

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

JIM AND NANCY BUNTIN, PENELOPE )  
AND PAUL STOVALL, )  
 )  
 Petitioners, )  
 )  
vs. ) Case No. 08-1086  
 )  
DEPARTMENT OF ENVIRONMENTAL )  
PROTECTION, )  
 )  
 Respondent, )  
 )  
and )  
 )  
FLORIDA FISH AND WILDLIFE )  
CONSERVATION COMMISSION, )  
 )  
 Intervenor. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

This case was heard by David Maloney, Administrative Law Judge of the Division of Administrative Hearings, on August 26 and 27, 2009, in Santa Rosa Beach, Florida.

APPEARANCES

For Petitioners: Ong-In Shin, P.E.  
Qualified Representative  
Florida Coastal Development  
Consulting, Inc.  
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Niceville, Florida 32758

For Respondent: Kelly L. Russell, Esquire  
Department of Environmental Protection  
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For Intervenors: Stanley M. Warden, Esquire  
Florida Fish and Wildlife  
Conservation Commission  
Bryant Building, Room 108  
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STATEMENT OF THE ISSUES

Whether the Buntins and the Stovalls should receive an after-the-fact coastal construction control line (CCCL) permit to allow a sand-filled HESCO Basket System constructed in the aftermath of Hurricane Dennis in 2005 and that is now primarily a vegetated dune to remain as a permanent structure in Walton County?

PRELIMINARY STATEMENT

On February 29, 2008, The Division of Administrative Hearings (DOAH) received a request (the Request) from the Department of Environmental Protection ("DEP" or "the Department"). The Request notified DOAH of a petition for hearing from Jim and Nancy Buntin, Janie B. Ketchum, and Penelope and Paul Stovall ("Petitioners" or the "Buntins and the Stovalls").

The case was assigned Case No. 08-1086 by DOAH. Bram D. E. Canter was designated as the administrative law judge to conduct

the proceedings and an Initial Order was issued the same day. The parties responded to the order on March 11, 2008. Pursuant to the response, 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 the undersigned.

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 Florida Fish and Wildlife Conservation Commission petitioned to intervene in the proceeding. The petition was granted on July 16, 2009. One week before the hearing, Petitioners filed a Motion for Voluntary Withdrawal related to Petitioner Ketchum. Shortly thereafter an order was entered removing Ms. Ketchum as a Petitioner.

The final hearing began the morning of August 26, 2009 and concluded on August 28, 2009. As applicants for the after-the-fact permit, Petitioners proceeded first. They presented the testimony of Paul Graham Stovall; James Earl Buntin; Quintin Smith, Senior Right-of-Way Specialist for Walton County; Jim

Martinello, Environmental Manager for the Bureau of Beaches and Coastal Systems with the Department; Reginald Dwayne Bradley, Engineering Specialist with the Department; Michael Allan Jones, General Contractor licensed in Georgia at the time the HESCO Basket System was constructed; Tony McNeal, Program Administrator for the Coastal Construction Control Line Program in the Bureau of Beaches and Coastal Systems in the Department; Michael Robert Barnett, Chief of the Bureau of Beaches and Coastal Systems in the Department; Ong-In Shin, the Petitioners' Qualified Representative; Craig Martin, accepted as an expert in coastal habitat including sea turtle habitat and coastal ecology; and, Penelope Stovall.

Petitioners offered into evidence fourteen exhibits, 1, 2, 4, 5, 11-17, 29, 30 and 31; all were admitted into evidence.

Following Petitioners' case-in-chief, the Department presented its case in support of its denial of the application. It re-called Jim Martinello, Michael Barnett, and Tony McNeal as its own witnesses. It also presented the testimony of Eugene Chalecki, Program Administrator for the Bureau of Beaches and Coastal Systems; and, Mark Edward Leadon, Program Director of the Beaches and Shores Resource Center at Florida State University. In the midst of the presentation of the Department's case-in-chief, the Commission presented the testimony of Blair Ernest Witherington, Ph.D., Associate

Research Scientist with the Florida Fish and Wildlife Conservation Commission. Dr. Witherington was accepted as an expert in sea turtles and sea turtle nesting.

The Department offered 16 exhibits. They are marked for identification as Department Exhibits 3, 4, 7 (P85 and P86), 7 (page 1 of 4), 8-13, 16, 18, 20-22 and 25. All were admitted into evidence. The Commission offered three exhibits. Marked for identification as Department and Commission Joint Exhibit 5, 17 and 19, the three were admitted into evidence.

The four-volume Transcript of the final hearing was filed at DOAH on September 29, 2009. Under the agreement of the parties stated at the conclusion of the hearing, proposed recommended orders were due to be filed on October 13, 2009, 14 days after the filing of the transcript. On October 13, 2009, the Department filed an unopposed motion for extension of time for the submission of proposed recommended orders. An extension was entered allowing proposed orders to be filed by Friday, October 23, 2009. Proposed orders were timely filed. This Recommended Order follows.

#### FINDINGS OF FACT

##### Sea Turtle Nesting Habitat on a Hurricane-battered Coast

1. Along the northernmost reaches of the Gulf of Mexico, roughly in the center of the Florida Panhandle coast, the beaches and shores of Walton County have been subject to the

many vicissitudes of coastal climate over the years. So have marine turtles, several species of which have relied through the ages on Florida beaches and shores, including those in Walton County for nesting habitat.

