection of the ALJ's findings (FOFs 49, 60, 61, 62). Therefore, the Petitioners' Sixth Exception is denied.

Seventh Exception

This exception purports to provide an additional reason for disputing "the above-referenced findings of fact" (presumably FOFs 49, 60, 61, and 62). As such, this exception is denied for the same reasons outlined in my rulings above. In addition, the Petitioners' argument appears to be directed at the ultimate conclusions of the ALJ in Conclusions of Law ("COL") 104 and 105. The ALJ concluded that the Petitioners Jackson and Howells failed to meet all the permitting criteria applicable to the Project.

Because of the Project's seaward extent, adverse impacts were not adequately minimized and the Project was likely to result in significant adverse impacts to the beach-dune system. (RO ¶ 104). In addition, although the Project was sited as far landward as practical for the geotextile tube system that was installed, the ALJ found that an alternative armoring structure could have been installed to minimize the extent to which the armoring protruded onto the active beach and into sea turtle habitat, thereby minimizing impacts on the beach-dune system. (RO ¶ 105). The ALJ's FOFs 49, 60, 61, and 62, along with other findings of fact that were not disputed by the Petitioners, form the basis for the conclusions in COLs 104 and 105.

Therefore, the Petitioners' Seventh Exception is denied.

Eighth Exception

The Petitioners take exception to the remedy described by the ALJ in COLs 120 through 124, on the basis that the remedy is not appropriate for all the reasons expressed in the prior exceptions. In COLs 120 through 124, the ALJ concluded that denial of the after-the-fact permit application would trigger the provisions of Sections 161.085(6) and 161.053(7), Florida Statutes, requiring removal of the temporary coastal armoring structure and restoration of the disturbed areas. *See also* Fla. Admin. Code R. 62B-33.0051(5)(g).

Based on my rulings in the Petitioners' First through Seventh Exceptions, this Eighth Exception is denied.

EXCEPTIONS OF THE PETITIONER LANIKAI INVESTMENTS

Exception to page 8, paragraph 23, and page 9, paragraph 27

The Petitioner Lanikai takes exception to the ALJ's FOFs 23 and 27, where he found that the Walton County building permits did not mention the Lanikai (or Tiger) undeveloped lots. Lanikai asserts that the findings are "not supported by the record." However, the building permits are part of the record evidence and there is no mention in either permit of the Lanikai (or Tiger) undeveloped lots. (Dept. Exs. 17 and 18). The first Walton County permit was issued for "210 Winston Lane," the residence of Petitioner Jackson. The second Walton County permit was issued for 210, 220, and 240 Winston Lane," the residences of Petitioner Jackson, the Petitioners Howells, and the Carnrites, respectively. (Dept. Exs. 17 and 18).

Therefore, the ALJ's FOFs 23 and 27 are based on competent substantial evidence in the record, and this exception is denied.

Exception to page 6, paragraph 10

Lanikai takes exception to FOF 10 where the ALJ found that "[i]n April 2004, the dune on Petitioners' properties extended approximately 50 feet seaward of the Jackson and Howell residences." Lanikai asserts that the finding is not supported by the quality of the record evidence. However, the finding is supported by competent substantial evidence in the record. (Dept. Ex. 15; T1186 - 1188; T294). The quality of the record evidence is an evidentiary issue over which the ALJ has exclusive jurisdiction. Evidentiary rulings of the ALJ that deal with "factual issues susceptible to ordinary methods of proof that are not infused with [agency] policy considerations," are not matters over which the agency has "substantive jurisdiction." *See Martuccio v. Dep't of*

Prof'l Regulation, 622 So.2d 607, 609 (Fla. 1st DCA 1993); *Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985); *Fla. Power & Light Co. v. Fla. Siting Bd.*, 693 So.2d 1025, 1028 (Fla. 1st DCA 1997).

Therefore, Lanikai's exception to FOF 10 is denied.

Exception to page 12, paragraph 41

Lanikai takes exception to FOF 41 where the ALJ found that the Project's slope is approximately four-to-one, "which is a much flatter profile than the natural dunes in Walton County, including those in the vicinity of Petitioners' properties." Lanikai asserts that the finding is not supported by the record. As noted by the Petitioners Jackson and Howells First Exception, the statement is "true." Competent substantial evidence supports the ALJ's finding. (T1059 – 1060: Testimony of Tony McNeal). Lanikai argues that one Department witness could not make the comparison. (T987 – 988: Testimony of Perry Ponder). However, findings of fact can only be rejected if a review of the entire record reveals no evidentiary support for the challenged finding. *See* § 120.57(1)(l), Fla. Stat. (2008). Therefore, since competent substantial record evidence supports the finding, Lanikai's exception to FOF 41 is denied.

