STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

IAN AND KELI LINEBURGER, KIM AND BOB MOREY, BONITA AND RICHARD AGAN, VIRGINIA HALSEY, CANDACE AND ROBY O'BRIEN, ANN SACKETT, FRANK T. AND MARILYN SHAY, PETER AND YVONNE PAV, KIMBERLEY BENDER, EMANUEL ROUX AND ELIZABETH SCHUH,	)	
Petitioners,	)	
vs.	)	**OGC CASE NO. 07-1367**
	)	**DOAH CASE NO. 07-3757**
PROSPECT MARATHON COQUINA and DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
Respondents.	)	

CONSOLIDATED FINAL ORDER

On March 21, 2008, an Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH") submitted his Recommended Order ("RO") to the Department of Environmental Protection ("Department") in the above captioned administrative proceeding. A copy of the RO is attached hereto as Exhibit A. The RO indicates that copies were served to counsel for the Petitioners Ian and Keli Lineburger, Kim and Rob Morey, Bonita and Richard Agan, Virginia Halsey, Candace and Roby O'Brien, Ann Sackett, Frank T. and Marilyn Shay, Peter and Yvonne Pav, Kimberley Bender, Emmanuel Roux and Elizabeth Schuh ("Petitioners"). Copies of the RO were also served to counsel for the Co-Respondents, Prospect Marathon Coquina ("PMC") and the Department. On April 7, 2008, the Petitioners, PMC and the Department filed

Exceptions to the RO. The Petitioners' Exceptions included a request for remand. On April 17, 2008, the parties filed Responses to the Exceptions. This matter is now before me for final agency action.[1]

BACKGROUND

On July 7, 2007, the Department issued its consolidated notice of intent to issue a consolidated environmental resource permit and modified sovereignty submerged land lease ("the proposed authorizations") to PMC. Previously, on June 12, 2007, the Board of Trustees of the Internal Improvement Trust Fund ("BOT") granted authority for the Department to proceed with the lease modification. The proposed authorizations would allow PMC to expand an existing multi-family, residential docking facility on the north end of Coquina Key, along an existing seawall and adjacent to the Coquina Key North condominiums that PMC converted from a former apartment complex. Coquina Key is located in Big Bayou which is near the southern end of the St. Petersburg peninsula. The mouth of the bayou opens to Tampa Bay. Big Bayou is part of the Pinellas County Aquatic Preserve, which includes most of the coastal waters of Pinellas County. The proposed project would add 60 boats slips to the existing 30 boat slips at the project site. The new slips could accommodate boats up to 25 feet in length. PMC would restrict use of the boat slips to Coquina Key North condominium owners. In converting the former apartment complex to condominiums, PMC retained ownership of a strip of land immediately upland of the submerged lands on which the proposed project would be constructed.

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[1] The Secretary of the Department is delegated the authority to review and take final agency action on applications to use sovereignty submerged lands when the application involves an activity for which the Department has permitting responsibility. *See* Fla. Admin. Code R. 18-21.0051(2).

The Petitioners filed a timely petition for administrative hearing and the matter was referred to DOAH to conduct an evidentiary hearing. With the exception of Elizabeth Schuh, all the Petitioners live in the Driftwood neighborhood, which is located across Big Bayou from the proposed project. All the Petitioners use Big Bayou for various recreational purposes, including swimming and boating. Several Petitioners also use Big Bayou for nature observation. Petitioner Peter Pav owns waterfront property on Big Bayou. Respondents did not dispute Petitioners' standing. Prior to the final hearing, the Petitioners filed a Motion for Summary Order, contending that PMC did not qualify for a submerged lands lease because it had severed the riparian rights from the upland residences. At the final hearing, the ALJ ruled that the issues raised in the motion would be ruled on in the RO. The ALJ conducted the final hearing on January 3 and 4, 2008, in St. Petersburg, Florida, and subsequently issued his RO.

THE RECOMMENDED ORDER

The issues for determination by the ALJ were whether Respondent PMC, was entitled to an environmental resource permit ("ERP") from the Department for the proposed expansion of the docking facility; and whether PMC was entitled to a modified sovereignty submerged land lease from the BOT for the proposed project. In applying the ERP regulatory criteria, the ALJ concluded that because Big Bayou is an Outstanding Florida Water ("OFW"), PMC was required to provide reasonable assurances that the proposed project would not result in the lowering of existing ambient water quality. (RO ¶17). The ALJ then determined that PMC provided reasonable assurances that the direct and secondary impacts of the proposed project would not significantly degrade the existing ambient water quality of Big Bayou nor

cause any other applicable water quality standard to be violated. (RO ¶¶18 and 25). Since Big Bayou is part of an OFW, a determination is required that the proposed project is "clearly in the public interest," requiring the consideration and balancing of seven criteria set forth in the Southwest Florida Water Management District's Basis of Review ("BOR"). (RO ¶54). At first, the ALJ concluded that "the adverse environmental impacts of the proposed project, taking into account the proposed [permit] conditions, would be insignificant," and "PMC would meet the 'clearly in the public interest' test for the environmental resource permit because the other mitigation offered by PMC would offset the secondary and cumulative impacts of the proposed project." (RO ¶¶15, 62a and 62b).[2] However, the ALJ further found that a public interest measure proposed by PMC, namely to contribute $300,000 to the construction of a second boat ramp at the current Sutherland Bayou Boat Ramp Project in Palm Harbor, "actually increases the secondary impacts and cumulative impacts of PMC's proposed project and causes it to fail to meet the ERP public interest criteria." (RO ¶¶56, 62a, 62b and 80).

The ALJ found that Big Bayou is part of the Pinellas County Aquatic Preserve, which includes most of the coastal waters of Pinellas County. (RO ¶4). The ALJ noted that a public water body like Big Bayou must be shared by persons living along its shores with all other citizens of Florida. (RO ¶48). Although some Petitioners would prefer that the bayou had the feel of a more remote or wild place, the ALJ concluded that the Pinellas County Aquatic Preserve is recognized by BOT rule to have a "highly developed, urban nature." (RO ¶48). In applying the BOT proprietary rule criteria, the ALJ found that the consideration of cumulative impacts in an Aquatic Preserve requires

[2] The RO, on page 25, contains two paragraphs numbered "62." In this Final Order the first paragraph will be referred to as "62a" and the second as "62b."

consideration of "the number and extent of similar human actions within the preserve which have previously affected or are likely to affect the preserve." (RO ¶50). He found that boating activity is the principal source of potential adverse impacts associated with the proposed project. (RO ¶50). Thus the cumulative impacts to Big Bayou from boating activity generated by the existing docking facility at Coquina Key North, the other docks in Big Bayou, and the public boat ramp at Grandview Park in Big Bayou must be taken into account. (RO ¶50). The ALJ found that boating activities have created material adverse cumulative impacts to Big Bayou in the form of trash, water contamination, damage to seagrasses, and prop scars. (RO ¶51).

