Florida Department of Environmental Protection

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Secretary

January 22, 2010

Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

Re: Jim and Nancy Buntin and Paul Stovall vs. DEP and FWC
DOAH Case No.: 08-1086
DEP/OGC Case No.: 07-2676

Dear Clerk:

Attached for filing are the following documents:

1. Agency Final Order
2. DEP's Exceptions to the Recommended Order
3. Petitioners' Response to DEP's Exceptions to the Recommended Order

If you have any questions, please do not hesitate to contact me at 245-2212 or lea.crandall@dep.state.fl.us.

Sincerely,

Lea Crandall

Lea Crandall
Agency Clerk

Attachments

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

JIM and NANCY BUNTIN, and
PENELOPE and PAUL STOVALL,

Petitioners,

vs.

OGC CASE NO. 07-2676
DOAH CASE NO. 08-1086

DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent,

and

FLORIDA FISH AND WILDLIFE CONSERVATION COMMISSION,

Intervenor.
_____/

FINAL ORDER

On November 30, 2009, an Administrative Law Judge ("ALJ") from the Division of Administrative Hearings ("DOAH") submitted a Recommended Order ("RO") to the Department of Environmental Protection ("DEP" or "Department") in the above captioned proceeding. The RO is attached hereto as Exhibit A. The RO indicated that copies were sent to counsel for the Department and Intervenor, Florida Fish and Wildlife Conservation Commission ("FWC"); and to the Qualified Representative for the Petitioners. The Department filed Exceptions on December 17, 2009, and the Petitioners filed responses on December 30, 2009.[1] This matter is now before me for

[1] The DEP's unopposed motion for extension of time to file exceptions was granted and

final agency action.

BACKGROUND

On June 28, 2006, the Department received two after-the-fact permit applications for construction of coastal armoring seaward of the Coastal Construction Control Line ("CCCL") in Walton County. (RO ¶ 58). The applications were from the Petitioners Stovall and the Petitioners Buntin regarding their properties located at 711 and 701 Eastern Lake Road, Santa Rosa Beach, respectively. The Petitioners own adjacent houses seaward of the CCCL on the Gulf of Mexico that were constructed in accordance with the applicable building code standards and are thereby able to withstand the impacts of a 100-year frequency storm. Hurricane Dennis made landfall near Navarre Beach on July 10, 2005, as a Category 3 hurricane and eroded the beach to a position landward of the Petitioners' houses. Some of the worst damage it caused was enormous erosion of the beaches and shores along the coastline where the Petitioners' properties are located. That stretch of beach remains classified as a "critically eroding beach." After the storm, there was nothing left of the dunes seaward of the Petitioners' houses.

The storm did not damage the houses but scoured out the pavers and gravel parking areas, which were located beneath the houses. The Petitioners had trouble restoring the parking areas, because the sand base kept eroding away. They decided to install a HESCO Basket System seaward of their houses as a means of retaining the sand base under their houses. (RO ¶¶ 32, 33, 36). The HESCO Basket System consists of connected wire boxes, open at the top and bottom, which are lined with

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the Petitioners' unopposed motion for extension of time to respond was granted. The

water-permeable fabric, and then filled and covered with sand. In this case, the HESCO Basket System provided the Petitioners with the temporary protection they believed they needed to successfully complete the reconstruction of their parking areas. (RO ¶¶ 32, 33, 36). The Petitioners received the necessary authorizations for temporary armoring from Walton County to install the HESCO System, and they understood that they had to apply for a permit from the Department within 60 days from completion of construction, at which time the System would either have to be removed or be permitted by the Department. The Petitioners decided to permit the System rather than remove it and applied to the Department for a permit under Rule 62B-33.0051, F.A.C.

The Department evaluated the application under the rules governing coastal armoring and eventually denied the permit because the HESCO System (1) failed to meet the coastal armoring criteria related to eligibility, vulnerability, and design, and (2) constituted a significant adverse impact to marine turtles. (RO 62). On February 29, 2008, the Department referred to the DOAH a petition for hearing from the Petitioners Buntin and Stovall. The DOAH assigned an ALJ and a Notice of Hearing was issued that set the final hearing for June 17 and 18, 2008, in Santa Rosa Beach, Florida. The case was continued, held in abeyance and then set for final hearing to commence June 10, 2009, in Santa Rosa Beach, Florida. In the meantime, Ong-In Shin was approved as a Qualified Representative to represent the Buntins and the Stovalls and the case was transferred to another ALJ. The case was continued again and ultimately set for final hearing on August 26 and 27, 2009, in Santa Rosa Beach. Two months before the new date set for the hearing, the FWC petitioned to intervene in the proceeding. The

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time for final agency action was also extended by agreement to January 21, 2010.

petition was granted on July 16, 2009. The final hearing began the morning of August 26, 2009 and concluded on August 28, 2009. The four-volume Transcript of the final hearing was filed at DOAH on September 29, 2009. The parties filed proposed recommended orders on October 23, 2009. The ALJ subsequently issued his RO on November 30, 2009.

RECOMMENDED ORDER

The ALJ ultimately recommended that the Petitioners' permit application be granted with three new "conditions," including the contingency that the approval was pending a separate decision from the U.S. Fish and Wildlife Service ("USFWS") on an Incidental Take Permit. (RO page 49 and page 48 ¶110). The ALJ recommended that the Department interpret its definition of "armoring" to exclude the Stovall/Buntin HESCO Basket system. (RO ¶ 111). In reaching his recommendations, the ALJ rejected the Department's interpretation of its own rules and statutes as "not entirely reasonable under the circumstances of this case." (RO ¶ 97). The ALJ found that in general Florida Administrative Code Rules 62B-33.005 and 62B-33.0051[2] govern the permitting of coastal armoring. (RO ¶¶ 94, 95, 104, 111). "Armoring" is defined in Florida Administrative Code Rule 62B-33.002(5) and the Department determined that the HESCO System met the definition of "armoring." (RO ¶ 62, 69, 70, 96). Rule 62B-33.002(5) provides that:

[2] Rule 62B-33.005, F.A.C. provides the general rule criteria applied to all construction seaward of a CCCL. Rule 62B-33.0051, F.A.C., provides the general rule criteria applied to all coastal armoring, except for geotextile containers used as the core of a restored dune that are governed under Chapter 62B-56, F.A.C.