Exception to page 15, paragraph [54][2], and page 16, paragraph 60

Lanikai excepts to FOFs 54 and 60 on the basis that "[t]hese statements are not supported by the record." In FOF 54 the ALJ found that the "Department uses the post-hurricane toe-of-dune as the baseline for determining whether a coastal armoring structure has been sited as landward as practical," and "for determining whether a structure is eligible and vulnerable under the Department's rules." FOF 54 is supported

[2] Lanikai's exception identifies their exception to "page 15, paragraph 41," but the quoted finding is from page 15, paragraph 54 of the RO.

by competent substantial record evidence. (T872, 1012 - 1013). In FOF 60 the ALJ determined that the footprint of the Project extends 20 to 25 feet seaward of the pre-2004/2005 natural dunes on Petitioners' properties. FOF 60 is supported by competent substantial record evidence. (Pet. Exs. 11 and 12; T178-179; Dept. Ex. 15; T294; T1194-1196). Findings of fact can only be rejected if a review of the entire record reveals no evidentiary support for the challenged finding. *See* § 120.57(1)(l), Fla. Stat. (2008). Therefore, since competent substantial record evidence supports the findings, Lanikai's exception to FOFs 54 and 60 are denied.

Exception to page 14, paragraph 49

Lanikai excepts to the ALJ's FOF 49 where he found that "the drawings show the seaward edge of the Project" to be "seaward of the pre-hurricane dune on Petitioners' properties." Lanikai argues that the finding does not indicate whether reference is to Hurricane Dennis or Hurricane Ivan. However, my ruling is the same as outlined in the Petitioners' Second and Third Exceptions, above. FOF 49 is supported by competent substantial evidence in the record including the testimony of the Petitioners' expert witness and Petitioners' own exhibits. (Pet. Exs. 11 and 12; T178-179; Dept. Ex. 15; T294). Therefore, Lanikai's exception to FOF 49 is denied.

Exception to page 15, paragraph 54

Lanikai again excepts to FOF 54, this time on the basis that the Department's approach "makes no sense." However, FOF 54 is simply a finding that describes the Department's approach and Lanikai does not argue that the ALJ's description is not accurate. FOF 54 is supported by competent substantial record evidence. (T872, 1012 - 1013). Therefore, Lanikai's exception to FOF 54 is denied.

Exception to page [16] sic, paragraph 59

Lanikai takes exception to FOF 59 where the ALJ determined that "the more persuasive evidence establishes that the Project extends further seaward than would an alternative type of armoring structure, such as a vertical seawall . . .." Lanikai's exception cites other findings of the ALJ that describe the physical characteristics and location of the Project (ProTec Tube System). (FOFs 40, 42, 58). These findings actually support the ALJ's determination, forming the basis for his ultimate inference in FOF 59 from "the persuasive evidence." Lanikai appears to be concerned that the ALJ's finding would preclude "any installation of this (geotextile tube) system." However, FOF 59 does not make any such finding or interpretation of applicable Department rule. Therefore, Lanikai's exception to FOF 59 is denied.

Exception to page 16, paragraph 61

Lanikai takes exception to FOF 61, on the basis that "the record reflects no actual measurements." However, I am not authorized to reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See e.g., Rogers v. Dep't of Health,* 920 So.2d 27, 30 (Fla. 1st DCA 2005). As pointed out by the Department's Exception No. 10 and CCC's Exception No. 4, the Department's exhibits showed and a Department witness testified to a distance of "20 to 25 feet." (T1228; Dept. Exs. 14 and 15). However, as outlined in my rulings below, the ALJ's finding of "10 to 20 feet" is a reasonable inference from the totality of the evidence presented at the hearing. (T1186 – 1189; T1194 – 1196; T1220 – 1222; T1228; T1242; T1247; Dept. Exs. 14 and 15; T1248 – 1249; T1359 – 1360;

T1258; Pet. Exs. 11 and 12; T178 - 179). Therefore, Lanikai's exception to FOF 61 is denied.

Exception to page 17, paragraph 62

Lanikai takes exception to FOF 62 on the basis that it is not supported by the record. FOF 62 states:

> Persistent scarping has occurred along Petitioners' properties as a result of frequent interaction between waves and the seaward extent of the Project. The scarping is two to three feet in height in some areas. Similar scarping has not been observed on adjacent properties, which is another indication that the Project extends too far seaward.

The ALJ's finding is supported by competent substantial evidence in the record. (Dept. Exs. 49-80 through 49-85; T888 – 889; T722 – 723). Therefore, Lanikai's exception to FOF 62 is denied.

Exception to page 17, paragraph 65

Lanikai takes exception to FOF 65 where the ALJ found that "[t]he Project is not uniform with the armoring structure on the Carnrite property." Lanikai does not assert that the factual finding has no record support. In fact, competent substantial evidence supports the finding. (T895). Lanikai is concerned that a rule interpretation regarding uniformity with existing armoring structures, would preclude a property owner from "closing the gap" utilizing a different type of armoring structure. However, there is record testimony explaining the Department's interpretation of the "closing the gap" criteria of Section 161.085(2)(c), Florida Statutes, and Florida Administrative Code Rule 62B-33.0051(1)(a)3. The Department's witnesses testified that the criteria do not prohibit closing the gap with a different type of armoring structure. A difference in the type of armoring structure is one of the factors considered by the Department, in

addition to whether or not the proposed armoring will extend any further seaward than the existing armoring on adjacent parcels. (T917 – 919; T1096 – 1101). The Department's interpretation is reasonable and the ALJ found no fault with it. *See* COLs 94, 99, 105, 108; *see also Suddath Van Lines, Inc. v. Dep't of Envtl. Prot.*, 668 So.2d 209, 212 (Fla. 1st DCA 1996)(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).