2. Survivors of shifting circumstances brought by weather, sea turtles are now imperiled by exposure to man-made dangers. Anthropogenic turtle hazards on populated beaches are numerous and, without educational efforts of the Department and the Commission, not likely to be recognized by beach-goers interested in the enjoyment of surf and sun.

3. Folding beach chairs and canopies, board walks designed to protect the dune system, and other seemingly-harmless by-products of human beach activity, even holes dug by children building sand castles, can contribute to sea turtle injury and cause sea turtle fatality.

4. While sea turtles in recent times have made their way across the Walton County beach toward their nests through obstacles set up by human beings and hatchlings have scurried toward the sea through these same impediments, owners of beachfront property have had to contend with powerful tropical storms, particularly in the relatively recent past. Especially damaging to property along the Walton County Coastline have been three hurricanes that hit in the span of a decade: Opal in 1995, Ivan in 2004 and Dennis in 2005.

5. The intense storm surge of Hurricane Opal destroyed much of the dune system along the stretch of Seagrove Beach in Walton County that is the subject of the aerial photography introduced into evidence in this case. Ivan, which made landfall just west of Gulf Shores, Alabama, as a Category 3 Hurricane on September 16, 2004, caused heavy damage to the Walton County coastline and areas west. Of the three, though, the damage done by Dennis is the sine qua non of this proceeding brought by Petitioners to preserve and protect their property.

The Stovall and Buntin Property

6. When Hurricane Dennis hit, the Stovalls had owned the property located at 711 Eastern Lake Road, Santa Rosa Beach, Walton County, for some time.

7. Purchased by both Mr. and Mrs. Stovall and in both their names at the time the petition was filed, by the time of hearing, the property had been transferred into Mrs. Stovall's name only.

8. The Stovalls bought the lot around 1997 give or take a year. "[T]he house itself is about 11 years old," tr. 17, built in 1998 or thereabouts.

9. Seaward of the CCCL established on December 29, 1982, construction of the house required a CCCL permit from the Department. In the words of Mr. Stovall, the permitting process required "hundreds of hoops to jump through." Tr. 18. The lot

had been in foreclosure and the permit was obtained through the services of a reputable architectural firm. The house, therefore, was designed and constructed to survive a major hurricane, a requirement of the permit.

10. The house was built on pilings sturdy enough to support the house in the event of a major hurricane. High enough to allow the bottom floor of the house to be above storm surge, the pilings' height and house elevation also allowed ample parking for vehicles beneath the house.

11. At the time the Stovall house was built, despite the damage done by Opal, there remained a good natural dune system seaward of the house, one that was "beautiful . . . wonderful," tr. 19, in the words of Mr. Stovall.

12. After the house was constructed, Mrs. Stovall took particular pleasure in the dune system and worked to preserve and cultivate sea oats in its support. She also was thrilled by the presence of two turtle nests not long after the purchase of the lot, one nest found in 1998 and the other discovered on July 22, 1999.

13. After the discoveries, Sharon Maxwell, the County-authorized "local turtle coordinator," tr. 295, and "the only person in the County permitted to touch . . . turtles," tr. 296 was contacted. Ms. Maxwell measured the nests from points related to the Stovall house. They were at least 20 feet



seaward of the toe of the most seaward dune. Because the nests were on a busy stretch of the beach, protective measures were implemented.

14. Among the protective measures were actions by Mrs. Stovall. In addition to working with the local turtle coordinator, Mrs. Stovall became involved in circulation of information to neighbors about sea turtle conservation. She was part of an effort to encourage the information to be placed in rental units in the neighborhood. The information recommended turning out lights on the beach that interfered with turtle nesting, "brought out the importance of a single . . . beach chair [that] can misdirect and kill over hundreds of endangered hatchlings . . . [and] umbrellas . . . left overnight [that] can interfere with nesting." Tr. 293. She called local government commissioners and attended commission meetings where she advocated beach removal of items hazardous to sea turtles, their nests and their offspring. Her efforts have extended off-shore as well. As a scuba diver, she learned how to respect sea turtles and their marine habitat and "encouraged others to stay away and not harass the turtles, which many divers do." Tr. 195.

15. The Buntin property, located at 701 Eastern Lake Drive, is adjacent to the Stovall property on the east side. Owned by the Buntins since 1990, the house on the lot was built

in 1991 or early 1992. Like the Stovall house, the Buntin house is seaward of the CCCL and built to withstand the forces of major tropical storms.

16. The Buntins, similar to the Stovalls, care about the beaches and shores of Walton County and particularly the beach adjacent to their property. Their intent with regard to the coastal environment is to protect it.

17. There have been times over the past two decades when the Buntins greatly enjoyed their property. Their relationship to it, however, has changed. As Mr. Buntin put it at hearing, "[I]t's a situation we put ourselves in [but] I wish we didn't have any beach property. And I imagine there's a lot of other folks that wish that, too, . . ." Tr. 54. A major factor in Mr. Buntin's change-of-attitude is damage done by Hurricane Dennis.