In applying the BOT statutory and rule requirement that a lease of sovereignty submerged lands within an aquatic preserve must be "in the public interest," the ALJ concluded that the demonstrated benefits did not "clearly exceed" all demonstrated costs of the proposed action. (RO ¶¶52, 53, 56 and 59). The ALJ found that public boat ramps and marking navigation channels are examples of public benefits. (RO ¶¶53 and 56). However, these benefits did not "clearly exceed" the demonstrated costs of negative impacts to marine resources associated with increased boating activity in the waters of Pinellas County (aquatic preserve waters), and adverse cumulative impacts to Big Bayou. (RO ¶¶51, 53, 56, 57, 59, 60, and 62a). Further, the ALJ found, based on record evidence, that if PMC were able, for example, to get a boat speed zone established in Big Bayou by the appropriate level of government, or contribute to the enforcement of boat speed zones in the aquatic preserve, then the lease modification should be issued. (RO ¶64). Additionally, the ALJ concluded that neither PMC nor the Department had evaluated the additional secondary and cumulative impacts in the

Pinellas County Aquatic Preserve of the $300,000 contribution to the Sutherland Bayou boat ramp. If these additional impacts were evaluated, and evidence presented that, in light of that evaluation, the boat ramp project was ultimately "in the public interest," the proposed project, including the boat ramp contribution, may be permittable. (RO ¶80).

The ALJ acknowledged that both the Department and the BOT have the ultimate authority to determine the outcomes of the ERP and BOT public interest balancing and mitigation analysis. (RO ¶¶ 65 and 81). However, the ALJ recommended that based on the record evidence, the Department deny the ERP permit and the BOT deny the lease modification. (RO page 32).[3]

STANDARDS OF REVIEW OF DOAH RECOMMENDED ORDERS

Section 120.57(1)(l), Florida Statutes ("F.S."), 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." 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 Commission*, 671 So.2d 287, 289 n.3 (Fla. 5th DCA 1996).

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[3] The ALJ also recommended that "[i]n the event the Trustees determine to issue the submerged land lease," . . . "that the lease be modified to add a condition that the boat slips shall only be subleased or sold to residents of Coquina Key North condominiums." (RO page 32).

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., 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). These evidentiary-related matters are within the province of the ALJ, as the "fact-finder" in these administrative proceedings. *See e.g., Heifetz v. Dept. of Business Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Also, the ALJ's decision to accept the testimony of one expert witness over 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 Medical Center v. State, Dept. of HRS*, 462 So.2d 83, 85 (Fla. 1st DCA 1985); *Florida Chapter of Sierra Club v. Orlando Utilities Commission*, 436 So.2d 383, 389 (Fla. 5th DCA 1983).

A reviewing agency thus has no authority to evaluate the quantity and quality of the evidence presented at a DOAH formal hearing, beyond making a determination that the evidence is competent and substantial. *See e.g., Brogan v. Carter*, 671 So.2d 822, 823 (Fla. 1st DCA 1996). Therefore, if the DOAH record discloses any competent substantial evidence supporting a challenged factual finding of the ALJ, I am bound by such factual finding in preparing this Final Order. *See e.g., Florida Dept. of Corrections v. Bradley*, 510 So.2d 1122, 1123 (Fla. 1st DCA 1987). In addition, an agency head has no authority to make independent or supplemental findings of fact in the course of reviewing a DOAH recommended order. *See, e.g., North Port, Fla. v. Consolidated Minerals*, 645 So.2d 485, 487 (Fla. 2d DCA 1994).

Section 120.57(1)(l), F.S., also authorizes an agency to reject or modify an ALJ's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." If an ALJ improperly labels a conclusion of law as a finding of fact, the label should be disregarded and the item treated as though it were actually a conclusion of law. *See, e.g., Battaglia Properties v. Fla. Land and Adjudicatory Commission*, 629 So.2d 161, 168 (Fla. 5th DCA 1994). However, neither should the agency label what is essentially an ultimate factual determination as a "conclusion of law" in order to modify or overturn what it may view as an unfavorable finding of fact. *See, e.g., Stokes v. State, Bd. of Professional Engineers*, 952 So.2d 1224 (Fla. 1st DCA 2007).

An agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction and expertise. *See, e.g., 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). 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); *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).

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. Dept. of Professional Regulation*, 622 So.2d 607, 609 (Fla. 1st DCA 1993); *Heifetz v. Dept. of Business Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985); *Florida Power & Light Company v. Florida Siting Board*, 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, supra, at* 609.

In reviewing a recommended order on a concurrently processed permit and request to use sovereignty submerged lands, the BOT has authorized the Department to take final agency action by entering a consolidated final order addressing each of the concurrently reviewed permit and authorization, unless the final agency action is to approve certain specified activities. *See* § 373.427(2)(c), Fla. Stat. and Fla. Admin. Code R. 18-21.0051(2).

RULINGS ON EXCEPTIONS

RESPONDENT PMC'S EXCEPTIONS

Exception 1

Respondent PMC takes exception to those portions of the ALJ's Findings of Fact 60 and 62a, which found that the Sutherland Bayou project – and thus PMC's financial contribution to that project – will impact an area that has already experienced adverse impacts to marine resources. PMC argues that these findings are not supported by competent substantial evidence and are contrary to the record evidence. PMC contends that the record evidence does not support a finding of potential adverse

impacts to marine resources from and in the vicinity of the Sutherland Bayou boat ramp project. However, it is clear from a full reading of the RO that the ALJ's findings focused on the potential impacts to marine resources of providing access for more recreational boaters to the waters of Pinellas County (i.e., the aquatic preserve). (RO ¶¶27, 32, 41, 42, 43, 44, 45). These findings regarding impacts in the waters of the aquatic preserve are based on competent substantial evidence in the record. (Pet. Ex. 9 at pp. 10-18; Pet. Ex. 11; T. pp. 350-351, 359, 364, 378). PMC did not take exception to any of these crucial factual findings underlying the ALJ's ultimate determinations in paragraphs 60 and 62a. *See, e.g., Environmental Coalition of Florida, Inc. v. Broward County*, 586 So.2d 1212, 1213 (Fla. 1st DCA 1991)(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).

Basically, the ALJ concluded that under the ERP criteria in the Basis of Review[4] the Sutherland Bayou boat ramp construction was a secondary impact and cumulative impact of the Respondent PMC's proposed project. *See* Basis of Review sections 3.2.7 and 3.2.8; RO ¶¶57, 62a, 80; *see also Conservancy, Inc. v. A. Vernon Allen Builder, Inc.*, 580 So.2d 772 (Fla. 1st DCA 1991) *rev. den.* 591 So.2d 631 (Fla. 1991). Thus, the adverse impacts of the Sutherland Bayou boat ramp construction on marine resources in Pinellas County's waters caused PMC's proposed project to fail the "clearly in the public interest " test under the Basis of Review for the ERP permit. *See* Basis of Review section 3.2.3 and RO ¶54, 62b, 80.