Therefore, based on the foregoing reasons, Lanikai's exception to FOF 65 is denied.

Exception to page 17, paragraph 66

Lanikai excepts to FOF 66 for essentially the same reason described in its exception to FOF 65, its concern that geotextile tubes could never receive approval under the ALJ's findings. Lanikai does not assert that the factual finding has no record support. Competent substantial evidence in the record supports FOF 66. (T1096 – 1101). In addition, as described above, the Department witnesses testified concerning interpretation of the "closing the gap" statutory and rule criteria. (T917 – 919; T1096 – 1101). The armoring rule and statute applicable in this case do not provide a blanket approval of geotextile tubes. *See* § 161.085, Fla. Stat. (2005); Fla. Admin. Code R. 62B-33.0051 (2005). Under these provisions geotextile tubes are armoring structures that must comply with all the Department's other coastal armoring and coastal construction control line ("CCCL") permitting criteria, in addition to the "closing the gap" criteria. *See* COL 109; Fla. Admin. Code R. 62B-33.005(1)(a)3.e.

Therefore, based on these reasons, Lanikai's exception to FOF 66 is denied.

Exception to page 20, paragraph 81

Lanikai takes exception to FOF 81, but does not assert that the factual finding has no record support. To the contrary, Lanikai argues that if FOF 81 is true then it "would be arbitrary, capricious, and manifestly contrary to both rule and statute to require the Project to be completely removed." First, FOF 81 is supported by competent substantial evidence in the record. (Pet. Exs. 11 and 12; T178-179; Dept. Ex. 15; T294; T330, 342 – 343, 352 – 356, 368, 379, 383; Pet. Ex. 47; T425 – 427)). Second, Lanikai's argument is actually directed at the ALJ's COLs 104, 105, 109, 120 – 123. Lanikai's argument lacks merit because the ALJ need not determine that there was a "take" of sea turtles or sea turtle nesting habitat in order to conclude that the Project does not meet all the other requirements of Sections 161.085 and 161.053, Florida Statutes, and Florida Administrative Code rules 62B-33.0051 and 62B-33.005. The record evidence did not lead the ALJ to conclude that "[t]he Department shall issue a permit for construction which an applicant has shown to be clearly justified by demonstrating that all standards, guidelines, and other requirements set forth in the applicable provisions of Part I, Chapter 161, F.S., and [62B-33] are met." Fla. Admin. Code R. 62B-33.005(4). To the contrary, the ALJ concluded that all the relevant criteria were not satisfied and recommended denial of the permit.

Therefore, Lanikai's exception to FOF 81 is denied.

EXCEPTIONS OF THE RESPONDENT DEPARTMENT

Clerical errors

(a) The Department's technical exception points out that the RO on page 4 contains a scrivenor's error. "Dr. Robin Trinedell" should be properly referred to as "Dr.

Robbin Trindell". (Dept. Ex. 4 – resume of Robbin Trindell). Endnote number 9 on page 42 of the RO also contains the same scrivenor's error. The technical exception is granted.

(b) The Department's technical exception to FOF 12, points out that dune measurements and distances in relation to nearby structures and features are based on "the toe of dune or toe of bluff." (T872 and 879). Although the ALJ's early findings (FOFs 10 and 12) refer only to "the dune," his later findings of fact include the terminology "toe-of-dune." (e.g., FOFs 48, 54, 57). In particular FOF 57 concerns the same "six feet" as FOF 12. Thus, based on all related findings of fact in the RO and on the record evidence supporting those findings, I conclude that this technical exception is not necessary, but will grant it.

(c) The Department's technical exception points out that two letters were sent to Petitioners Jackson and Howells, one to each property owner. (Dept. Exs. 18 and 19). The ALJ makes this factual finding in FOF 24. The letters are form letters containing boilerplate language. (T493, line 7; Dept. Exs. 18 and 19). Thereafter, the ALJ describes certain content of the form letters in FOFs 25 and 26. These findings require no modification and are supported by competent substantial evidence. FOF 28 refers to a period of time in relation to the two letters when all the "Petitioners" made a collective decision to install a geotextile tube system as a permanent protection measure. This finding should refer to "the Department's letters" and not "the Department's letter." Therefore, this technical exception is granted as to FOF 28.

Exception No. 1

The Department takes exception to a portion of FOF 14, which states that sand-

fill eliminated the immediate threat to the [Jackson and Howells] residences, "but did not offer any long-term protection against future storm events." The Department argues that no competent substantial evidence supports a finding regarding the long-term protection of sand-fill for the residences and that such a finding requires expert analysis. In FOF 13 the ALJ found that shortly after Hurricane Dennis, Jackson and the Howells "placed a significant volume of sand-fill immediately seaward of their homes . . . as an emergency protection measure." This finding is undisputed. In COL 92 the ALJ notes that the Department's rules include guidelines and definitions concerning temporary armoring structures in a provision titled "Emergency Protection." The rule provides that emergency protection measures "shall be the minimum required . . . to protect the structure from imminent collapse." *See* Fla. Admin. Code R. 62B-33.0051(5)(c). Department rule defines "Emergency Protection" as "the use of armoring or other measures such as sand fill or expedient foundation reinforcement to temporarily protect eligible structures which are threatened by erosion as a result of recent storm events." Fla. Admin. Code R. 62B-33.002(19). Thus, the nature of a temporary emergency protection measure is that it is not necessarily expected to be the long term solution. (T986). I conclude that the ALJ's challenged finding is a permissible inference from the evidence contained in this record and the language of the Department's rules. *See Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985).