#### Hurricane Dennis

18. Hurricane Dennis made landfall near Navarre Beach not far west of the Stovall and Buntin Properties on July 10, 2005, having struck the tip of peninsular Florida the day before. Classified according to the Saffir-Simpson Scale as a Category 4 Hurricane at moments in its journey through the Caribbean and the Gulf of Mexico, it came ashore in the northern Gulf as a Category 3 hurricane. Some of the worst damage it caused was along the panhandle coast. One of its damaging effects was

enormous erosion of the beaches and shores along the coastline where the Stovall and Buntin property is 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 Stovall and Buntin houses.

19. The Stovall house, itself, was not structurally damaged; there was not "a crack in the Sheetrock. The house stood solid." Tr. 30. It had lost its bottom deck and the deck on its western side but true to the CCCL permitting criteria, the house, perched on pilings about the storm surge, had also withstood the Category 3 force winds of the hurricane. Dennis had caused more damage to the property, however, than just the loss of a few decks. It had eroded the beach as far up as landward of the Stovall's house. At hearing, Mr. Stovall described his first view of the property post-Dennis:

[T]he water was lapping back . . . behind the house. And if anybody walked up to where it was, it would just cave in. I fully believed that if that storm would've gone on another two hours, it would have been in the man's house behind me[.] . . . [W]e had no access to the front door and one of the neighbors down the street brought in a ladder . . . It would have taken a 20 or 21-foot ladder to have gotten up to [the] first deck level . . . .

Tr. 25. Without a ladder, the house was not accessible. Most pertinent to the Stovall's persistence in bringing this

proceeding, there was nowhere to park their vehicles. The parking area under the house had been scoured out.

20. The Buntin property likewise suffered the impact of the hurricane's scour. Mr. Buntin was contacted by a neighbor and told that the scouring under his house was so bad that the air-conditioners midway between the seaward and landward sides of the house were "hanging over a 20-foot drop-off." Tr. 45. Mr. Buntin did not give the report much credibility at first but, to his dismay, found it true when he visited the property shortly after the storm. Just as in the case of the Stovall property, a car could not be parked under the house in the space that had served as the parking area prior to Dennis. Half of a car could be parked under the house but the rest of the sand-based parking area was gone. In its place was a steep embankment that "dropped off 20 feet." Tr. 46.

#### A Serious Parking Problem

21. Eastern Lake Road runs roughly east-west just north of the Stovall and Buntin properties. The roadbed lies in a roadway and utility easement. Because of the easement, property owners along the roadway are not allowed to use it for permanent parking. The restriction includes the entire right-of-way that extends beyond the roadbed.

22. As a combination of the easement and the parking restriction, under-story parking is the only permanent parking place that can serve the properties.

23. Aware that their properties were seaward of the CCCL, the Stovalls and Buntins sought guidance as to how to re-establish parking for their beach front property. They turned both to local government and to DEP.

DEP's Emergency Order

24. On the same day that Hurricane Dennis hit South Florida (the day before it made landfall on the panhandle coast), the Department issued an Emergency Final Order (the "Emergency Final Order." Styled, In re: EMERGENCY AUTHORIZATION FOR REPAIRS, REPLACEMENT, RESTORATION AND CERTAIN OTHER MEASURES MADE NECESSARY BY HURRICANE DENNIS and dated July 9, 2005, the Emergency Final Order followed a declaration by Governor Jeb Bush of a state-wide emergency.

By State of Florida Executive Order No. 05-139, the Governor declared that a state of emergency exists throughout the State of Florida, based upon the serious threat to the public health, safety and welfare posed by the Hurricane.

Department Exhibit 9, paragraph 2., at 1. The Department's Emergency Order, therefore, had state-wide application and applied to Walton County even though Dennis had not yet come ashore onto the panhandle coast.

25. The Final Emergency Order made the following findings:

3. The Department finds that the Hurricane has created a state of emergency threatening the public health, safety, welfare and property throughout the Emergency Area. As a result of the emergency, immediate action by Florida's citizens and government is necessary to repair, replace, and restore structures, equipment, surface water management systems, works, and operations damaged by the Hurricane.

4. The Department finds that an emergency authorization is required to address the need for immediate action because the normal procedures for obtaining the necessary authorizations would not result in sufficiently timely action to address the emergency.

5. The Department finds that immediate, strict compliance with the provisions of the statutes, rules, or orders noted within this Order would prevent, hinder, or delay necessary action in coping with the emergency, and that the actions authorized under this order are narrowly tailored to address the immediate need for action and are procedurally fair under the circumstances.

Department Exhibit 9, at 2.

26. With regard to "Coastal Construction Control Line Activities," Section 3., of the order was clear. It did not "authorize the construction of structures that did not exist prior to the emergency . . . ." Id. at 17.

27. The Final Emergency Order contained a provision, however, that may have related directly to the predicament of the Stovalls and the Buntins. Paragraph 3.b., entitled

"Activities Requiring Local Authorization," opens with an introductory statement with regard to certain activities and then lists those activities as follows:

Local governments are authorized to issue permits in lieu of Department permits to private and public property owners for the activities listed below.

\* \* \*

(4) Return of sand to the beach dune system which has been deposited upland by the Hurricanes.

Id. (emphasis added).