> "Armoring" is a manmade structure designed to either prevent erosion of the upland property or protect eligible structures from the effects of coastal wave and current action. Armoring includes certain rigid coastal structures such as geotextile bags or tubes, seawalls, revetments, bulkheads, retaining walls, or similar structures but it does not include jetties, groins, or other construction whose purpose is to add sand to the beach and dune system, alter the natural coast currents or stabilize the mouths of inlets.

However, the ALJ disagreed with the Department's interpretation and concluded that "the HESCO Basket System is not conventional coastal armoring," because it led to a "vegetated dune" (RO ¶ 65). He further concluded that it "is unquestionably 'other construction' that adds sand to the beach and dune system." (RO ¶ 98). His use of the term "other construction" refers to the phrase "jetties, groins, or other construction" in the definition and is differentiated from the rigid coastal structures that constitute armoring, "such as geotextile bags or tubes, seawalls, revetments, bulkheads, retaining walls, or similar structures." Under the ALJ's reasoning, the fact that sand is piled over the System and may be vegetated, appears to be the most important criterion that differentiates the HESCO System from other armoring. (RO ¶ 66). He found that "[w]hile the purpose of the HESCO Basket System is to protect upland development[,] unlike typical coastal armoring, it has added not only sand to the beach but has resulted in the creation and presence of a well-vegetated dune." (RO ¶ 66). The ALJ found that unlike conventional coastal armoring, the HESCO System "follows the encouragement of [Rule 62B-33.0051(1), F.A.C.]: it is a protection method that has resulted in dune restoration." (RO ¶ 71). The ALJ noted that the HESCO System was a "new technology when it comes to Florida's beaches and shores." He concluded that the statute governing coastal armoring was amended in 1995 to balance private property interests with the

protection of the beach system, and in 2006 the statute was amended again to incorporate the "new" technology of geotextile systems. (RO ¶ 68). Thus the ALJ concluded that the HESCO System is a hybrid of manmade and natural structures that meets the statutory and rule intent of encouraging "dune restoration" in the Beach and Shore Preservation Act. (RO ¶¶ 99, 101). The ALJ further concluded that "[i]t would not be reasonable to destroy the dune [over the HESCO System] in order to protect the beach dune system." (RO ¶ 101). In addition to the benefits provided by the "well-vegetated dune" (RO ¶ 101), the "HESCO Basket System provides the best place along that stretch of beach for nests for sea turtles so long as the potential impacts of the baskets can be avoided." (RO ¶102). The ALJ agreed that the HESCO System did not meet the coastal armoring criteria and constitutes a significant adverse impact to marine turtles: "If the Department is right that the HESCO Basket System and the dune that it supports is coastal armoring then the Stovall/Buntin permit application should be denied because it does not meet the "vulnerability, "eligibility" and "design" criteria as explained by Mr. McNeal at hearing." (RO ¶ 96; *see also* RO ¶¶ 47, 55, 56, 69, 70). In addition, the ALJ found "The HESCO Basket System as designed and installed poses the threat of a significant adverse impact to marine turtles." (RO ¶ 105). The ALJ found that the HESCO System "could have been designed to avoid the threat [to marine turtles] by calling for more than three feet of sand to separate any point in the system from the surface of the dune" (RO ¶ 105), and he recommended "that the Department adopt an approach in permitting [the Petitioners'] HESCO Basket System that the Legislature has provided for with regard to dune restoration incorporating sand-filled geotextile containers or similar structures proposed as the core of a restored dune feature." (RO ¶

106). The ALJ then evaluated the HESCO System under Section 161.085(9), Florida Statutes, (the statute authorizing geotextile sand-filled containers or similar structures) and found that although the System did not meet all statutory provisions, "the intent of the Legislature appears clear. Innovative methods of achieving dune restoration should be allowed provided protective conditions are met particularly with regard to the protection of marine turtles." (RO ¶ 108). Thus, the ALJ suggested three additional "conditions" to the permit that would make the HESCO System permittable:

> a) Removal of the top layer of HESCO Baskets and add beach-compatible sand to ensure a minimum of 3 foot cover over the system.
>
> b) After a storm event, if any of the remaining HESCO system is exposed, DEP will make a determination whether the system should be removed.
>
> c) Approval pending the issuance of a United States Fish and Wildlife Service Incidental Take Permit.

(RO ¶ 110).

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. (2009); *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). The Department has substantive jurisdiction over the statutes and rules governing coastal construction control line permitting in Part I of Chapter 161, Florida Statutes, and the rules promulgated thereunder in Chapters 62B-33 and 62B-56, Florida Administrative Code.

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).

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). However, even when exceptions are not filed, an agency head reviewing a recommended order is free to modify or reject any erroneous conclusions of law over which the agency has substantive jurisdiction. *See* § 120.57(1)(l), Fla. Stat. (2009); *Barfield v. Dep't of Health,* 805 So.2d 1008 (Fla. 1st DCA 2001); *Fla. Public Employee Council, 79 v. Daniels*, 646 So.2d 813, 816 (Fla. 1st DCA 1994).

RULINGS ON DEP'S EXCEPTIONS TO THE RECOMMENDED ORDER

CCCL Permitting

The well established law in Florida is that an applicant for a CCCL permit has the burden of proof to demonstrate its project is entitled to the approval sought.

Accordingly, the Petitioners must establish that they are entitled to the CCCL permit based upon the criteria set forth by statute and rule. *See Dep't of Transportation v. J.W.C. Company, Inc.*, 396 So. 2d 778 (Fla. 1st DCA 1981). The Department is mandated to issue permits that an applicant has shown to be clearly justified by demonstrating that all applicable standards, guidelines, and other requirements set forth in Part I, Chapter 161, Florida Statutes, and Chapters 62B-33 and 62B-56, Florida Administrative Code, are met. *See e.g., Barbara Ritch Jackson v. Dep't of Envtl. Protection*, DOAH Case No. 06-4508 (DEP 2008) *affirmed* --- So.3d ---, 2009 WL 3817910 (Fla. 1st DCA 2009); *Northern Trust v. Negele*, 22 F.A.L.R. 4490 (DEP 2000); *Lovett v. Dep't of Envtl. Protection,* 22 F.A.L.R. 556 (DEP 1999).