Therefore, the Department's Exception No. 1 is denied.

Exception No. 2

The Department takes exception to FOF 35 on the basis that it is not based on competent substantial evidence. In FOF 35 the ALJ found:

> However, the Department staff could have raised concerns about the location or extent of the Project during construction even though they might not have been able to stop the construction. This, in turn, may have allowed Petitioners to modify the Project during construction, as was done in the case of another geotextile tube system installed in south Walton County after Hurricane Dennis.[endnote 8/]

In endnote 8 on page 42 of the RO, the ALJ cites to the hearing transcript testimony of Mikel Lee Perry, a co-owner of the Tiger Joint Ventures, Inc., property. Mr. Perry testified that he modified the installation of a two-tiered geotextile system at his own property after speaking to Dr. Robbin Trindell. This ocurred prior to the installation of the Project. (T1321 - 1322, 1329 - 1330, 1333). The Department argues that the same evidence considered by the ALJ and determined in factual findings (FOFs 17, 24, 25, 26, 29, 30, 32, 33), should lead to a different inference than that drawn by the ALJ in FOF 35. I have no authority to reweigh the evidence in order to reach a different inference than that drawn by the ALJ. *See Heifetz,* 475 So.2d at 1281.

Therefore, the Department's Exception No. 2 is denied.

Exception No. 3

The Department takes exception to FOF 44 where the ALJ finds that "the Project extends from the western edge of the Jackson property." The Department contends that the record evidence shows that the western edge of the Project "is built on and extends from a public access easement which is located immediately to the West of the Jackson's property." (Pet. Ex. 6A, composite 15 of 15; Pet. Ex. 10, sheet C4; Pet. Ex. 11). However, the competent substantial evidence in the record shows that the 33-foot public access easement runs across the western 33 feet of Jackson's property. The evidence suggests that the easement is an encumbrance on Jackson's property. (Pet.

Ex. 2; Pet. Ex. 6A, composite 15 of 15). Therefore, the ALJ's finding is supported by competent substantial record evidence, and the Department's Exception No. 3 is denied.

Exception No. 4

The Department takes exception to FOF 45 where the ALJ stated the cost of the Project and how the cost was allocated amongst the Petitioners. Contrary to the Department's assertion, FOF 45 was relevant to the evaluation of the Petitioners' equitable estoppel argument, which the ALJ ultimately rejected. The finding is also supported by competent substantial record evidence. (Pet. Ex. 56). Therefore, the Department's Exception No. 4 is denied.

Exception No. 5

The Department takes exception to the second sentence in FOF 52, on the basis that it is an "unclear statement." FOF 52 states that "[g]eotextile tube systems are designed to dissipate wave energy as the wave runs up the slope. This helps to reduce erosion and scour." FOF 52 is based on record evidence that the design of geotextile tube systems reduces the amount of erosion and scour. (T149 – 151). Thus, the second sentence of FOF 52 reasonably follows from the first sentence, and all of FOF 52 is supported by competent substantial evidence. The Department's Exception No. 5 is denied.

Exception No. 6

The Department takes exception to FOF 53 on the basis that certain portions of the finding are not based on competent substantial record evidence. FOF 53 states that "[v]ertical seawalls, by contrast, refract wave energy, which can result in increased

scour and beach erosion seaward of the wall. Toe scour protection at the base of the wall is necessary to minimize erosion and scour and to maintain the integrity of the wall." First, the Department argues that the first sentence of FOF 53 incorrectly uses the term "refract." The Department points out that the correct term used by the experts in the hearing testimony is the term "reflect." (T150). In their response, the Petitioners Jackson and Howells indicate that they have no objection to changing the term "refract" to "reflect." However, a more thorough review is necessary to make sure that the exception is well founded and not just a matter of the difference between what the ALJ and the court reporter may have heard while listening to the witness testify.

The definitions of the terms "refraction" and "reflection" regarding waves show that in the context of the hearing testimony the Department's exception is well taken. The transcript shows that the Petitioners' expert, Dr. Lee Harris, used the term "reflect" to describe a wave's encounter with a vertical seawall. Reflection is the change in direction of a wavefront at an interface between two different media so that the wavefront returns into the medium from which it originated. Thus, when a wave encounters a fixed medium, such as a vertical seawall, it is turned (reflected) back. On the other hand, refraction is the change in direction of a wave due to its change in speed when it moves into water of a different depth. This phenomenon explains why whatever direction waves travel in deep water, they always refract towards the normal (perpendicular) as they enter the shallower water near the beach. Therefore, this exception is granted and FOF 53 is modified to replace "refract" with "reflect."

Second, the Department argues that there's no evidence in the record to support the second part of the second sentence. The ALJ found that toe scour protection is

necessary "to maintain the integrity of the wall." Contrary to the Department's assertion the testimony of Dr. Lee Harris supports this finding. *See* T195, lines 14 – 18 ("Well, if you take away the toe scour protection ... And if it is unabated, ...possible undermining of the seawall."); T197, line 24 – 198, line 2 ("I've had situations where I've had to install toe scour protection after the fact to keep a seawall from failing."). Therefore, the Department's exception to the second part of the second sentence of FOF 53 is denied.