28. The activity of returning sand to the beach dune system is subject to a section of the Final Emergency Order dedicated to "General Conditions." Id. at paragraph 4., pp. 20-23. In addition to the requirement that the activities "be performed using appropriate best management practices" id. at 20, in accord with the Florida Land Development Manual, the General Conditions section contained explicit provisions with regard to sea turtles:

d. The nature, timing, and sequence of construction activities authorized under this Order shall be conducted in such a manner as to provide protection to, and so as to not disturb . . . listed species and their habitat, including threatened or endangered sea turtles . . . . If activities under C.3 of this Order occur during the marine turtle nesting season (March 1 through October 31 in Brevard and Broward County, May 1 in all other coastal counties), such activities must be

coordinated with the Florida Fish and Wildlife Conservation Commission's Imperiled Species Management Section to ensure that all activities comply with state and federal requirements for the protection of sea turtles, their nests, hatchlings, and nesting habitat.

e. Nothing in this order authorizes the taking, attempted taking, pursuing, harassing, capturing or killing of any species (or the nests or eggs of any species) listed under Rule 68A-27 of the Florida Administrative Code or under the Federal Endangered Species Act.

Id. at 21-22.

29. Under Section D., "GENERAL PROVISIONS," of the Emergency Final Order, the order cautioned, "[u]nder no circumstances shall anything contained in this Order be construed to authorize the repair, replacement, or reconstruction of any type of unauthorized or illegal structure, habitable or otherwise." Id. at 27, 28.

30. The Emergency Final Order declared its effectiveness for 60 days following its execution on July 9, 2005, by the Secretary of the Department. Expressly set to expire on September 7, 2005, therefore, it promised in the meantime, "to act on requests for field authorizations in a timely and expeditious manner." Id. at 28.

#### The Field Permit

31. True to its word, the Department issued a field permit to Mr. Stovall on August 16, 2005. See Department Exhibit 10.



The project is described in the field permit as repair and replacement of wooden decks and "repair/replace understructure concrete/brick paver parking area to original condition." Id. The repairs included electrical, plumbing and HVAC work and replenishment of approximately 1800 yards of sand for foundation pilings. The permit stressed, "[n]o other activity is authorized." Id. And, as part of its special conditions, the permit listed, "all construction shall comply with attached marine turtle conditions." Id.

32. In the attempt to return the understory parking to its original condition, simply replacing sand did not work. "[I]t became pretty obvious to us as we put the sand in there," Mr. Stovall testified at hearing, "the sand was running out." Tr. 31.

33. The Buntins were experiencing much of the same difficulties. Mr. Buntin compared the situation right after the hurricane to four years later at the hearing:

There was so much confusion going on . . . we are so far after the fact now [August of 2009]. It's kind of hard to put yourself back in the position we were in at the time [summer of 2005] because there were an awful lot of questions and very few answers. You would get referred . . . this is what the regulations say. Well, you read the regulation and it is left to interpretation . . . the written word is . . . wonderful, but if you've got three people reading it, it's kind of hard to figure out exactly what it means. Now

[August of 2009], after the fact . . . , we [have] answers . . . we didn't have at the time.

Tr. 51 (emphasis added). Mr. Buntin knew one thing for sure: placing sand under the house would not be enough, "you've got to have some way to keep it underneath . . . because you're going to have to build a parking pad on top of it." Tr. 47. Neither an expert in CCCL regulations nor a coastal engineer, Mr. Buntin had no doubt "[y]ou can't just pile up sand and park the car on sand." Tr. 48. Mr. Buntin knew that in a coastal environment the understory parking would require a base of sand and a means of retaining the sand base under the house. The answer to the quandary was presented by Mike Jones, a contractor hired initially by the Stovalls and eventually by the Buntins, too. Mr. Jones suggested a HESCO Basket System.

#### The HESCO Basket System

34. In the aftermath of the storm, it was difficult to get assistance from repair companies. Mr. Stovall described the difficulty at hearing: "That was a tough job because everybody along the beach had damage, too, and getting someone to even come out there and give you a bid on it was like pulling eye teeth." Tr. 30.

35. Eventually, through his brother, Mr. Stovall learned about Michael Alan Jones ("Mike Jones"), a general contractor licensed in Georgia. Mr. Jones agreed to look at the property.

At hearing, he recalled his initial assessment of the Stovall and Buntin repair jobs:

[T]here was a crater below the residences. We had to use an extension ladder to gain access to the Stovall property and we had to use some unique engineering to be able to access Mr. Buntin's property. There was no place to park.

I noted on the Stovall property that . . . a paver system . . . was used for his parking area and the end of Eastern Lake Road as well, and the majority of that system was either currently . . . in the ocean or was in various stages of disrepair. It was falling apart. It was sagging one foot, 18 inches in many areas. It appeared . . . unsafe.

\* \* \*

Some of . . . the pressurized [water] lines had been broken. The drain lines that lead into the septic or the county sewer were broken . . . the same on both properties.

The air conditioning units were hanging by the power cables [I'd guess] 15 to 20 feet in the air, which, of course, poses a serious threat to anybody that walks . . . underneath them when the cable . . . unhook[s] itself from whatever connector or breaks.