It is also well established case law that if DEP ignores mandated statutory and rule criteria, the omission is fatal "and belies the assertion that the applicants have demonstrated entitlement to the coastal construction permit they seek." *Atlantis at Perdido Assoc., Inc. v. Warner*, 932 So.2d 1206, 1214 (Fla. 1st DCA 2006). Failure to take any applicable statutory or rule criteria into account falls outside the range of discretion delegated to the Department by law and is inconsistent with its own rule. *Id* at 1214; Fla. Admin. Code R. 62B-33.005(4); *see also Vantage Healthcare Corp. v. Agency for Health Care Admin.*, 687 So.2d 306, 308 (Fla. 1st DCA 1997)("The agency is obligated to follow its own rules.").

Application of the statutory and rule criteria to the facts as found by the ALJ lead to the conclusion that the Petitioners are not entitled to the CCCL permit approval under Section 62B-33.0051, Florida Administrative Code, which governs the permitting of coastal armoring. In the RO the ALJ agreed that the HESCO System did not meet the

coastal armoring criteria and constitutes a significant adverse impact to marine turtles under Chapter 62B-33, Florida Administrative Code. (RO ¶¶ 47, 55, 56, 69, 70, 96, 105). The ALJ found that "[t]he HESCO Basket System was not designed to meet coastal armoring standards. Nor was it designed to minimize impacts to sea turtles." (RO ¶ 47). He concluded that: "If the Department is right that the HESCO Basket System and the dune that it supports is coastal armoring then the Stovall/Buntin permit application should be denied because it does not meet the "vulnerability, "eligibility" and "design" criteria as explained by Mr. McNeal at hearing." (RO ¶¶ 70 and 96). In addition, the ALJ found "The HESCO Basket System as designed and installed poses the threat of a significant adverse impact to marine turtles." (RO ¶ 105).

However, the ALJ found that the HESCO System "could have been designed to avoid the threat [to marine turtles] by calling for more than three feet of sand to separate any point in the system from the surface of the dune" (RO ¶ 105), and he recommended "that the Department adopt an approach in permitting [the Petitioners'] HESCO Basket System that the Legislature has provided for with regard to dune restoration incorporating sand-filled geotextile containers or similar structures proposed as the core of a restored dune feature." (RO ¶ 106). The ALJ then evaluated the HESCO System under Section 161.085(9), Florida Statutes, (the statute authorizing geotextile sand-filled containers or similar structures) and found that although the System did not meet all the statutory provisions, "the intent of the Legislature appears clear. Innovative methods of achieving dune restoration should be allowed provided protective conditions are met particularly with regard to the protection of marine turtles." (RO ¶ 108). Thus, the ALJ suggested three additional "conditions" to the permit that would make the HESCO

System permittable under Section 161.085(9):

a) Removal of the top layer of HESCO Baskets and add beach-compatible sand to ensure a minimum of 3 foot cover over the system.

b) After a storm event, if any of the remaining HESCO system is exposed, DEP will make a determination whether the system should be removed.

c) Approval pending the issuance of a United States Fish and Wildlife Service Incidental Take Permit.

(RO ¶ 110).

Exception No. 3

In its third exception DEP takes exception to those portions of paragraphs 97, 98, 101 and 103 of the RO where the ALJ rejected the Department's interpretation of its rule that the HESCO System was "armoring" as defined in Florida Administrative Code R. 62B-33.002(5). The rule provides that:

> "Armoring" is a manmade structure designed to either prevent erosion of the upland property or protect eligible structures from the effects of coastal wave and current action. Armoring includes certain rigid coastal structures such as geotextile bags or tubes, seawalls, revetments, bulkheads, retaining walls, or similar structures but it does not include jetties, groins, or other construction whose purpose is to add sand to the beach and dune system, alter the natural coast currents or stabilize the mouths of inlets.

The Department contends that the testimony of its expert witness and the plain language of the rule support the Department's interpretation that the HESCO Basket System is "armoring" as defined by the rule. Tony McNeal, a Department coastal engineer, testified that the HESCO System was armoring. (T. Vol. I, p. 127, lines 7-12, line 27 – p. 128, line 6). Mr. McNeal testified and even the ALJ found that the HESCO System has several attributes in common with other specifically named rigid coastal

armoring structures. The welded wire baskets form a rigid manmade structure (RO ¶ 37), which the Department's expert witness testified made the HESCO System a rigid armoring structure as defined in Rule 62B-33.002(5). (T. Vol. IV, p. 564, lines 10-15). The purpose of the HESCO System is to retain sand or prevent sand from eroding away like all coastal armoring. (RO ¶¶ 17, 32, 33, 36, 65). Mr. McNeal further testified and the ALJ found that HESCO Systems have been used as revetments. (T. Vol. IV p. 564-566; RO ¶ 38). The baskets are filled with sand and covered with sand like geotextile containers (specifically defined as armoring) that create the core of a reconstructed dune. (RO ¶ 106). The ALJ also found that the purpose of the HESCO Structure is to protect upland development. (RO ¶ 66). Thus, I conclude that the competent substantial evidence in the form of expert testimony and the plain language of the Department's rule support the interpretation that the HESCO Basket System is coastal armoring. This interpretation is permissible and more reasonable than that of the ALJ. *See* § 120.57(1)(l), Fla. Stat. (2009); *G.E.L. Corp. v. Dep't of Envtl. Prot.*, 875 So. 2d 1257, 1264 (Fla. 5th DCA 2004)(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) and *Suddath Van Lines, Inc. v. Dep't of Envtl. Protection*, 668 So.2d 209, 212 (Fla. 1st DCA 1996).