Exception No. 7

The Department takes exception to the second sentence in FOF 55, where the ALJ summarized testimony regarding whether the Project was sited as far landward as practical. The ALJ begins FOF 55 by noting that conflicting evidence was presented on this issue. The second sentence then summarizes the testimony presented by the Petitioners by finding that "[p]etitioners' witnesses testified that the Project could not have been sited any further landward without undermining the integrity of the Jackson and Howell residences during construction." The Department argues that Petitioners' expert only testified generally that undermining of a structure is something that must be avoided. However, the Department cites to the hearing transcript, (T213, lines 2 – 13) to the testimony of Dr. Lee Harris responding to the specific question: "Q Could this system have been [sited] *sic* any closer to the Howell and Jackson residences than it has been?" (T212, line 15). Therefore, the finding is supported by competent substantial evidence. The Department's Exception No. 7 is denied.

Exception No. 8

The Department takes exception to the portion of FOF 57 where the ALJ found that "even the Department's witnesses acknowledged that armoring structures typically

cannot be placed closer than 20 feet of existing structures." The Department asserts that this portion of the finding is not supported by competent substantial evidence. However, the finding is supported by competent substantial record evidence. (T750 – 753; T1376, line 13 – 1377, line 11; T1346). Therefore, the Department's Exception No. 8 is denied.

Exception No. 9

The Department takes exception to FOF 58 where the ALJ found that "the more persuasive evidence establishes that this geotextile tube system could not have been sited any further landward on Petitioners' property." (Emphasis in original). The Department contends that this finding is not based on competent substantial evidence, and that it is a mixed finding of fact and law. The ALJ's finding is a clear indication that as the trier of fact he was persuaded by the expert testimony for the Petitioners on this issue. (T212, line 15 – T213). This is not a mixed finding of fact and law, but is indeed a purely factual finding based on the hearing testimony. Although the record contains contrary testimony from the Department's experts, the ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that I cannot alter, absent a complete lack of any competent substantial evidence of record supporting his decision. *See e.g., Collier Med. Ctr. v. State, Dep't of HRS*, 462 So.2d 83, 85 (Fla. 1st DCA 1985); *Fla. Chapter of Sierra Club v. Orlando Utils. Comm'n*, 436 So.2d 383, 389 (Fla. 5th DCA 1983).

In addition, the Department contends that the "documents upon which the experts attempted to determine the location of the structures are unsubstantiated hearsay." These documents are "the drawings" that the ALJ referred to in FOFs 47, 48,

and 49, and discussed in my prior rulings on the Petitioners' Second and Third Exceptions and Lanikai's exception to page 14, paragraph 49. However, I do not have jurisdiction to modify or reject rulings on the admissibility of evidence. Evidentiary rulings of the ALJ that deal with "factual issues susceptible to ordinary methods of proof that are not infused with [agency] policy considerations," are not matters over which the agency has "substantive jurisdiction." *See Martuccio v. Dep't of Prof'l Regulation*, 622 So.2d 607, 609 (Fla. 1st DCA 1993). Therefore, the Department's Exception No. 9 is denied.

Exception No. 10

The Department takes exception to FOF 61 where the ALJ found that "[t]he Project also extends 10 to 20 feet further seaward than the restored dunes in Rosemary Beach to the west of Petitioners' properties." The Department and CCC's Exception No. 4, argue that the Department's exhibits showed and a Department witness testified to a distance of "20 to 25 feet." (T1228; Dept. Exs. 14 and 15). The Department contends that "the preponderance of the evidence" shows the project extends greater than 20 feet seaward of the Rosemary Beach restored dunes. However, I conclude that the ALJ's finding of "10 to 20 feet" is a reasonable inference from the competent substantial record evidence. (T1186 – 1189; T1194 – 1196; T1220 – 1222; T1228; T1242; T1247; Dept. Exs. 14 and 15; T1248 – 1249; T1359 – 1360; T1258; Pet. Exs. 11 and 12; T178 - 179). I am not authorized to reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or draw inferences from the evidence. *See e.g., Rogers v. Dep't of Health,* 920 So.2d 27, 30 (Fla. 1st DCA 2005). Therefore, the Department's Exception No. 10 is denied.

Exception No. 11

The Department excepts to FOF 69 where the ALJ found that "Walton County beaches are not major nesting beaches under the Loggerhead Sea Turtle Recovery Plan." The Department asserts that this finding is not supported by competent substantial evidence. However, the finding is based on the testimony of the Petitioners' sea turtle expert. (T316, 327; Pet. Ex. 47). In addition the Department argues that the finding is based on hearsay because the recovery plan was not introduced into evidence. Evidentiary rulings are matters within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. *See Martuccio,* 622 So.2d at 609. Therefore, the Department's Exception No. 11 is denied.