I noted at Mr. Stovall's, the whole bottom level of his deck was missing.

\* \* \*

Mr. Buntin's dune walkover and much of his deck were sagging and unsafe [with] pieces missing. There was no . . . foundation on which to place a vehicle or anything for that matter underneath . . . the houses.

I also noted . . . several onlookers . . . were using the area underneath the Stovalls' and Buntins' houses to access the beach, which was, in my opinion, extremely unsafe . . . [because of] falling five pound bricks and air conditioners hanging and wood falling off the side of the house.

Tr. 82-83. The "crater" under the houses was not just a parking problem. Before the necessary repairs could be started, the understory had to be shored up. In the meantime, efforts were made to keep "onlookers" from using the area under the houses but they were not completely successful. Every morning that Mr. Jones visited the site at the beginning of his efforts, there was evidence left behind by people under the house the night before.

36. Mr. Jones was of the same opinion as the Stovalls and the Buntins. For replacement of sand to work, there had to be a system for retaining the sand under the house. For several weeks, he conducted research by traveling up and down the beach discussing the issue with other contractors. Ultimately, Mr. Jones reached the conclusion that "the least invasive, most efficient . . . , environmentally friendly" system was a HESCO Basket System.

#### HESCO Baskets

37. HESCO Baskets are wire-framed open cell structures. One cell consists of four flat panels of wires of the same gauge. The "top" of the cell or basket is completely open as is

the "bottom." Each of the four sides consist of horizontal wire rods spaced equally apart and welded to four similar-sized rods in a vertical position to form a panel of squares framed by the rods but which are mostly open space. The fours sides are bound together by a coil of wire of a gauge identical to the wire used in the rest of the structure. Attached to the sides on the inside of the cells is felt-like material that is water-permeable. Two baskets are created by joining three wire panels to an existing basket. Only seven panels, therefore, are needed to create two baskets since one of the panels is shared.

38. Used in military applications to create revetment structures to protect aircraft and personnel and in river settings for flood control in places as diverse as Alaska and the Middle East, HESCO baskets also have commercial applications. These were investigated by Mr. Jones as he talked to other contractors in the area. Ultimately, he viewed the process of installation of HESCO baskets locally, obtained a list of installers from a HESCO basket distributor and picked Robert Klemen, an installer who worked in the area of the Stovall and Buntin properties to hire as a subcontractor under his supervision. Before installation, however, a permit was required.

39. Under the DEP Final Emergency Order authorizing local governments to issue permits for temporary emergency protection

seaward of the CCCL, separate permits for the Stovall and Buntin properties were issued by Walton County.

The Walton County Permits

40. On October 28, 2005, Billy Bearden, Building Official for Walton County, issued two building permits to Robert Klemen. The first, Permit No. SW398Dennis, (the "County Stovall Permit") was for 711 Eastern Lake Dr., the Stovall Property. The second, SW400Dennis, (the "County Buntin Permit") was for 701 Eastern Lake Dr., the Buntin Property.

41. The County Stovall Permit gives Mr. Klemen permission for "TEMP SEAWALL STABILIZING BASKETS." Department Exhibit 8. Similarly, the County Buntin Permit gives Mr. Klemen permission for "TEMP Stabilizing BASKETS."

42. Each permit recited that "[t]he Florida Department of Environmental Protection in Hurricane Dennis Emergency Final Order 05-1700 is attached," and warned that "[p]ursuant to the FDEP emergency order, care must be taken for the protection of sea turtles, their nests, hatchlings and nesting habitat." Department Exhibit 8, the 7th and 15th pages of fifteen un-numbered pages.

43. The two permits also recited the following:

All temporary retaining walls (or other types of beach armoring), permitted as an emergency measure as a result of Hurricane Dennis and Katrina, must be removed within 60 days of completion or applied to be

permitted through DEP as a permanent structure.

\* \* \*

For ease in monitoring and control, Walton County will consider all temporary restraining walls complete no later than October 28, 2005 and therefore must be removed within (sic) 60 days of completion or by December 27, 2005, whichever is sooner (unless complete application made to DEP).

Department Exhibit 8 (emphasis added.)

44. Each permit contained a drawing of the permitted activity. The County Stovall Permit drawing depicts a system consisting of three rows of baskets, two on bottom and one on top, that runs for 70 feet seaward of the Stovall House and then in an "L-fashion" 30 feet to the west of the house. The baskets are shown to be 3 feet wide each so that the bottom row is 6 feet wide. The height of each basket is depicted as 4 feet so that the height of the structure would be 8 feet. The drawing is consistent with the representation at hearing that each basket within the vegetated dune the structure now supports is 3 feet by 3 feet by 4 feet. The drawing also shows a connection to the Buntin system to be installed to the east.

45. The County Buntin Permit shows the same type of structure with three rows of baskets, two on bottom and one on top. The structure extends 60 feet to the east of the Stovall structure seaward of the Buntin house.

46. Prior to construction, it was made clear to Mr. Jones that the "system needed to be as much within the footprint of the house," tr. 93, as possible. The information was communicated from both county representative who conducted inspections and DEP representatives who "were around the property during the process of doing the beach walkovers, as well as the HESCO systems . . .". Id.