Because of DEP's expertise the ALJ is required to consider carefully DEP's construction of its own rules. Only if DEP's construction is "implausible," "unreasonable," and "clearly erroneous," should it be rejected. *Atlantis at Perdido Assoc., Inc. v. Warner*, 932 So.2d 1206, 1213 (Fla. 1st DCA 2006). Although the ALJ found that the Department's interpretation was "not entirely reasonable under the circumstances of this

case," (RO ¶ 97) the ALJ did not conclude that the Department's interpretation was clearly erroneous. In addition, the rule's plain language does not condition the definition of armoring on special circumstances. *See Vantage Healthcare Corp. v. Agency for Health Care Admin.*, 687 So.2d 306, 308 (Fla. 1st DCA 1997)("The agency is obligated to follow its own rules."). The ALJ did not clearly articulate these special circumstances, but they appear to be: (1) The HESCO System is different from the types of armoring listed in the definition, because it is a combination of wire structure and sand. While it is not a jetty or groin, the HESCO System is a similar "other construction." (RO ¶ 98); (2) The sand piled over the HESCO System is now vegetated and destroying it would be unreasonable. (RO ¶ 101); (3) The "dune" will be the most attractive area to marine turtles since it is the highest ground on the eroded beach; (4) While the HESCO System as presently constructed is not permittable, it can be modified to satisfactorily address the danger to marine turtles. (RO ¶ 103). To the extent that these "circumstances" form the basis for the ALJ's recommendation in paragraph 111 of the RO that "the Department interpret its definition of 'armoring' to exclude the Stovall/Buntin HESCO Basket System," those reasons are not adopted in this Final Order.

Therefore, based on the foregoing, the Department's Exception No. 3 is granted.

Exception No. 2

The DEP takes exception to the portion of paragraph 98 in the RO where the ALJ finds that "the system . . . adds sand to the beach and dune system." (RO ¶ 98, third sentence). The DEP argues that this finding was not based on competent substantial evidence. The ALJ's finding in paragraph 98 states that "[w]hile there is no contention that the HESCO Basket System would add sand to the beach and dune system in the

manner of a jetty or a groin might, the system is unquestionably 'other construction' that adds sand to the beach and dune system." (RO ¶ 98). This ultimate conclusion and the ALJ's underlying factual findings to which the DEP did not take exception, are supported by competent substantial record evidence. (T. Vol. I, p. 109-110; RO ¶¶ 52, 65, 66, 98).

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

Exception No. 1

The DEP takes exception to the ALJ's findings in several places in the RO that the HESCO Basket System created a "dune." The DEP argues that the following uses of the term "dune" in the RO should be rejected to the extent the ALJ used the term "dune" to encompass the technical and legal definition found in the Department's rules. These include: (a) [the HESCO System] "is now primarily a vegetated dune" (RO p. 2, Statement of the Issues); (b) "The dune created by the HESCO baskets" (RO ¶ 56, second sentence); (c) "The construction of the HESCO System led to a vegetated dune" (RO ¶ 65, fourth sentence); (d) "[HESCO System] has added not only sand to the beach but has resulted in the creation and presence of a well-vegetated dune" (RO ¶ 66, last sentence).

"Dune" is defined in Rules 62B-33.002(17) and 62B-56.020(16), Florida Administrative Code, as "a mound, bluff or ridge of loose sediment, usually sand-sized sediment, lying upland of the beach and deposited by any natural or artificial mechanism, which may be bare or covered with vegetation and is subject to fluctuations in configuration and location." As the Department argues in its exception, the sand piled over the HESCO System is more akin to a "reconstructed dune," which is defined in Rule 62B-56.020(16)(b):

> "Reconstructed dune" is a man-made dune feature that has a sand filled geotextile container as its core that is continuously covered with a minimum of three feet of sand, meets the specific design and siting criteria of this chapter, is contoured to minimize erosive effects, and is vegetated with native beach-dune plants.

Thus, the sand piled over the HESCO System, with sand piled on top of it, could be defined as a "reconstructed dune," under 62B-56.020(16)(b), Florida Administrative Code.

I also conclude that the plain language of the Department's rule supports the interpretation that the HESCO Basket System with sand piled on top of it, does meet the definition of coastal armoring. This interpretation is permissible and more reasonable than that of the ALJ. *See* § 120.57(1)(l), Fla. Stat. (2009); *G.E.L. Corp. v. Dep't of Envtl. Prot.*, 875 So. 2d 1257, 1264 (Fla. 5th DCA 2004)(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) and *Suddath Van Lines, Inc. v. Dep't of Envtl. Protection*, 668 So.2d 209, 212 (Fla. 1st DCA 1996). Thus, the above referenced uses of the term "dune" in the RO is adopted in this Final Order because the HESCO Basket System with sand piled on top of it, complies with the definition of a "reconstructed dune" in Rule 62B-56.020(16)(b), Florida Administrative Code.

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

Section 161.085(9), Florida Statutes

After concluding that the HESCO System is not armoring, the ALJ recommended an approach to permitting the System (since it does not meet the coastal armoring criteria of Chapter 62B-33) using the provision of the statute that authorizes sand-filled

geotextile containers or similar structures proposed as the core of a restored dune feature. *See* §161.085(9), Fla. Stat. (2009). Subsection 161.085(9) contains the standards for authorizing a type of coastal armoring, namely "sand-filled geotextile containers or similar structures proposed as the core of a restored dune feature." § 161.085(9), Fla. Stat. (2009).

As the ALJ noted, Subsection 161.085(9) was recently enacted by the Florida Legislature. *See* s. 2, chapter 2007-99, Laws of Florida. Pursuant to Subsection 161.085(5), the Department then promulgated Florida Administrative Code Chapter 62B-56 to implement this new permitting approach for geotextile containers or similar structures proposed as the core of a restored dune feature. § 161.085(5), Fla. Stat. (2009)("The department shall adopt rules to implement the provisions of this section."). Chapter 62B-56 became effective in June 2008 and exclusively governs the permitting of geotextile containers as the core of a reconstructed dune. *See* Fla. Admin. Code R. 62B-33.0051(1). These permitting criteria were in effect at the time of the final hearing in August 2008. Florida case law holds that "[w]here there is a change in the law during the pendency of a license application, the law in effect at the time of the final hearing controls, rather than a law in effect when the application was filed or when the agency reached its preliminary or initial decision." *Kelly Cadillac, Inc. v. Dep't of Envtl. Protection,* DOAH Case No. 97-0342, 1998 WL 866308 (Div. of Admin. Hearings, Jan. 30, 1998); *see also Agency for Health Care Admin. v. Mount Sinai Medical Center for Greater Miami,* 690 So.2d 689, 692-693 (Fla. 1st DCA 1997) and *Lavernia v. Dep't of Professional Regulation,* 616 So.2d 53 (Fla. 1st DCA 1993) *rev. denied* 624 So.2d 267 (Fla. 1993).