Exception No. 12

The Department takes exception to FOF 75 on the basis that it is "not relevant to any issues of law in this case and should be rejected." In FOF 75 the ALJ found that "the more persuasive evidence establishes that geotextile tube systems, when properly designed, sited, and maintained with appropriate sand cover do not adversely impact marine turtles and even provide benefits that other armoring structures do not." As the Petitioners' response points out, this finding is clearly relevant to one of the main reasons for the Department's initial intent to deny the after-the-fact permit application. In the preceding FOF 74, the ALJ found that the FWCC letter "objected to the use of the geotextile tube system, stating that such structures are 'reasonably certain to cause [a] take' of sea turtles and their nests." Then, he states in the first sentence of FOF 75 that the "more persuasive evidence presented at the final hearing did not support this latter claim." Although, contending that FOF 75 should be rejected, the Department does not

argue that it is not supported by competent substantial record evidence. Indeed, the finding is supported by the record. (T330, 342 – 343, 352 – 356, 368, 379, 383; Pet. Ex. 47; T425 – 427). Under the standard of review in Section 120.57(1)(l), Florida Statutes, an agency reviewing a recommended order may not reject or modify the findings of fact of an ALJ, "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." Therefore, the Department's Exception No. 12 is denied.

Exception No. 13

The Department takes exception to FOF 77, which states that "FWCC does not have a rule on this issue, and the evidence failed to establish the reasonableness of the approach described by the FWCC witness presented by the Department. [Endnote 9]" The Department argues that the finding that FWCC does not have rules that describe how the FWCC determines take is not relevant. The ALJ's FOF 77 follows FOF 76 in which he found that the FWCC's comment letter to the Department regarding the Project stated that it "directly impacts approximately 0.4 acres of sandy beach." The testimony at hearing from the FWCC witness described the area as the difference between the width of the active beach after Hurricane Dennis and the width of the beach after installation of the Project. According to FWCC staff, this is the appropriate comparison for determining whether a "take" has occurred. (FOF 76). However, the ALJ found, based on the evidence he heard, that this approach was not reasonable. *See* Endnote 9 on page 42. Although the Department only takes exception to the first part of FOF 77, that FWCC does not have a rule on this issue, the argument is directed

at the ALJ's ultimate determination. The Department appears to argue that FWCC's or the Department's "interpretation" of the relevant statute that defines "take" is reasonable. However, the ALJ's factual finding is not about legal interpretation, it is about his judgment concerning the scientific basis presented at the hearing to explain the approach taken by FWCC when making this "take" determination. *See* § 20.331(10), Fla. Stat. (2008)(Providing that the commission shall defend the validity of the credible, factual scientific data used as a basis for its comment letters). In this context, it is wholly the province of the ALJ to accept the testimony of one expert witness over that of another expert, to weigh the evidence, judge the credibility of witnesses, and resolve conflicting evidence. *See e.g., Collier Med. Ctr. v. State, Dep't of HRS*, 462 So.2d 83, 85 (Fla. 1st DCA 1985); *Rogers v. Dep't of Health,* 920 So.2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep't of Envtl. Prot.*, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997). Therefore, the Department's Exception No. 13 is denied.

Exception No. 14

The Department takes exception to FOF 79, arguing that it is a mixed finding of fact and law based on an incorrect statement of the law. In FOF 79 the ALJ found that "there is not credible evidence that the Project has actually deterred sea turtles from nesting on Petitioners' property or otherwise caused a 'take' of sea turtles. To the contrary, it is undisputed that sea turtles nested seaward of the Project in 2006 and 2007." The ALJ's finding is obviously his judgment, as the trier of fact, based on weighing the evidence presented at the hearing. I am not authorized to reweigh the evidence or judge the credibility of witnesses. *See, e.g., Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985).

The Department also argues that the finding is based on an incorrect statement of the law and cites to federal cases that interpret the federal Endangered Species Act. However, as quoted by the ALJ in FOF 81, and in the Department's rules, the relevant law applicable here is Florida law, namely Section 370.12, Florida Statutes, the "Marine Turtle Protection Act." *See* Fla. Admin. Code R. 62B-33.002(32)(definition of "Significant Adverse Impacts"). The Act defines a "take" as "an act that actually kills or injures marine turtles, and includes significant habitat modification or degradation that kills or injures marine turtles by significantly impairing essential behavioral patterns, such as breeding, feeding, or sheltering." § 370.12(1)(c)2., Fla. Stat. (2008). Thus, the ALJ's finding is relevant to his ultimate conclusion regarding whether the Project has or will cause a "take" of sea turtles.

Therefore, the Department's Exception No. 14 is denied.

Exception No. 15

The Department takes exception to FOF 80 arguing that it is not relevant to the legal issues in this proceeding and is not based on competent substantial evidence. FOF 80 follows from the last sentence in FOF 79, and states that "[t]he 2006 nest was successful. The 2007 nest was not successful, but there is no credible evidence that the Project contributed to the nest's failure. Rather, the sea turtle experts generally agreed that the nest failed because of flooding caused by Hurricane Dean passing offshore." As I've discussed in my ruling on the Department's Exception No. 14, this factual finding is legally relevant to the issues in this case. In addition, the finding is supported by competent substantial record evidence. (T358 – 361; T686; T769 - 770).

Therefore, the Department's Exception No. 15 is denied.