47. The HESCO Basket System was not designed to meet coastal armoring standards. Nor was it designed to minimize impacts to sea turtles.

#### Installation

48. Pursuant to the County permits, the Hesco Basket Container Systems were installed on the Stovall and Buntin properties over the course of several weeks. The official CCCL location of the installation is approximately 285 to 399 feet east of DEP's reference monument R-93 in Walton County with a project address of 701 and 711 Eastern Lake Road, Santa Rosa Beach. The purpose of the installation of the man-made structures, consistent with their design, is to assist the retention of sand beneath the understory parking area of the two houses.

49. As depicted on the permit drawings, the Stovall and Buntin systems were unified into one structure, that is,



connected so that the structure ran without a break seaward of the Stovall and Buntin houses.

50. During the construction process, Mr. Jones saw and conversed with several DEP representatives who were taking pictures along the beach. Although Mr. Jones "acted firmly in the belief that there would be no problem getting a permanent permit for [the HESCO] structure," tr. 96, he was never told by any DEP representatives, either on site or in phone conversations with Department employees in Tallahassee, that the structure would be permitted permanently by the Department. He was not told that such a permit application would be denied, either, he simply "was never able to get an actual answer . . .". Id.

51. The structure on the Buntin property was constructed as depicted on the permit drawing. There were two rows installed on the bottom and one row on top for a total height of 8 feet. The structure installed on the Stovall property, however, was more elaborate than what was shown on the permit drawing. "[T]he Stovall property has three on the bottom, then two in the middle and then one on the top stacked pyramid style." Tr. 97. Twelve feet tall, the HESCO structure installed on the Stovall property was four feet higher than specified by the County permit.

52. The structures were covered with sand in order to "rebuild the dune," tr. 109, in other words, the HESCO Baskets were installed in such a way as to serve as the core of a restored dune feature. The purpose of the installation was to provide a means of stabilizing the sand under the houses to restore the under-story parking. The installation was complete on November 4, 2005. The sand wall installed by Mr. Jones and his crew was then plugged with sea oats that were watered in the hope that their establishment would encourage the creation of a dune.

#### A Vegetated Dune

53. Pictures introduced into evidence reveal that the HESCO structure installed by the Stovalls and the Buntins, the sand installed on top and around it and the planting of the sea oats has resulted in a well-vegetated dune. As Mrs. Stovall put it at hearing, "y'all have got to admits that's the prettiest set of sea oats y'all [have] ever seen in your lives." Tr. 296.

54. By the time of hearing, the dune had been maintained for nearly four years without any more sand imported by human hands. There has occurred, however, some exposure of wires of the HESCO system. A corner of one of the baskets in front of the Stovall house was exposed at the time of hearing and a picture introduced into evidence showed exposure of the top of several baskets in 2007. Mrs. Stovall expressed a desire to add

more sand and ultimately to restore the dune to its pre-Opal status which "would add five-and-a half feet and make [the dune] level with the deck." Tr. 298. No sand has been added since the installation in November of 2005, however, because of the uncertain outcome of this proceeding.

55. The exposure to date of the HESCO Baskets is in all likelihood the result of wind. Wave action, should it reach the system and be strong enough, will cause even more exposure. In fact, the HESCO Basket dune is not likely to be able to withstand wave action from 15 and 25-year return storms and a storms of such strength could expose the entire HESCO Basket structure leaving a jumble and tangle of wires on the beach.

56. A recent series of aerial photographs from 2004 to 2007 show that the dune position to the west of the Buntin/Stovall property is approximately 30-to-50 feet further landward. The dune created by the HESCO baskets, therefore, is more seaward and more interactive with coastal processes than the dune to the west making the HESCO basket dune less likely to survive wave action than the dunes to its west. Nonetheless, as of the time of hearing, the system has maintained its integrity since installation.

57. After the installation, the Stovalls and the Buntins were under no illusion that they had done all that was required in the way of governmental permitting. They knew that the

County permits were good for only 60 days. They knew that they needed a CCCL permit from the Department if the structure were to achieve permanent permitting status. For that, they turned to their Qualified Representative in this proceedings, Ong-In Shin. Mr. Shin duly filed a CCCL permit application.

The Application and Action by DEP

58. On June 28, 2006, the Department received two applications for permits for construction seaward of the CCCL. Both were filed by Mr. Shin. One was filed on behalf of the Stovalls, the other on behalf of the Buntins. Section 4., of the applications, which called for "[a] brief description of the proposed work, activity or construction," contains the description: "Coastal Armoring."

59. By letter dated July 11, 2006, the Department requested additional information related to the application. Among the eight separate requests was a request for a description of the proposed activity: *"Please describe the work done at the subject property for which this After-the-Fact application has been submitted."* Department Exhibit 7, at 80.

60. In the notes of the request for additional information there appears the following:

1. Please be advised that structures to be protected must be eligible and vulnerable as per Rule 62B-33.051, F.A.C.

\* \* \*

2. DEP has been notified by the Florid (sic) Fish and Wildlife Conservation Commission that Hesco box structures require an incidental take permit from the U.S. Fish and Wildlife service.

Id. at 82.