The ALJ's evaluation in paragraphs 106 through 109 of the subject permit applications only with reference to the provisions of Subsection 161.085(9) is authorized under the case law cited above. However, the ALJ concluded that all the statutory provisions were not met by the Petitioners' applications, unless the clear legislative intent of the statute was considered along with additional permit conditions, acceptable to the Petitioners, which are sufficient to make the project permittable. Although the ALJ does not reference the rule chapter promulgated under the authority of Subsection 161.085(9), he does conclude that the HESCO Basket System is a "similar structure" proposed as the core of a dune feature, such that the provisions in Subsection 161.085(9) should apply to permitting of the HESCO System. (RO ¶ 108). He also concluded that "[t]he [statutory] Section [161.085(9)] does not square perfectly with the Stovall and Buntin proposal," (RO ¶ 108), but "the intent of the Legislature appears clear. Innovative methods of achieving dune restoration should be allowed provided protective conditions are met particularly with regard to the protection of marine turtles." (RO ¶ 108). To that end the ALJ found that the HESCO System "could have been designed to avoid the threat [to marine turtles] by calling for more than three feet of sand to separate any point in the system from the surface of the dune" (RO ¶ 105), and recommended an additional permit condition that calls for "a) Removal of the top layer of HESCO Baskets and add beach-compatible sand to ensure a minimum of 3 foot cover over the system." (RO ¶ 110).

Exception No. 4

The DEP takes exception to the ALJ's decision in paragraphs 106-109 of the RO to evaluate the HESCO Basket System under Subsection 161.085(9), Florida Statutes.

The DEP also argues that the ALJ's conclusion in paragraphs 110-111 that the permit should be issued is not supported by competent substantial evidence in the record.

The DEP contends that there are at least four conditions in Subsection 161.085(9) that the Petitioners' application clearly cannot meet. Under subparagraph 161.085(9)(a)1., Florida Statutes, all geotextile containers or similar structures must:

> Provide for the protection of an existing major structure or public infrastructure, and, notwithstanding any definition in department rule to the contrary, that major structure or public infrastructure is vulnerable to damage from frequent coastal storms, or is upland of a beach-dune system which has experienced significant beach erosion from such storm events. (Emphasis added).

The ALJ admits that "the department regards the understory parking areas of the Stovall and Buntin homes to be minor structures." (RO ¶ 108). However, it is undisputed that the Petitioners' houses are major structures that are "upland of a beach-dune system which has experienced significant beach erosion from [frequent coastal] storm events." Thus, under the "plain and ordinary intent of the law" the HESCO System satisfies the fundamental predicate for permitting a geotextile container or similar structure. *See e.g., Colbert v. Dep't of Health,* 890 So.2d 1165, 1166 (Fla. 1st DCA 2004)(finding that the agency's interpretation should not conflict with the plain and ordinary intent of the law).

Also, subparagraph 161.085(9)(a)4., Florida Statutes, requires that the geotextile container system be continuously covered with 3 feet of native or beach quality sand and stabilized with native salt-tolerant vegetation. There is competent substantial record evidence from the Petitioners' testimony and reflected in the ALJ's finding that the Systems are already partially uncovered, which means that the Systems do not currently meet the requirement for maintenance of 3 feet of continuous sand cover. (RO

¶ 54). However, the ALJ's recommended additional condition (a) would allow the Systems to meet this statutory requirement.

The DEP also argues that there's no competent substantial record evidence to support a conclusion that the HESCO System would meet the statutory requirement in subparagraph 161.085(9)(a)9., Florida Statutes. This provision requires that the geotextile containers or similar structures "[a]re designed to facilitate easy removal of the geotextile containers if needed." However, the ALJ's recommended additional condition (b) would allow the Department to require removal of the HESCO System, if needed.

In addition, paragraph 161.085(10)(b), Florida Statutes, requires that:

> The applicant or successive property owners shall provide financial assurances in the form of surety or performance bonds or other financial responsibility mechanisms that the authorized geotextile containers will be removed if the requirements of this subsection and the permit conditions are not met. The permittee shall file a notice of formal permit conditions in the public records of the county where the permitted activity is located.

There is no competent substantial record evidence that the Petitioners would comply with this requirement to provide financial assurances, and the ALJ did not include such a requirement in his recommended additional conditions. However, for the Department to issue a permit that complied with Subsection 161.085(9), Florida Statutes, and Chapter 62B-56, Florida Administrative Code, this requirement would be included since these permitting criteria were in effect at the time of the final hearing in August 2008. Florida case law holds that "[w]here there is a change in the law during the pendency of a license application, the law in effect at the time of the final hearing controls, rather than a law in effect when the application was filed or when the agency

reached its preliminary or initial decision." *Kelly Cadillac, Inc. v. Dep't of Envtl. Protection,* DOAH Case No. 97-0342, 1998 WL 866308 (Div. of Admin. Hearings, Jan. 30, 1998); *see also Agency for Health Care Admin. v. Mount Sinai Medical Center for Greater Miami,* 690 So.2d 689, 692-693 (Fla. 1st DCA 1997) and *Lavernia v. Dep't of Professional Regulation,* 616 So.2d 53 (Fla. 1st DCA 1993) *rev. denied* 624 So.2d 267 (Fla. 1993).

Therefore, based on the foregoing and my prior conclusions, the DEP's exception that the ALJ's conclusions in paragraphs 106-109 of the R.O. are erroneous is denied. Further, the DEP's exception that the ALJ's conclusions in paragraphs 110-111 that the permit should be issued are not supported by competent substantial evidence in the record, is also denied based on my rulings in Exception Nos. 5, 7 and 8 below.