Exception No. 16

The Department takes exception to FOF 81 on the basis that it is conclusion of law that does not accurately reflect the law on "take." This finding is clearly a mixed finding of fact and law where the ALJ summarizes his view of the evidence and then applies the definition of take in Section 370.12(1), Florida Statutes, from which he directly quotes relevant statutory language. The ALJ's ultimate factual determinations are based on competent substantial evidence in the record, as described in my previous rulings on the Department's exceptions to FOFs 77, 79 and 80, above. The ALJ's quote from the statute is accurate. So all that remains for review is the ALJ's application of the statute's provisions to the fact found by him. I find no fault with the ALJ's legal analysis based on applying the statute's provisions to his view of the evidence. I have no authority to reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, judge the credibility of witnesses, or draw inferences from the evidence. *See e.g., Rogers v. Dep't of Health,* 920 So.2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep't of Envtl. Prot.,* 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands County Sch. Bd.,* 652 So.2d 894 (Fla. 2d. DCA 1995).

Therefore, the Department's Exception No. 16 is denied.

Exception No. 17

The Department takes exception to COL 105 to the extent that the ALJ concluded that "the more persuasive evidence establishes that the Project was sited as far landward as practical for the geotextile tube system that was installed." Based on my rulings in the Department's Exception No. 7 and Exception No. 9, this exception is also denied.

Exception No. 18

The Department takes exception to COL 117 on the basis that it is not legally relevant. However, based on my ruling on the Department's Exception No. 2 and the ALJ's discussion the law of equitable estoppel in COLs 112, 113 and 114, the Department's Exception No. 18 is denied.

EXCEPTIONS FROM INTERVENOR CCC

Exception No. 1

CCC takes exception to FOF 14, which states that sand-fill eliminated the immediate threat to the [Jackson and Howells] residences, "but did not offer any long-term protection against future storm events." CCC contends that no competent substantial evidence supports a finding regarding the long-term protection of sand-fill for the residences. Based on my ruling in the Department's Exception No. 1 above, this exception is denied.

Exception No. 2

CCC takes exception to FOF 53, where the ALJ found that "[t]oe scour protection at the base of the wall is necessary to minimize erosion and scour and to maintain the integrity of the wall." CCC argues that there's no competent substantial evidence in the record to support the finding that toe scour protection is "necessary," citing to the definition of "necessary" as "absolutely needed; required." Merriam-Webster's Online Dictionary. Contrary to the CCC's assertion the testimony of Dr. Lee Harris supports this finding. (T195 – 198; Pet. Exs. 43 and 44). Therefore, the CCC's Exception No. 2 is denied.

Exception No. 3

CCC takes exception to FOFs 57 and 58 on the basis that they are not supported by competent substantial evidence. However, based on my rulings in the Department's Exception No. 8 and Exception No. 9, this exception is also denied.

Exception No. 4

CCC takes exception to FOF 61 on the basis that it is not supported by competent substantial evidence. However, based on my ruling in the Department's Exception No. 10, this exception is also denied.

Exception No. 5

CCC takes exception to FOF 69 on the basis that it is not supported by competent substantial evidence. However, based on my ruling in the Department's Exception No. 11, this exception is also denied.

Exception No. 6

CCC takes exception to FOF 70 where the ALJ found that "[s]ea turtles typically nest at or near the seaward toe of the dune or dune escarpment, they do not climb very far into the dune, and they are not able to climb vertical escarpments of as little as 18 inches in height." CCC contends that the ALJ's general reference to "sea turtles" is incorrect. CCC argues that FOF 70 contains findings that are specific to loggerhead sea turtles, which is the most prevalent species nesting on the beaches in Walton County. (FOF 68). CCC requests a minor modification of FOF 70 to clarify the record. Although CCC's exception did not provide me with any record citations to justify the request, my review of the record shows that there is competent substantial evidence to

justify the request. (T611, 630, 632, 800 – 801). Therefore, CCC's Exception No. 6 is granted.

Exception No. 7

CCC takes exception to FOF 75 on the basis that the ALJ's acceptance of the Petitioners' sea turtle expert's testimony is not based on competent substantial evidence. CCC argues that his opinions represent "unshared, novel expert opinion," and the reports on which he relied were problematic. In FOF 75 the ALJ found that "the more persuasive evidence establishes that geotextile tube systems, when properly designed, sited, and maintained with appropriate sand cover do not adversely impact marine turtles and even provide benefits that other armoring structures do not." In my ruling on the Department's Exception No.12, I concluded that FOF 75 is supported by the competent substantial record evidence. (T330, 342 – 343, 352 – 356, 368, 379, 383; Pet. Ex. 47; T425 – 427).

Under the standard of review in Section 120.57(1)(l), Florida Statutes, an agency reviewing a recommended order may not reject or modify the findings of fact of an ALJ, "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." In addition, I have no authority to modify or reject the ALJ's evidentiary rulings, which are not within this agency's substantive jurisdiction, or his acceptance of one expert's testimony over that of another expert. *See e.g., Collier Med. Ctr. v. State, Dep't of HRS*, 462 So.2d 83, 85 (Fla. 1st DCA 1985); *Martuccio v. Dep't of Prof'l Regulation*, 622 So.2d 607, 609 (Fla. 1st DCA 1993).

Therefore, CCC's Exception No. 7 is denied.