61. The application was deemed incomplete a number of times and specific information was requested for it to be deemed complete. During the course of DEP's correspondence and additional submittals by Mr. Shin on behalf of the Stovalls and the Buntins, the Commission wrote to the Department on May 10, 2007, about its concern with regard to sea turtles. Based on Mr. Shin's representation that HESCO boxes are designed to collapse if subject to wave attack, Robin Trindell, Ph.D., wrote on behalf of the Commission to DEP, "Sea turtles attempting to nest or hatchlings in an area with HESCO containers could become entangled in these collapsible structures. Therefore, we do not recommend that these blocks be installed in sea turtle nesting habitat." Id. at 49.

62. The application was deemed complete on August 30, 2007. On November 28, 2007, the Department issued a notice of denial that was received by Mr. Shin on December 4, 2007. While the HESCO Box System was found to meet applicable siting requirements, it was found to have failed to meet coastal armoring criteria related to eligibility, vulnerability, and

design. Furthermore, the Department concluded that "the construction of the HESCO Box Container System does not meet the Department requirements for . . . absence of significant adverse impact to marine turtles." Id. at 9.

63. A December 17, 2008, memorandum from Mr. Shin, received by the Department on December 24, 2007, put DEP on notice of his clients' intent to appeal the denial of the permit. The memorandum requested a 60-day extension of time to research the issues associated with the denial before beginning the "formal appeal process." Id. at 2.

64. Mr. Shin filed the Petition for Formal Administrative Hearing with DEP on February 15, 2008. It initiated this proceeding at DOAH when the Department on February 29, 2008, requested assignment of an administrative law judge to conduct the proceedings. The issues in this case fall under two broad categories: Coastal Armoring and impacts to marine turtles.

#### Coastal Armoring

65. "Armoring" is defined by Florida Administrative Code Rule 59C-33.001(5):

"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.

(emphasis added). There is no question that the Stovall/Buntin Hesco Basket System is a manmade structure. Its purpose is to retain the sand under the Stovall and Buntin houses. At the same time, its construction resulted in sand added to the beach and dune system. One thing is clear: the HESCO Basket System is not conventional coastal armoring. Unlike "seawalls, revetments, bulkheads, retaining walls or similar structures" listed in the rule as examples of coastal armoring, the construction of the HESCO System led to a vegetated dune.

66. Coastal armoring is closely regulated under Chapter 161 of the Florida Statutes by the Department and its Bureau of Beaches and Shores because that chapter is "all about protection of the beach dune system." Tr. 337. Coastal armoring usually contravenes such protection. "Coastal armoring does not protect the beach dune system. It's purpose . . . is to protect upland development." Id. While 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.

67. Prior to 1995, "coastal armoring was only authorized as a last case possibility . . . ." Tr. 337-338. And it was

only authorized when approval was given at the highest level of the state executive branch of government, the Governor and Cabinet.

68. But the law was changed in 1995 in recognition that property owners have a right to protect their property. The Coastal Armoring Rule was amended to set up eligibility, vulnerability, siting and design criteria that would strike a reasonable balance between protection of the beach dune system and a property owner's right to protect his or her property. The law was amended again in 2006 to incorporate a new technology for dune restoration: geotextile systems. HESCO Basket Systems use in coastal armoring is also a new technology when it comes to Florida's beaches and shores. Use of HESCO baskets was described at hearing as "very new", tr. 344, relative to the time of the filing of Stovall and Buntin application.

69. If the HESCO Basket System constructed on the Stovall and Buntin properties constitutes "armoring," then it must meet the requirements of Florida Administrative Code Rule 62B-33.051 which govern "Coastal Armoring and Related Structures" (the "Coastal Armoring Rule"). These requirements include conditions related to "eligibility", "vulnerability", and "design," some of the bases upon which the Department's denial of the after-the-



fact permit rests. See Fla. Admin. Code R. 62B-33.0051(1)(a) and (2).

70. Mr. McNeal's testimony established that the HESCO Basket System does not meet the "eligibility," "vulnerability," and "design," criteria for coastal armoring.

71. But the Coastal Armoring Rule also encourages applicants for coastal armoring to "be aware that armoring may not be the only option for providing protection." Fla. Admin. Code R. 62B-33.0051(1). To that end, applicants for would-be armoring "are encouraged to evaluate other protection methods . . . such as dune restoration." Id. The HESCO Basket System installed by the Stovalls and Buntins follows the encouragement of the rule: it is a protection method that has resulted in dune restoration.

#### CCCL Permit General Criteria

72. Regardless of whether the HESCO Basket System and the vegetated dune it now supports constitutes coastal armoring, the structure on the Stovall and Buntin property must meet the General Criteria contained in Florida Administrative Code Rule 62B-33.005 for issuance of CCCL permits. Applications for those permits must be denied "for an activity which . . . would result in a significant adverse impact . . .". Fla. Admin. Code R. 62B-33.005(3)(a). Impact assessments conducted by the

Department "shall include the anticipated effects of the construction on . . . marine turtles." Id.

#### Marine Turtle Behavior

73. Marine turtles spend most of their lives at sea often foraging hundreds of miles from their nesting habitat. Adult females migrate from feeding grounds and their foraging areas and aggregate off shore beginning in May of nesting season, generally from May through August. Off shore, the female turtles wait for nightfall to swim ashore and crawl landward in search of a spot to nest.