Exception No. 5

The DEP takes exception that portion of paragraph 108 of the RO where the ALJ articulates the legislative intent with regard to the requirements in Subsection 161.085(9), Florida Statutes. The ALJ concluded that "the intent of the Legislature appears to be clear. Innovative methods of achieving dune restoration should be allowed provided protective conditions are met particularly with regard to the protection of marine turtles." (RO ¶ 108). The DEP argues that there is no competent substantial record evidence for that conclusion, and points out that legislative intent was not at issue at the hearing. It is a well settled rule of statutory construction that unambiguous language is not subject to judicial construction in a way which would extend, modify, or limit its express terms or its reasonable and obvious implications. *See Atlantis at*

Perdido Assoc., Inc. v. Warner, 932 So.2d 1206, 1212-1213 (Fla. 1st DCA 2006)(quoting *Am. Bankers Life Assurance Co. of Fla. v. Williams,* 212 So.2d 777, 778 (Fla. 1st DCA 1968)). In addition, "where a department's construction of a statute is inconsistent with clear statutory [and rule] language it must be rejected, notwithstanding how laudable the goals of that department [may be]." *Id.* at 1212 (quoting *Fla. Dep't of Children and Family Servs. v. McKim,* 869 So.2d 760, 762 (Fla. 1st DCA 2004)).

The plain and unambiguous statutory language supports the ALJ's conclusion. Subsection 161.085(9) provides:

> (9) The department may authorize dune restoration incorporating sand-filled geotextile containers or similar structures proposed as the core of a restored dune feature when the conditions of paragraphs (a)-(c) and the requirements of s. 161.053 are met.
>
> (a) A permit may be granted by the department under this subsection for dune restoration incorporating geotextile containers or similar structures provided that such projects:
>
> 1. Provide for the protection of an existing major structure or public infrastructure, and, notwithstanding any definition in department rule to the contrary, that major structure or public infrastructure is vulnerable to damage from frequent coastal storms, or is upland of a beach-dune system which has experienced significant beach erosion from such storm events.
>
> 2. Are constructed using native or beach-quality sand and native salt-tolerant vegetation suitable for dune stabilization as approved by the department.
>
> 3. May include materials other than native or beach-quality sand such as geotextile materials that are used to contain beach-quality sand for the purposes of maintaining the stability and longevity of the dune core.
>
> 4. Are continuously covered with 3 feet of native or beach-quality sand and stabilized with native salt-tolerant vegetation.

5. Are sited as far landward as practicable, balancing the need to minimize excavation of the beach-dune system, impacts to nesting marine turtles and other nesting state or federally threatened or endangered species, and impacts to adjacent properties.

6. Are designed and sited in a manner that will minimize the potential for erosion.

7. Do not materially impede access by the public.

8. Are designed to minimize adverse effects to nesting marine turtles and turtle hatchlings, consistent with s. 379.2431.

9. Are designed to facilitate easy removal of the geotextile containers if needed.

10. The United States Fish and Wildlife Service has approved an Incidental Take Permit for marine turtles and other federally threatened or endangered species pursuant to s. 7 or s. 10 of the Endangered Species Act for the placement of the structure if an Incidental Take Permit is required.

(b) The applicant or successive property owners shall provide financial assurances in the form of surety or performance bonds or other financial responsibility mechanisms that the authorized geotextile containers will be removed if the requirements of this subsection and the permit conditions are not met. The permittee shall file a notice of formal permit conditions in the public records of the county where the permitted activity is located.
(c) The department shall order removal of the geotextile container if the conditions of subparagraph (a)4. are not met, if the project ceases to function due to irreparable damage, if the project is determined by the department to have caused a significant adverse impact to the beach-dune system, or if the United States Fish and Wildlife Service revokes the Incidental Take Permit required in subparagraph (a)10.

(d) The department may require any engineering certifications that are necessary to ensure the adequacy of the design and construction of the permitted project.

(e) Upon receipt of a permit application, the department

> must notify the applicant and agent of all the statutory provisions of this subsection.

Therefore, based on the foregoing, the DEP's Exception No. 5 is denied.

Exception No. 6

The DEP takes exception to the portion of paragraph 101 of the RO where the ALJ concluded that it was unreasonable to remove the HESCO Basket System, since "[i]t would not be reasonable to destroy the dune in order to protect the beach dune system." (RO ¶ 101, last sentence). The statute clearly contemplates removal when certain conditions are not met and does not contain any exceptions for "well vegetated" dunes. *See Atlantis*, 932 So.2d at 1212 ("It is a well settled rule of statutory construction that unambiguous language is not subject to judicial construction in a way which would extend, modify, or limit its express terms... .").

Subsection 161.085(9)(b), Florida Statutes, provides for removal "if the requirements of this subsection and the permit conditions are not met." Subsection 161.085(9)(c) provides for removal when:

> the conditions of subparagraph (a)4. are not met [requiring at least three feet of sand cover], if the project ceases to function due to irreparable damage, if the project is determined by the department to have caused a significant adverse impact to the beach-dune system, or if the United States Fish and Wildlife Service revokes the Incidental Take Permit required in subparagraph (a)10.

None of these conditions for removal of the geotextile container is limited by the amount of vegetation on the reconstructed dune. Therefore, based on the foregoing, the DEP's Exception No. 6 is granted.

Additional permit conditions

The case law holds that an ALJ has the ability to recommend additional

modifications or conditions that would allow issuance of a permit , so long as the parties' due process rights are not violated and the conditions are minor in nature and sufficient to make the project permittable. *See e.g., Hopwood v. State, Dep't of Envtl. Regulation*, 402 So.2d 1296, 1299 (Fla. 1st DCA 1981); *Charlotte County, et al. v. IMC Phosphates Co.*, 18 So.3d 1089 (Fla. 2d DCA 2009)(ALJ had authority to further state that if certain modifications were made or conditions were added by applicant, issuance of the permit would be appropriate.). Therefore, based on my rulings below I conclude that the conditions suggested by the ALJ in paragraph 110 of the RO allow the issuance of a permit under Subsection 161.085(9), Florida Statutes, and Chapter 62B-56, Florida Administrative Code.