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[4] The ALJ took official recognition of the Southwest Florida Water Management District's Basis of Review for Environmental Resource Permits, adopted by the Department in Fla. Admin. Code R. 62-330.

Therefore, based on the foregoing, Respondent PMC's Exception No. 1 is denied.

Exception 2

Respondent PMC takes exception to the ALJ's Findings of Fact 59, 63, and 64, which ultimately conclude that the public benefits of the proposed project do not "clearly exceed" the costs under the BOT public interest assessment criteria in Rule 18-20.004(2), Florida Administrative Code. (*see also* RO ¶¶52 and 53). Rule 18-20.004(2) provides:

> (2) PUBLIC INTEREST ASSESSMENT CRITERIA.
>
> In evaluating requests for the sale, lease or transfer of interest, a balancing test will be utilized to determine whether the social, economic and/or environmental benefits clearly exceed the costs.
>
> (a) GENERAL BENEFIT/COST CRITERIA:
> 1. Any benefits that are balanced against the costs of a particular project shall be related to the affected aquatic preserve;
> 2. In evaluating the benefits and costs of each request, specific consideration and weight shall be given to the quality and nature of the specific aquatic preserve. Projects in the less developed, more pristine aquatic preserves such as Apalachicola Bay shall be subject to a higher standard than the more developed preserves; and,
> 3. For projects in aquatic preserves with adopted management plans, consistency with the management plan will be weighed heavily when determining whether the project is in the public interest.
>
> (b) BENEFIT CATEGORIES:
> 1. Public access (public boat ramps, boatslips, etc.);
> 2. Provide boating and marina services (repair, pumpout, etc.);
> 3. Improve and enhance public health, safety, welfare, and law enforcement;
> 4. Improved public land management;
> 5. Improve and enhance public navigation;

6. Improve and enhance water quality;
7. Enhancement/restoration of natural habitat and functions; and
8. Improve/protect endangered/threatened/unique species.

(c) COSTS:
1. Reduced/degraded water quality;
2. Reduced/degraded natural habitat and function;
3. Destruction, harm or harassment of endangered or threatened species and habitat;
4. Preemption of public use;
5. Increasing navigational hazards and congestion;
6. Reduced/degraded aesthetics; and
7. Adverse cumulative impacts.

(d) EXAMPLES OF SPECIFIC BENEFITS:
1. Donation of land, conservation easements, restrictive covenants or other title interests in or contiguous to the aquatic preserve which will protect or enhance the aquatic preserve;
2. Providing access or facilities for public land management activities;
3. Providing public access easements and/or facilities, such as beach access, boat ramps, etc.;
4. Restoration/enhancement of altered habitat or natural functions, such as conversion of vertical bulkheads to riprap and/or vegetation for shoreline stabilization or re-establishment of shoreline or submerged vegetation;
5. Improving fishery habitat through the establishment of artificial reefs or other such projects, where appropriate;
6. Providing sewage pumpout facilities where normally not required, in particular, facilities open to the general public;
7. Improvements to water quality such as removal of toxic sediments, increased flushing and circulation, etc.;
8. Providing upland dry storage as an alternative to wetslip; and
9. Marking navigation channels to avoid disruption of shallow water habitats.

Fla. Admin. Code R. 18-20.004(2).

PMC argues that the ALJ's findings are not supported by competent substantial evidence and are contrary to the applicable BOT rule. PMC's argument is an attempt to

explain away the lack of record evidence regarding the potential negative impacts on marine resources from increasing access for recreational boaters to the aquatic preserve. (RO ¶59). PMC contends that since the public boat ramp falls in the "benefit" category under Rule 18-20.004(2), then it can only be considered a *"positive"* factor, and that the ALJ presented an incorrect theory when he regarded the public boat ramp project as a negative. However, nothing in the rule language suggests that projects that fall into the benefit category should not also be evaluated for their potential impacts (positive and negative) in the subject aquatic preserve. In addition, it is clear from reviewing the RO that the ALJ did not label the public boat ramp project as a negative factor under the rule. The ALJ simply asserted that no record evidence was available to explain the comparative value of increasing public access in this particular aquatic preserve against the established negative impacts on marine resources from increased boating activity in these waters. (RO ¶¶59, 60). In other words, the value of the proposed public benefit to the subject aquatic preserve depended on the weight of the evidence presented in its favor. The ALJ, as the trier of fact, found the evidence to be lacking. *See, e.g., Brogan v. Carter*, 671 So.2d 822, 823 (Fla. 1st DCA 1996)(A reviewing agency 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). Without this information it was difficult for the ALJ and ultimately the BOT to properly conduct the balancing test utilized in Rule 18-20.004(2).

PMC also contends that the ALJ's theory is without record support since the "cost" factors that may result from the proposed project itself were found by the ALJ in Finding of Fact 62b to have been sufficiently mitigated. PMC's argument ignores the

fact that the ALJ made findings and concluded that the proposed project itself will lead to adverse cumulative impacts to Big Bayou under the criteria in Rule 18-20.006(1), Florida Administrative Code. (RO ¶¶50 and 51). Finding of Fact 51 states:

> 51. Although the proposed project, with the conditions on its construction and operation, would, alone, have no significant adverse impact on water quality, seagrasses, manatees, or recreational uses in Big Bayou, the cumulative impacts to Big Bayou from all similar activities in the preserve have created significant (material) adverse impacts to Big Bayou in the form of trash, water contamination, damage to seagrasses, and prop scars.

Adverse cumulative impacts is a separate "cost" factor to be balanced under Rule 18-20.004(2). PMC did not take exception to these crucial factual findings of the ALJ. *See, e.g., Environmental Coalition of Florida, Inc. v. Broward County*, 586 So.2d 1212, 1213 (Fla. 1st DCA 1991)(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). In addition, as pointed out by the Petitioners' response the ultimate finding of fact in paragraph 63 is supported by competent substantial record evidence. (T. pp. 154-164, 169-176).

Therefore, based on the foregoing Respondent PMC's Exception No. 2 is denied.

Exception 3

Respondent PMC takes exception to Conclusion of Law 80 in the RO based on the arguments made in its Exceptions 1 and 2. Therefore, based on the above rulings, PMC's Exception No. 3 is denied.

Exception 4

Respondent PMC takes exception to the ALJ's Recommendation on page 32 of the RO based on the arguments made in its Exceptions 1 and 2. Therefore, based on the above rulings, PMC's Exception No. 4 is denied.