Exception No. 8

CCC takes exception to FOFs 76 and 77, including the ALJ's rationale for FOF 77 described in Endnote 9 of the RO. CCC basically argues in this lengthy exception that I should reweigh the evidence and reach a different conclusion than the ALJ. As I've already explained in this Final Order, the applicable standard of review precludes this agency from invading the exclusive province of the trier of fact. Based on my ruling in the Department's Exception No. 13, above, this exception is also denied.

Exception No. 9

CCC takes exception to FOF 79, where the ALJ found that "there is no credible evidence that the Project has actually deterred sea turtles from nesting on Petitioners' property or otherwise caused a 'take' of sea turtles." CCC argues that based on the ALJ's factual findings and other record evidence, "it can be reasonably inferred that...the Project has disrupted reproductive activity, resulting in a take of the species." Essentially, CCC argues that I should reweigh the evidence, make additional findings of fact, and draw an ultimate inference from the evidence different than that drawn by the ALJ. This would violate the applicable standards of review. *See e.g.,* § 120.57(1)(l), Fla. Stat. (2009); *Collier Med. Ctr. v. State, Dep't of HRS*, 462 So.2d 83, 85 (Fla. 1st DCA 1985); *Martuccio v. Dep't of Prof'l Regulation*, 622 So.2d 607, 609 (Fla. 1st DCA 1993). Therefore, the CCC's Exception No. 9 is denied.

Exception No. 10

CCC excepts to FOF 80 on the basis that it is internally inconsistent and is not based on competent substantial evidence. Based on my ruling in the Department's Exception No. 15 above, this exception is also denied.

Exception No. 11

CCC takes exception to FOF 81 for the reasons discussed in its Exceptions 7 through 10. Therefore, based on my rulings in those exceptions and my ruling in the Department's Exception No. 16, this exception is denied.

Exception No. 12 [sic]

CCC takes exception to the ALJ's COL 105 for the same reasons in its related Exception No. 3, above. Based on my rulings in the Department's Exception Nos. 7, 8, 9, and 17; and my ruling in CCC's Exception No. 3, this exception is also denied.

CONCLUSION

The ALJ concluded that it is undisputed that the Petitioners Jackson and Howells are entitled to install some type of armoring seaward of their residences, which are defined by Department rule as eligible and vulnerable structures. However, he found that they failed to meet all the permitting criteria applicable to the Project. Because of the Project's seaward extent, adverse impacts were not adequately minimized and the Project was likely to result in significant adverse impacts to the beach-dune system. In addition, although the Project was sited as far landward as practical for the geotextile tube system that was installed, the ALJ found that an alternative armoring structure could have been installed to minimize the extent to which the armoring protruded onto the active beach and into sea turtle habitat, thereby minimizing impacts on the beach-

dune system. The ALJ also concluded that the portion of the Project on the Lanikai and Tiger undeveloped lots extended significantly further seaward than the currently unauthorized wall on the Carnrite property. Also, the portion of the Project on the Lanikai and Tiger lots did not meet the permitting criteria, as outlined above. These findings and conclusions are adopted in this Final Order.

The ALJ addressed the issue of the remedy contemplated by Section 161.085(6), Florida Statutes. *See also* § 161.053(7), Fla. Stat. ("Any coastal structure erected, or excavation created, in violation of the provisions of this section is hereby declared to be a public nuisance; and such structure shall be forthwith removed or such excavation shall be forthwith refilled..."); Fla. Admin. Code R. 62B-33.0051(5)(g). The ALJ found that the parties did not dispute that the Project must be removed if the Department denies the after-the-fact permit application. He found reasonable, the remedy ordered by the Department's intent to deny giving the Petitioners a period of 60 days to remove the Project subject to coordination with the marine turtle permit holder for the subject beach segment. Otherwise, removal shall occur after October 31 and before March 1 (i.e., outside of marine turtle nesting season).

Based on the underlying factual findings of the ALJ adopted in this Final Order, I concur with his ultimate recommendation that I deny the Petitioners' after-the-fact permit

application, File No. WL-914 AR ATF.

It is therefore ORDERED:

A. The Recommended Order (Exhibit A) is adopted, except as modified in this Final Order, and incorporated by reference herein.

B. The Petitioners' after-the-fact permit application, File No. WL-914 AR ATF, is DENIED.

C. Within 60 days from the date of this Final Order the Petitioners shall remove the sand filled ProTec Tube Container System and composite sheet pile return walls. Any areas disturbed during the removal process shall be restored to the condition which existed prior to placement of the ProTec Tube System and composite sheet pile walls. Removal shall be accomplished after October 31 and before March 1 (i.e. outside of marine turtle nesting season). If removal does occur after March 1 and before October 31, the Petitioners shall coordinate with the marine turtle permit holder for this segment of beach to ensure protection of marine turtles or their nests.

JUDICIAL REVIEW

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rules 9.110 and 9.190, 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 3rd day of December, 2008, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

Mimi Drew, Deputy Secretary for
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.

Vera D. Cobb 12/3/08
CLERK DATE

CERTIFICATE OF SERVICE

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

Brett Michael Paben, Esquire
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233 3rd Street, North
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Gary A. Shipman, Esquire
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Tallahassee, FL 32301

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:

Kelly L. Russell, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this 11th day of December, 2008.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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