Exception No. 7

The DEP takes exception to paragraph 110 where the ALJ suggests three additional permit conditions proposed by the Petitioners in their proposed recommended order in an effort to make the project permittable under Subsection 161.085(9), Florida Statutes. The DEP contends that the suggested conditions are not minor, are vague, do not track the statutory language, and would not make the project permittable.

The first proposed condition is a minor project modification and meets the standard identified in the controlling case law. *See e.g., Charlotte County, et al. v. IMC Phosphates Co.*, 18 So.3d 1089 (Fla. 2d DCA 2009)(ALJ had authority to further state that if certain modifications were made or conditions were added by applicant, issuance of the permit would be appropriate.). As I've concluded in my ruling on Exception No. 4 above, Florida case law holds that "[w]here there is a change in the law during the pendency of a license application, the law in effect at the time of the final hearing

controls, rather than a law in effect when the application was filed or when the agency reached its preliminary or initial decision." *Kelly Cadillac, Inc. v. Dep't of Envtl. Protection,* DOAH Case No. 97-0342, 1998 WL 866308 (Div. of Admin. Hearings, Jan. 30, 1998); *see also Agency for Health Care Admin. v. Mount Sinai Medical Center for Greater Miami,* 690 So.2d 689, 692-693 (Fla. 1st DCA 1997) and *Lavernia v. Dep't of Professional Regulation,* 616 So.2d 53 (Fla. 1st DCA 1993) *rev. denied* 624 So.2d 267 (Fla. 1993). Thus, the Petitioners' application for an after-the-fact permit must be reviewed to determine if the existing structure meets applicable statutory and rule criteria, including the modifications or conditions recommended by the ALJ and accepted by the permit applicant. *See e.g., Charlotte County, et al. v. IMC Phosphates Co.*, 18 So.3d 1089 (Fla. 2d DCA 2009).

The second condition suggested by the ALJ is designed to ensure compliance with Subsection 161.085(9)(c), Florida Statutes. *See e.g., Charlotte County, et al. v. IMC Phosphates Co.*, 18 So.3d 1089 (Fla. 2d DCA 2009)(ALJ had authority to further state that if certain modifications were made or conditions were added by applicant, issuance of the permit would be appropriate.). The third condition is addressed in my ruling on Exception No. 8 below.

The proposed conditions are sufficient to make the project permittable, since they are intended to address the conditions in Subsections 161.085(9)(a)4., (9)(a)10., and part of (9)(b), Florida Statutes. *See e.g., Charlotte County, et al. v. IMC Phosphates Co.*, 18 So.3d 1089 (Fla. 2d DCA 2009). Therefore, based on the foregoing, the DEP's Exception No. 7 is denied.

Exception No. 8

The DEP takes exception to the third additional permit condition suggested by the ALJ in paragraph 110 on the basis that it violates the condition precedent mandated in the statute. Subsection 161.085(10), Florida Statutes, conditions the issuance of a permit for a geotextile container or similar structure on the approval by the USFWS of an "incidental Take Permit for marine turtles . . . for the placement of the structure if an incidental Take Permit is required."

The ALJ found that the HESCO System constituted a "take" of marine turtles (RO ¶ 105), because after a storm, the System could end up as a "jumble" on the beach impeding turtles moving towards nesting locations; partially exposed baskets could trap, entangle or upend turtles; and nesting turtles could be deterred if the baskets were buried under less than three feet of sand. (RO ¶ 103). However, he conditioned the permit on the issuance of an Incidental Take Permit from the USFWS. (RO ¶ 110, third condition). I conclude that this is a reasonable construction of the statutory requirement by the ALJ under the circumstances of an after-the-fact permit application. *See e.g., Colbert v. Dep't of Health,* 890 So.2d 1165, 1166 (Fla. 1st DCA 2004)(finding that the agency's interpretation should not conflict with the plain and ordinary intent of the law).

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

Miscellaneous Exceptions

Exception No. 9

The DEP takes exception to several places in the RO where the ALJ uses the incorrect document title when referring to the Department's Exhibit 9. (RO p.14, ¶ 25, first sentence; p. 15, ¶ 28, first sentence; p. 21, ¶ 39, first sentence). The ALJ

repeatedly entitles the "Emergency Final Order" issued by the Department as a "Final Emergency Order." Based on the competent substantial record evidence (DEP Ex. 9), this exception is granted.

Exception No. 10

The DEP takes exception to the third sentence in paragraph 31 of the RO where the ALJ found that the activities authorized in the Department's Field Permit included "[t]he repairs included electrical, plumbing and HVAC work and replenishment of approximately 1800 yards of sand for foundation pilings." The Field Permit only authorized repair and replacement of the wooden decks and the understructure concrete and brick pavers. (DEP Ex. 10). The quoted repairs were authorized by Walton County's permit. (DEP Ex. 8; DEP Ex. 9, p. 19, ¶b.(2)). Based on the competent substantial record evidence, this exception is granted.

Exception No. 11

The DEP takes exception to paragraph 39 of the RO where the ALJ found that Walton County issued separate permits for the Buntin and Stovall properties "[u]nder the DEP [Emergency Final Order] authorizing local governments to issue permits for temporary emergency protection seaward of the CCCL." The DEP argues that the temporary emergency protection permits issued by Walton County were issued pursuant to the statutory authority of Section 161.085, Florida Statutes, and not under the authority of the DEP Emergency Final Order.

The Department's Emergency Final Order was issued under the authority of Sections 120.569(2)(n) and 252.36, Florida Statutes. The Department is only authorized to address in the Emergency Final Order the legal jurisdiction it already

holds under its governing statutes and rules. The Emergency Final Order does not delegate the Department's CCCL permitting authority to Walton County. Such authority is provided in Subsection 161.085(3), Florida Statutes, which states in part:

> (3) If erosion occurs as a result of a storm event which threatens private structures or public infrastructure . . . an agency, political subdivision, or municipality having jurisdiction over the impacted area may install or authorize installation of rigid coastal armoring structures, exclusive of those authorized under [161.085(9)], for the protection of private structures or public infrastructure,... (Emphasis added).