RESPONDENT DEP'S EXCEPTIONS

DEP Exception #1

Respondent DEP takes exception to the portion of Finding of Fact 4 which states, "[l]ike all aquatic preserves in Florida, the Pinellas County Aquatic Preserve is also designated as an Outstanding Florida Water." DEP contends that the statement is factually incorrect in referring to "all aquatic preserves," and is not supported by competent substantial record evidence. However, the ALJ's finding is consistent with Rule 62-302.700(2), Florida Administrative Code, which provides that "Outstanding Florida Waters generally include . . . (f) Waters in Aquatic Preserves created under the provisions of Chapter 258, F.S." (*see also* T. p. 202). Consequently, DEP's Exception #1 is denied.

DEP Exception #2

Respondent DEP takes exception to the ALJ's Finding of Fact 20 where he makes a reasonable inference from the record evidence that there will be more boat trips in Big Bayou because the proposed project adds 60 boat slips in Big Bayou. DEP argues that this inference is not supported by the record evidence and by the ALJ's finding that it is impossible to determine the number of daily, weekly or monthly boat trips that would be generated by the proposed project absent a statistical analysis of boater behavior or other evidence. (RO ¶¶20 and 38). As argued by the Petitioners in

their response, a finding of fact may be reasonably inferred from the evidence of record. *See, e.g., Heifetz v. Dept. of Business Regulation*, 475 So.2d 1277, 1281-82 (Fla. 1st DCA 1985); *Greseth v. Dept. of Health and Rehabilitative Services,* 573 So.2d 1004 (Fla. 4th DCA 1991). The competent substantial record evidence establishes that the proposed project will add 60 new boat slips in Big Bayou, which is a fairly confined water body. (Joint Exs. 1, 25 and 29). The record also establishes that a statistical analysis of boater behavior or a site specific boat traffic study was not presented in the hearing. (Pet. Ex. 10, p. 91).

In addition, the ALJ's Finding of Fact 21 further explains why it is "impossible to say how many boat trips would be generated by the proposed project," and why it is "mere speculation" without more evidence in the form of a statistical analysis or other evidence. Finding of Fact 21 concluded that the number of boats in Big Bayou on any given day fluctuates depending on the whims of the boat slip owners, boat owners that anchor in the open waters, boat owners that launch from the public boat ramps on Big Bayou, or boat owners who enter Big Bayou from Tampa Bay or more distant waters. DEP did not take exception to this finding.

Therefore, based on the foregoing, DEP's Exception #2 is denied.

DEP's Exception #3

Respondent DEP takes exception to Finding of Fact 50 on the basis that although the ALJ discusses and makes findings on the requirements of chapter 18-20, Florida Administrative Code, he did not explicitly acknowledge that chapter 18-20 requirements pertain only to the submerged lands lease and not to issuance of the ERP. Contrary to DEP's assertion the second sentence of Finding of Fact 50 states

that "but Florida Administrative Code Rule 18[-20].006(1) also requires, **for a sovereignty submerged lands lease,** consideration of 'the number and extent of similar human actions within the preserve which have previously affected or are likely to affect the preserve'." (emphasis added). The ALJ goes on to identify "boating activity" as the principal source of potential adverse impacts that must be taken into account in the cumulative impacts analysis under Rule 18-20.006.

DEP does not argue that the factual findings in paragraph 50 are not supported by competent substantial record evidence or that the ALJ incorrectly applies "the requirements of chapter 18-20." Therefore, this exception is improper because under Section 120.57(1)(k), Florida Statutes, a reviewing agency need not rule on an exception that does not "include appropriate and specific citations to the record," or that "does not identify the legal basis for the exception." However, based on the foregoing, DEP's Exception #3 is denied.

DEP's Exception #4

Respondent DEP takes exception to Finding of Fact 51 on the basis that there is no competent substantial evidence to support the finding that "the cumulative impacts to Big Bayou from all similar activities in the preserve have created significant (material) adverse impacts to Big Bayou in the form of trash, water contamination, damage to seagrasses, and prop scars." This ultimate finding followed the ALJ's determination in Finding of Fact 50 that potential adverse impacts associated with boating activity must be taken into account in the cumulative impacts analysis under Rule 18-20.006, Florida Administrative Code. (RO ¶50). Rule 18-20.006 provides that:

> In evaluating applications for activities within the preserves or which may impact the preserves, the Board recognizes

> that, while a particular alteration of the preserve may constitute a minor change, the cumulative effect of numerous such changes often results in major impairments to the resources of the preserve. Therefore, the particular site for which the activity is proposed shall be evaluated with the recognition that the activity may, in conjunction with other activities, adversely affect the preserve which is part of a complete and interrelated system. The impact of a proposed activity shall be considered in light of its cumulative impact on the preserve's natural system. The evaluation of an activity shall include:
>
> (1) The number and extent of similar human actions within the preserve which have previously affected or are likely to affect the preserve;
> (2) The similar activities within the preserve which are currently under consideration by the department and the water management districts;
> (3) Direct and indirect effects upon the preserve and adjacent preserves, if applicable, which may reasonably be expected to result from the activity;
> (4) The extent to which the activity is consistent with management plans for the preserve, when developed;
> (5) The extent to which the activity is permissible within the preserve in accordance with comprehensive plans adopted by affected local governments, pursuant to Section 163.3161, Florida Statutes, and other applicable plans adopted by local, state, and federal governmental agencies;
> (6) The extent to which the loss of beneficial hydrologic and biologic functions would adversely impact the quality or utility of the preserve; and
> (7) The extent to which mitigation measures may compensate for adverse impacts.

The competent substantial evidence in the record of the hearing established that boating activities have previously affected the preserve (RO ¶¶26, 27; T. pp. 338-387) and Big Bayou (RO ¶¶6, 26, 28, 30; T. pp. 141, 147, 230, 249, 257, 260, 275); and are likely to affect the preserve and Big Bayou (RO ¶¶28, 30, 31, 38; T. pp. 352, 358-59, 364, 375, 381-82). Thus, contrary to DEP's contention, the factual findings in paragraph 51 are supported by the competent substantial evidence in the record of the hearing. In

addition, the ALJ made crucial factual findings underlying his ultimate application of Rule 18-20.006, to which DEP did not take exception. (*see* RO ¶¶6, 26, 27, 28, 30, 31, 38). Therefore, based on the foregoing, DEP's Exception #4 is denied.

DEP's Exception #5

Respondent DEP takes exception to Finding of Fact paragraph 58 where the ALJ concludes that the Sutherland Bayou boat ramp cash contribution proposal does not meet the definition of "mitigation" under Rule 18-20.003(35), Florida Administrative Code. The DEP's argument is correct, in that, the ALJ has mistakenly labeled PMC's public interest proposal as the mitigation defined in Rule 18-20.003(35). As the DEP points out, chapter 18-20 requires "mitigation" in the aquatic preserve cumulative impact evaluation conducted under Rule 18-20.006 (see rule citation above). When adverse impacts are identified in an aquatic preserve as a result of a proposed activity, one of the factors to be evaluated under Rule 18-20.006 is "[t]he extent to which mitigation measures may compensate for adverse impacts." There's no evidence in the record of the hearing that supports any finding that PMC's boat ramp contribution proposal was intended to be "mitigation" as defined in Rule 18-20.003(35). *See* § 120.57(1)(l), Fla. Stat. (2007). The competent substantial record evidence clearly established that PMC's boat ramp contribution proposal was intended as a public benefit factor to be considered in the public interest cost/benefit assessment under Rule 18-20.004(2), as discussed in the ruling on PMC's Exception 2 above. (RO ¶¶53, 56, 57, 59, 63; T. pp. 159-161, 175). Thus, DEP's exception to Finding of Fact 58 is granted.[5]

[5] The above interpretation of the plain language of the BOT's rule is more reasonable than that of the ALJ. *See* § 120.57(1)(l), Fla. Stat. (2007). An agency has the primary responsibility of interpreting statutes within its regulatory jurisdiction and expertise. *See,*

DEP's exception argues further that Findings of Fact paragraphs 62 and 65 contain the ALJ's misapplication of the "mitigation" defined in Rule 18-20.003(35). First, DEP does not specify which paragraph 62 (i.e., 62a or 62b on page 25 of the RO), it intends to refer to in making the argument. However, as discussed above in the ruling on PMC's Exception 1, paragraphs 62a and 62b are the ALJ's findings and conclusion that the ERP "clearly in the public interest" test under the Basis of Review section 3.2.3 has not been met. Second, paragraph 65 is actually a conclusion of law.[6] Therefore, the statement in paragraph 65 should be read in light of the above ruling granting DEP's exception to Finding of Fact 58. In addition, any other paragraphs in the RO that describe PMC's boat ramp contribution proposal as the "mitigation" defined in Rule 18-20.003(35), should be read and applied in light of the above ruling granting DEP's exception to Finding of Fact 58 (e.g., RO ¶60).

Then, without specifying paragraphs or page numbers, DEP's exception offers an argument regarding "the performance of the balancing test" under "rule 18-20.004(2)," and the ALJ's ultimate recommendation. This portion of DEP's exception is improper because under Section 120.57(1)(k), Florida Statutes, a reviewing agency need not rule on an exception that does not "include appropriate and specific citations to the record," or that "does not identify the legal basis for the exception." However, the public interest assessment under Rule 18-20.004(2), Florida Administrative Code, is addressed in the

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e.g., Public Employees Relations Commission v. Dade County Police Benevolent Association, 467 So.2d 987, 989 (Fla. 1985); *Florida Public Employees Council, 79 AFSCME v. Daniels*, 646 So.2d 813, 816 (Fla. 1st DCA 1994).

[6] If an administrative law judge improperly labels a conclusion of law as a finding of fact, the label should be disregarded and the item treated as though it were actually a conclusion of law. *See, e.g., Battaglia Properties v. Fla. Land and Adjudicatory Commission*, 629 So.2d 161, 168 (Fla. 5th DCA 1994).

ruling on PMC's Exception 2 above. The ALJ's ultimate recommendation is addressed in the ruling on PMC's Exception 4 above.

DEP's Exception #6

Respondent DEP seeks correction of "an important typographical error." The RO in Finding of Fact 50 contains a clerical error regarding the citation to Rule 18-20.006(1), Florida Administrative Code.[7] DEP's technical exception is granted.

PETITIONERS' EXCEPTIONS

Request for remand

The first seven pages of the Petitioners' Exceptions contain several arguments explaining the basis for their request to remand this case to the ALJ for "further proceedings and entry of supplemental recommended findings of fact and conclusions of law." The Petitioners contend that a remand is necessary because the ALJ (a) failed to make recommended findings and conclusions regarding the public interest criteria in Section 373.414(1)(a), Florida Statutes, (b) failed to make recommended findings and conclusions regarding mitigation to offset adverse impacts to functions identified in the Basis of Review sections 3.2 through 3.2.8.2, (c) failed to make recommended findings whether the proposed project can be successfully implemented, and (d) made inconsistent or ambiguous recommended findings.

It is well established by the controlling case law of Florida that an agency has the authority to remand an administrative case back to DOAH for further limited proceedings where additional findings of fact and related conclusions of law are critical to the issuance of a coherent final order. *See, e.g., Dept. of Environmental Protection v.*

[7] The rule is cited in the RO as "Rule 18.006(1)."

Dept. of Management Services, Div. of Adm. Hearings, 667 So.2d 369 (Fla. 1st DCA 1995); *Collier Development Corp. v. State, Dept. of Environmental Regulation*, 592 So.2d 1107 (Fla. 2d DCA 1991); *Dept. of Professional Regulation v. Wise*, 575 So.2d 713 (Fla. 1st DCA 1991); *Miller v. State, Dept. of Environmental Regulation*, 504 So.2d 1325 (Fla. 1st DCA 1987); *Cohn v. Dept. of Professional Regulation*, 477 So.2d 1039, 1047 (Fla. 3d DCA 1985). An agency head is prohibited from reopening the record, receiving additional evidence, or making supplemental findings, and is required to remand the case to the ALJ in limited circumstances when further factual findings are needed. *See e.g., Intelligence Group, Inc. v. Dept. of State*, 610 So.2d 589 (Fla. 2d DCA 1992); *Lawnwood Medical Center, Inc. v. AHCA*, 678 So.2d 421 (Fla. 1st DCA 1996).

However, remand is only available in exceptional circumstances. *See, e.g., Henderson Signs v. Dept. of Transportation*, 397 So.2d 769, 772 (Fla. 1st DCA 1981); *Dept. of Professional Regulation v. Wise*, 575 So. 2d 713 (Fla. 1st DCA 1991). If the agency head concludes that the ALJ "failed to perform" his function as a fact finder, the appropriate remedy is to remand the case back to the ALJ because the agency head cannot make his own findings of fact. *See e.g., Cohn v. Dept. of Professional Regulation*, 477 So.2d 1039 (Fla. 3d DCA 1985). Remand may be authorized where the reviewing agency or a court properly modifies or rejects an important conclusion of law contained in the RO, thereby requiring that certain additional factual issues be resolved. *See, e.g., Putnam County Environmental Council v. Georgia Pacific Corp.*, 24 FALR 4674 (Fla. DEP 2002) *app. den.*, Case Nos. 1D02-3673 and 1D02-3674 (Fla. 1st DCA, Nov. 26, 2003).