The statute further provides in Subsection 161.085(6):

> (6) A rigid coastal armoring structure or other structure constructed under the authority of subsection (3) shall be temporary, and the agency, political subdivision, municipality, or private property owner shall remove the structure or submit a permit application to the department for a permanent rigid coastal armoring structure, pursuant to s. 161.041 or s. 161.053, within 60 days after the emergency installation of the structure or other measure to relieve the threat to private structures or public infrastructure. (Emphasis added).

Thus, the temporary emergency protection permits issued by Walton County to the Petitioners are authorized under and governed by Section 161.085, Florida Statutes. (DEP Ex. 8). Therefore, based on the foregoing, the DEP's Exception No. 11 is granted.

Exception No. 12

The DEP takes exception to the incorrect rule citation in paragraph 65 of the RO. The correct rule citation is "Rule 62B-33.002(5)." This exception is granted.

Exception No. 13

The DEP takes exception to the incorrect statutory citation in paragraph 89 of the

RO. The correct statutory citation is "Section 379.2431(1)(c)2." This exception is granted.

Exception No. 14

The DEP takes exception to the incorrect rule citation in paragraph 97 of the RO. The correct rule citation is "Rule 62B-33.002(5)." This exception is granted.

CONCLUSION

Application of the statutory and rule criteria to the facts as found by the ALJ lead to the conclusion that the Petitioners are not entitled to the CCCL permit approval under Section 62B-33.0051, Florida Administrative Code, which governs the permitting of coastal armoring. In the RO the ALJ agreed that the HESCO System did not meet the coastal armoring criteria and constitutes a significant adverse impact to marine turtles under Chapter 62B-33, Florida Administrative Code. (RO ¶¶ 47, 55, 56, 69, 70, 96, 105). The ALJ found that "[t]he HESCO Basket System was not designed to meet coastal armoring standards. Nor was it designed to minimize impacts to sea turtles." (RO ¶ 47). He concluded that: "If the Department is right that the HESCO Basket System and the dune that it supports is coastal armoring then the Stovall/Buntin permit application should be denied because it does not meet the "vulnerability, "eligibility" and "design" criteria as explained by Mr. McNeal at hearing." (RO ¶¶ 70 and 96). In addition, the ALJ found "The HESCO Basket System as designed and installed poses the threat of a significant adverse impact to marine turtles." (RO ¶ 105).

However, I agree with and adopt in this Final Order the ALJ's conclusion that the HESCO System "could have been designed to avoid the threat [to marine turtles] by calling for more than three feet of sand to separate any point in the system from the

surface of the dune" (RO ¶ 105). I concur with the recommendation "that the Department adopt an approach in permitting [the Petitioners'] HESCO Basket System that the Legislature has provided for with regard to dune restoration incorporating sand-filled geotextile containers or similar structures proposed as the core of a restored dune feature." (RO ¶ 106). The ALJ evaluated the HESCO System under Section 161.085(9), Florida Statutes, (the statute authorizing geotextile sand-filled containers or similar structures) and found that although the System did not meet all the statutory provisions, "the intent of the Legislature appears clear. Innovative methods of achieving dune restoration should be allowed provided protective conditions are met particularly with regard to the protection of marine turtles." (RO ¶ 108). Thus, the ALJ recommended the following three additional conditions to the permit that would make the HESCO System permittable under Section 161.085(9):

> a) Removal of the top layer of HESCO Baskets and add beach-compatible sand to ensure a minimum of 3 foot cover over the system.
>
> b) After a storm event, if any of the remaining HESCO system is exposed, DEP will make a determination whether the system should be removed.
>
> c) Approval pending the issuance of a United States Fish and Wildlife Service Incidental Take Permit.

(RO ¶ 110).

Based on the findings and conclusions of the ALJ adopted in this Final Order, and my rulings on the Department's exceptions, I concur with his ultimate recommendation that I issue, subject to the additional conditions, an after-the-fact permit under the provisions of Subsection 161.085(9), Florida Statutes, and Chapter

62B-56, Florida Administrative Code.

It is therefore ORDERED:

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

B. The Department's Bureau of Beaches and Coastal Systems shall issue to the Petitioners an after-the-fact permit in File No. WL-940 AR ATF that requires compliance with the provisions of Subsection 161.085(9), Florida Statutes, and Chapter 62B-56, Florida Administrative Code, including the requirement to provide adequate financial assurances.

C. The permit shall also be subject to the following conditions:

a) Removal of the top layer of HESCO Baskets and add beach-compatible sand to ensure a minimum of 3 foot cover over the system.

b) After a storm event, if any of the remaining HESCO system is exposed, DEP will make a determination whether the system should be removed.

c) Approval pending the issuance of a United States Fish and Wildlife Service Incidental Take Permit.

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 21st day of January, 2010, 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.

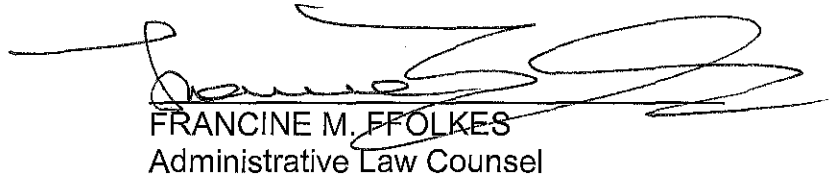
B Reardon
Deputy CLERK

1/21/10
DATE

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing was sent by electronic mail to Ong-In Shin, P.E., ong.shin@embarqmail.com, and to Jim Antista, General Counsel and Mark Henderson, Senior Attorney, Florida Fish and Wildlife Conservation Commission, james.antista@MyFWC.com and Mark.Henderson@MyFWC.com; and to Kelly L. Russell, Senior Assistant General Counsel, Department of Environmental Protection, Kelly.L.Russell@dep.state.fl.us, and by electronic filing to the DOAH Clerk, on this 22nd day of January, 2010.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



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