The evidentiary record in this proceeding and the ALJ's RO do not present any "exceptional circumstances" requiring remand. No additional factual findings and related conclusions of law are critical for the entry of a coherent final order in this case. *See, e.g., Lane, et al. v. Dept. of Environmental Protection*, 29 FALR 4063, 4069-70 (Fla. DEP 2007)(DEP's motion for remand denied where additional factual issues not needed for entry of a coherent final order). Contrary to the Petitioners' contentions, the ALJ made extensive factual findings in accordance with the disputed issues of material fact underlying the legal issues identified in the parties' Joint Prehearing Stipulation. Additional factual issues do not need to be resolved in order to allow for entry of a coherent final order. Therefore, the remand request is denied.

Petitioners' Exceptions to Findings of Fact

Exception No. 1

The Petitioners take exception to the last sentence in Finding of Fact 17 on the basis that it is not supported by competent substantial evidence. The finding states that "[b]ecause the current water quality [in Big Bayou] is better than it was in 1972 when the Pinellas County Aquatic Preserve was created, the current water quality is the standard to apply in this case." (RO ¶17). This finding constitutes an ultimate factual determination based on uncontested findings (RO ¶6) and competent substantial record evidence (T. pp. 129, 305, 345; Pet. Ex. 10 at 37). Therefore, Petitioners' Exception No. 1 is denied.

Exception No. 2

The Petitioners take exception to Finding of Fact 18 on the basis that it is a conclusion of law and misapplies the proper standard. Finding of Fact 18 states:

> Although some incidental non-compliance with the conditions of the proposed authorizations could occur, such incidental non-compliance would not likely result in significant degradation of the existing ambient water quality in Big Bayou.[8]

The Petitioners contend that the ALJ failed to apply the appropriate "OFW water quality standard." Rule 62-4.242(2)(a)2, Florida Administrative Code, provides that no permit shall be issued for any proposed activity within an Outstanding Florida Water unless the applicant affirmatively demonstrates that the proposed activity is clearly in the public interest and the existing ambient water quality will not be lowered. The ALJ correctly stated that "[b]ecause Big Bayou is an Outstanding Florida Water, PMC is required to provide reasonable assurances [affirmatively demonstrate] that the project will not result in the lowering of existing ambient water quality." (RO ¶17). An applicant's burden of proof is one of "reasonable assurances" not "absolute guarantees." *See* RO ¶¶74, 75, 76; *see also Save Our Suwannee v. Florida Dept. of Environmental Protection and Piechocki,* 18 FALR 1467, 1472 (Fla. DEP 1996). Thus, it was proper for the ALJ to conclude that "incidental non-compliance" with permit and lease conditions "would not likely result in significant [material or meaningful] degradation of the existing ambient water quality in Big Bayou." The ALJ's finding is clearly an ultimate factual determination based on the competent substantial evidence (T. pp. 130-135; Joint Exs. 7, 8) and other uncontested findings (RO ¶¶15, 16, 23, 24, 25). Under the standard of review an 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., Belleau v. Dept. of Environmental Protection*, 695 So.2d 1305, 1307 (Fla. 1st DCA

[8] The ALJ uses the word "significant" throughout the RO for its meaning "to be material or meaningful." It is not used as a synonym for "substantial." *See* RO p. 33, endnote 2.

1997); *Dunham v. Highlands County School Board*, 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., Heifetz v. Dept. of Business Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985).

Therefore, based on the foregoing, the Petitioners' Exception No. 2 is denied.

Exception No. 3

The Petitioners take exception to the second sentence of Finding of Fact 20, which states, "[h]owever, it is impossible to say how many more boat trips would be generated by the proposed project." Petitioners contend that the finding is not supported by competent substantial evidence because "no expert testified at hearing that one cannot opine as to the amount of use that can be expected to be generated by a 60 boat slip docking facility." However, the record evidence establishes that a statistical analysis of boater behavior or a site specific boat traffic study was not presented in the hearing. (Pet. Ex. 10, p. 91; RO ¶38). Thus, contrary to the Petitioners' suggestion, the ALJ did not make a finding that this type of statistical analysis is impossible. Consequently, the Petitioners' Exception No. 3 is denied.

Exception Nos. 4 and 5

In Finding of Fact 37 the ALJ ultimately determines that "the 'net' effect of the proposed project would likely be no significant increase in prop scars or related adverse impacts to seagrasses in Big Bayou due to the proposed project." The ALJ then concludes that "PMC provided reasonable assurance that the proposed project would not result in significant [material or meaningful] adverse impacts to seagrasses." *See also* RO ¶40. The Petitioners take exception to these ultimate determinations in

Findings of Fact 37 and 40 on the bases that they are not supported by competent substantial evidence, are inconsistent with other findings, and fail to apply the proper legal standard. However, the ALJ's findings are reasonable inferences based on the competent substantial evidence in the record. (T. pp. 207, 358, 367, 385; Joint Ex. 29; Pet. Ex. 11; Pet. Ex. 10, p. 33, 86).

The Petitioners did not take exception to the crucial findings of fact underlying the ALJ's ultimate determinations. (RO ¶¶29, 30, 32, 33, 34, 35, 36). Instead, the Petitioners argue that other allegedly "inconsistent" findings of fact do not support the ALJ's ultimate determinations in Findings of Fact 37 and 40. As Respondent PMC points out in its response "[w]hile Petitioners may not like the inference reached [by the ALJ] and attempt to point out other record evidence which they allege supports their argument, there is no opportunity here to reweigh the evidence or interpret the evidence to fit Petitioners' desired ultimate findings." *See, e.g., Heifetz v. Dept. of Business Regulation*, 475 So.2d 1277 (Fla. 1st DCA 1985).

The Petitioners also contend that the ALJ failed to apply the legal standard set forth in Section 373.414(1)(a)2 and 4, Florida Statutes. However, the RO reflects the fact that the ALJ was well aware of the applicable requirements. *See* RO¶¶54 and 79. The legal standard applicable to issuance of an ERP permit in Section 373.414(1)(a) is fully reiterated in paragraph 54 of the RO. *See also* Section 3.2.3 of the Basis of Review. It is clear from a full reading of the RO that the ALJ made extensive factual findings and related legal conclusions in the RO in accordance with the disputed factual and legal issues identified in the parties' Joint Prehearing Stipulation.

Therefore, based on the foregoing, the Petitioners' Exception Nos. 4 and 5 are denied.

Exception No. 6

The Petitioners take exception to Finding of Fact 47 where the ALJ ultimately determines that "PMC provided reasonable assurance that the proposed project would not cause significant [material or meaningful] adverse impacts to manatees." The Petitioners argue that this is a conclusion of law. However, the ALJ's determination is an ultimate finding of fact based on competent substantial record evidence (T. pp. 105, 215; Pet. Ex. 9, pp. 19-20; Joint Exs. 10, 15, 29, 32) and other uncontested findings of fact (RO ¶¶43, 44, 46). Under the standard of review an agency should not label what is essentially an ultimate factual determination as a "conclusion of law" in order to modify or overturn what it may view as an unfavorable finding of fact. *See, e.g., Stokes v. State, Bd. of Professional Engineers*, 952 So.2d 1224 (Fla. 1st DCA 2007). In addition, an ALJ's finding of fact may be reasonably inferred from the evidence of record. A reviewing agency is not authorized to reweigh the evidence in order to reach a different inference than that of the trier of fact. *See, e.g., Heifetz v. Dept. of Business Regulation*, 475 So.2d 1277, 1281-82 (Fla. 1st DCA 1985); *Greseth v. Dept. of Health and Rehabilitative Services,* 573 So.2d 1004 (Fla. 4th DCA 1991).

The Petitioners also argue that the ALJ applied the wrong the legal standard in concluding that reasonable assurance had been provided of no significant adverse impact to manatees. The Petitioners contend that Section 373.414(1)(a)2., Florida Statutes, sets forth a different standard. However, the RO reflects the fact that the ALJ was well aware of the applicable requirements. *See* RO¶¶54 and 79.

Therefore, based on the foregoing, the Petitioners' Exception No. 6 is denied.

Exception No. 7

The Petitioners take exception to Findings of Fact 51 and 62a to the extent that they provide that the proposed project, alone, would have no significant adverse impact on seagrasses and manatees; and that the adverse environmental impacts of the proposed project would be insignificant. In this exception the Petitioners adopt the arguments set forth in Exception No. 4 to Finding of Fact 37 and Exception No. 6 to Finding of Fact 47. Therefore, based on the above rulings on Exception Nos. 4 and 6, the Petitioners' Exception No. 7 is denied.

Exception No. 8

The Petitioners take exception to the ALJ's ultimate determination in Finding of Fact 62b that:

> Without the $300,000 contribution to the Sutherland Boat Ramp project, PMC would meet the "clearly in the public interest" test for the environmental resource permit because the other mitigation offered by PMC would offset the secondary and cumulative impacts of the proposed project.

The Petitioners contend that this ultimate factual determination is not supported by competent substantial evidence "because, exclusive of the $300,000, the applicant has not offered mitigation to offset the adverse effects which the ALJ found may be caused by the proposed project." Contrary to the Petitioners' contention the competent substantial record evidence, including uncontested findings, established that the measures described in Finding of Fact 56 were offered by PMC to offset the secondary impacts of the proposed project. (RO ¶¶32-36, 44, 46; T. pp. 367, 369-370; Jt. Ex. 29 at 17; Pet. Ex. 11 at 31; Jt. Stip, at 13-14).

The Petitioners are attempting to convince the agency to violate the applicable standard of review by re-labeling PMC's proposed mitigation measures as "practicable design modifications to eliminate or reduce impacts to surface water functions." *See Stokes v. State, Bd. of Professional Engineers*, 952 So.2d 1224 (Fla. 1st DCA 2007)(An agency should not label what is essentially an ultimate factual determination as a "conclusion of law" in order to modify or overturn what it may view as an unfavorable finding of fact). The Petitioners' argument also conflicts with the record evidence and uncontested findings that PMC had already implemented practicable design modifications to eliminate or reduce impacts by avoiding direct impacts to seagrass beds at the site of the proposed project (T. pp. 66-69; RO¶¶13, 14).

Therefore, based on the foregoing, the Petitioners' Exception No. 8 is denied.

Exception No. 9

The Petitioners take exception to the ALJ's ultimate determination in Finding of Fact 64, which states:

> Although the record in this case is insufficient to demonstrate that PMC's contribution to the boat ramp project would cause the benefits of the project to clearly exceed its costs, the record evidence is sufficient to support issuance of the lease modification if PMC were able to get the appropriate government authorities to establish a boat speed zone in Big Bayou, or if PMC contributed to the enforcement of boat speed zones in the aquatic preserve.

The Petitioners contend that this finding is not supported by competent substantial evidence. However, uncontested findings (RO ¶¶32, 42, 43, 45) and competent substantial record evidence support this finding (Pet. Ex. 11; T. pp. 90-93, 358; Pet. Ex. 9). Therefore, the Petitioners' Exception No. 9 is denied.

Petitioners' Exceptions to Conclusions of Law

Exception No. 10

The Petitioners take exception to the last sentence of Conclusions of Law 79 contending that it misstates the law regarding entitlement to a permit within an OFW. However, as indicated in the conclusion of law, the statement is supported by the cited case law. *See 1800 Atlantic Developers v. Dept. of Environmental Regulation,* 552 So.2d 946, 957 (Fla. 1st DCA 1989) *rev. denied by Department of Environmental Regulation v. 1800 Atlantic Developers*, 562 So.2d 345 (Fla. 1990). Therefore, the Petitioners' Exception No. 10 is denied.

Exception No. 11

The Petitioners take exception to Conclusion of Law 80 to the extent that the conclusion holds that the proposed project otherwise addresses cumulative impacts, absent the proposed contribution of $300,00 to the Sutherland Bayou Boat Ramp Project. Based on the above ruling in Exception No. 8, the Petitioners' Exception No. 11 is denied.

Exception to Conclusions of Law 68 through 73 regarding Petitioners' Motion For Summary Order

The Petitioners take exception to the ALJ's ruling on their Motion For Summary Order contained in Conclusions of Law 68 through 73 of the RO:

> 68. Petitioners contend that PMC does not have the requisite upland interest to be entitled to a sovereignty submerged land lease. Section 258.42, Florida Statutes, prohibits the erection of structures within an aquatic preserve, except for certain described projects, including "Private residential multislip docks". § 258.42(3)(e)(2), Fla. Stat. Florida Administrative Code Rule 18-21.003(42) defines "Private residential multi-family dock or pier" as follows:

> "Private residential multi-family dock or pier" means a dock or pier on a common riparian parcel or area that is intended to be used for private recreational or leisure purposes by persons or groups of persons with real property interest in a multi-family residential dwelling such as a duplex, a condominium, or attached single-family residences or a residential development such as a residential or mobile home subdivision.

Petitioners argue that this definition requires that PMC have "some real property interest in the upland residential area," which PMC does not have. PMC retained ownership only of a narrow strip of land at the shoreline.

69. It was undisputed that PMC owns uplands contiguous to Big Bayou and that the proposed project is intended to be used for private recreational or leisure purposes. Use of the proposed project is restricted to condominium owners in Coquina Key North. Therefore, the definition of "Private residential multi-family dock or pier" does not support Petitioners' argument.

70. Petitioners also cite Section 258.42(3)(e)(1), Florida Statutes, which refers to allowing private residential docks "for reasonable ingress or egress of riparian owners," arguing, in essen[c]e, (sic) that the condominium owners are not riparian owners. However, the reference in Section 258.42(3)(e)(2), Florida Statutes, to "private residential multislip docks," does not contain the wording about reasonable ingress or egress of riparian owners.

71. An applicant for a submerged lands lease must demonstrate satisfactory evidence of sufficient upland interest which is defined in Florida Administrative Code Rule 18-21.003(55) as documentation which "clearly demonstrate[s] that the holder has control and interest in the riparian uplands adjacent to the project area and the riparian rights necessary to conduct the proposed activity." Satisfactory evidence of sufficient upland interest can include leases and easements on the uplands, indicating that the Trustees did not think it was necessary to limit submerged land leases to riparian landowners. The Trustees' rule defining multi-family docks to include those

used by condominium owners and members of homeowners associations is another indication of the Trustees' willingness to accommodate non-traditional upland ownership situations.

72. The interpretation of the governing statutes and rules by the Trustees and the Department as qualifying PMC to obtain a submerged land lease is a reasonable interpretation because it preserves the legislative intent to restrict new residential docks to those persons who reside along the shore of the aquatic preserve.

73. Petitioners argue that the condominium documents do not clearly restrict use of the boat slips to the condominium owners. The Department stated at the hearing that use of the boat slips must be restricted to use by condominium owners. That should be an express condition of the proposed authorizations. With that condition in the lease, it is concluded that PMC would qualify to apply for a submerged land lease.

Because the ALJ's conclusions are supported by the plain language of the BOT rules, the Petitioners' exception is denied. The ALJ's conclusions are adopted in this Consolidated Final Order.

CONCLUSION

The Florida courts have held that there are some circumstances under which agency remand to DOAH is not only appropriate, but is actually "dictated." *See, e.g., Miller v. Dept. of Environmental Regulation*, 504 So.2d 1325, 1327 (Fla. 1st DCA 1987); *Cohn v. Dept. of Environmental Regulation*, 477 So.2d 1039, 1047 (Fla. 3d DCA1985). The subject consolidated proceeding does not constitute one of those circumstances where remand to DOAH is dictated. The ALJ fulfilled his role as to factual findings. A reviewing agency is not authorized to remand an administrative proceeding back to DOAH for the purpose of allowing a party to present evidence that the party failed to introduce during the original hearing. *See e.g., Henderson Signs v. Dept. of*

Transportation, 397 So.2d 769 (Fla. 1st DCA 1981); *Florida Dept. of Transportation v. J.W.C.*, 396 So.2d 778 (Fla. 1st DCA 1981).

In the RO the ALJ determined that PMC provided reasonable assurances that the direct and secondary impacts of the proposed project would not significantly degrade the existing ambient water quality of Big Bayou nor cause any other applicable water quality standard to be violated. He also concluded that "the adverse environmental impacts of the proposed project, taking into account the proposed [permit] conditions, would be insignificant," and "PMC would meet the 'clearly in the public interest' test for the environmental resource permit because the other mitigation offered by PMC would offset the secondary and cumulative impacts of the proposed project." However, the proprietary public interest measure proposed by PMC, namely to contribute $300,000 to the construction of a second boat ramp at the current Sutherland Bayou Boat Ramp Project in Palm Harbor, "actually increases the secondary impacts and cumulative impacts of PMC's proposed project and causes it to fail to meet the ERP public interest criteria."

In applying the BOT proprietary rule criteria, the ALJ found that the consideration of cumulative impacts in an Aquatic Preserve requires consideration of "the number and extent of similar human actions within the preserve which have previously affected or are likely to affect the preserve." Thus the cumulative impacts to Big Bayou from boating activity generated by the existing docking facility at Coquina Key North, the other docks in Big Bayou, and the public boat ramp at Grandview Park in Big Bayou must be taken into account. Those boating activities have created material adverse cumulative impacts to Big Bayou in the form of trash, water contamination, damage to

seagrasses, and prop scars. In applying the BOT statutory and rule requirement that a lease of sovereignty submerged lands within an aquatic preserve must be "in the public interest," the ALJ concluded that the demonstrated benefits did not "clearly exceed" all demonstrated costs of the proposed action. The ALJ found that public boat ramps and marking navigation channels are examples of public benefits. However, these benefits did not "clearly exceed" the demonstrated costs of negative impacts to marine resources associated with increased boating activity in the waters of the Pinellas County Aquatic Preserve, and adverse cumulative impacts to Big Bayou.

The ALJ did find, based on record evidence, that if PMC were able, for example, to get a boat speed zone established in Big Bayou, or contribute to the enforcement of boat speed zones in the aquatic preserve, then the lease modification should be issued. Additionally, the ALJ concluded that neither PMC nor the Department had evaluated the additional secondary and cumulative impacts in the Pinellas County Aquatic Preserve of the $300,000 contribution to the Sutherland Bayou boat ramp. If these additional impacts were evaluated, and evidence presented that, in light of that evaluation, the boat ramp project was ultimately "in the public interest," the proposed project, including the boat ramp contribution, may be permittable. Indeed, based on the ALJ's footnotes 5 and 6 to the RO's Findings of Fact Nos. 57 and 60, if properly addressed by PMC and the Department and mitigated to the extent necessary, I can reasonably infer that the Sutherland Bayou proposed boat ramp would, if permitted and built, help to alleviate the critical shortage of boating access available to the general public. Further, the ALJ

found that the Sutherland Bayou proposed boat ramp project would not impact Big Bayou based on the large distance between Big Bayou and Sutherland Bayou. This said, I determine that, if PMC and the Department can demonstrate in any future proposal, that the impacts of the $300,000 contribution to the Sutherland Bayou boat ramp project are non-existent or minimal, or are appropriately mitigated, the ERP public interest criteria can be met and the lease modification can be approved.

Having considered the applicable law and standards of review in light of the findings and conclusions set forth in the RO, and being otherwise duly advised,

It is therefore ORDERED:

A. The ALJ's Recommended Order (Exhibit A), as modified in the above rulings in this Consolidated Final Order, is adopted and incorporated by reference herein.

B. Respondent Prospect Marathon Coquina's application in File No. 52-0258984-001 for an Environmental Resource Permit is DENIED.

C. Respondent Prospect Marathon Coquina's application for a modification of Sovereignty Submerged Land Lease No. 520224543 is DENIED.

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 4th day of August, 2008, 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.

Lea Crandall
CLERK

8/4/08
DATE

CERTIFICATE OF SERVICE

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

Daniel B. Schuh, Esquire
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248 Mirror Lake Drive, North
St. Petersburg, FL 33701

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Claudia Llado, Clerk and
Bram D. E. Canter, Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
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 14th day of August, 2008.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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