74. Four species of marine turtles typically nest in Walton County: the Loggerhead, the green turtle, the Leatherback and Kemp's Ridley. Because the Loggerhead and green turtle are by far the most prevalent on Walton County beaches, the Commission focused on their specific behavior when it presented the testimony of Dr. Witherington.

75. The mechanics of crawling differ between Loggerhead and green turtles. Loggerheads use an alternating gait while green turtles have simultaneous butterfly-style strokes. Both species drag the plastron or "belly shell" using all four flippers. Their crawls enable them to scale slopes and penetrate dune vegetation but they are not able to crawl backward. They are capable of crawling up a slope that is steeper than one to one.

76. At a location between the recent high water mark, often observable by a wrack line (floating seaweed washed ashore) and the crest of the primary dune, the female selects a spot. The female creates a pit that she can slide her body into it. Loggerheads do so by scraping sand from the front with their front flippers and by gathering sand from beneath at the posterior to push it behind. This behavior referred to as "body pitting" tr. 474, results in a pit that the turtle eases into at a slight angle posterior end-downward at the deepest part of the pit.

77. Green turtles have similar body-pitting behavior but it is more elaborate. "A green turtle will . . . blast the sand out in front of it, dig an enormous pit . . . two or more feet deep and create a very large mound." Tr. 475.

78. Beneath the body pit, the turtle digs an egg chamber. For Loggerheads the depth of the egg chamber is "a little over two feet . . . say 26 inches or so," tr. 482 from the surface of the sand. For a green turtle, the depth is closer to 3 feet.

79. On average, clutch size for a Loggerhead is 115 eggs. The range is from 70-to-170 eggs per clutch. Average clutch size for green turtles in Florida is roughly 128 with a range from 70 to 200.

## Turtles and the Stovall/Buntin Property

80. Assuming no obstacles such as an exposed HESCO Basket, a sea turtle would have no trouble making its way to the crest of the HESCO Basket dune on the Stovall/Buntin property. The Stovall/Buntin dune supported by HESCO baskets is mostly vegetated with sea oats. There is Seaside Evening Primrose and some Beach Morning Glory, too. As long as the turtles are not interfered with by the HESCO baskets, a sea turtle would have no problem nesting amidst the vegetation on the Stoval/Buntin dune.

81. Heavily eroded beaches do not discourage sea turtle nesting behaviors. But where sea turtles choose to nest on a heavily eroded beach is altered by the erosion.

Dr. Witherington explained:

[F]ollowing a severe erosion event, . . . [t]he beach tends to be flatter and in some cases broader and with escarpment from erosion that has occurred. And almost invariably following severe erosion events . . ., sea turtles aim for the high ground. In part, because that is the only dry sand remaining on the beach, . . . [a]nd they're choosing the safest sites on the beach to nest.

Tr. 485. Thus, the erosion that has occurred on the Stovall/Buntin property is not likely to deter sea turtles from nesting there. Almost all of the area seaward of the Stovall and Buntin houses is nesting habitat, but if a sea turtle

chooses to nest there, the most likely place is somewhere on the dune created by the HESCO Baskets.

### Threats to Sea Turtles

82. Sea turtles encounter numerous threats, impediments and hazards when they are attempting to nest on beaches visited by human beings as much as the beaches of Walton County currently.

83. Coastal armoring is commonly recognized as a threat to sea turtle nesting because it serves as a barrier to sea turtle nesting habitat -- precisely the opposite of the Stovall/Buntin HESCO Basket-supported dune which is an appealing place along a severely eroded beach in which to nest.

84. Man-made debris is a threat to sea turtles. There are numerous types of debris: monofilament line is one example. Holes in the sand dug by beachgoers, beach furniture and walkways are either barriers or can cause entanglement that can lead to sea turtle injury or death. If a turtle gets up on a sea wall and falls, the fall can seriously injure the turtle or result in death. Artificial lighting is a particularly dangerous and prevalent threat. The lighting can disorient both nesting turtle and hatchlings causing them to move away from the ocean or gulf. Death can result from dehydration in the morning sun, wandering inland and falling prey to predators, or ending up on highways and being struck by cars.

85. In addition, there are natural threats to sea turtles. A variety of predators dig into sea turtle nest for the eggs. The eggs may be swept away when the sediment around the clutch is washed away. Inundation, as well, if over too long a period can destroy the eggs.

86. Exposed HESCO baskets are a threat to sea turtles and their hatchling in multiple ways. The ways in which they could injure or kill a turtle were described by Dr. Witherington:

HESCO baskets accessible to sea turtles would act as a barrier to a sea turtle reaching an appropriate nesting habitat. An open HESCO basket . . . could act as a trap, . . . [for] turtles that might end up inside the top of the basket itself, and then there's an entanglement effect that would probably be of very little concern for HESCO baskets that were not exposed, but when they do become exposed, the entrapment effect would be much . . . larger . . .

Tr. 502. Dr. Witherington also described three problems that could be posed by an exposed HESCO basket shown in a photograph taken on the Stovall property and attached to a Site Inspection Report date November 19, 2007. See Department Exhibit 16P, at 9. These were first, "the pitfall hazard," tr. 504, second, a vertical fall that the turtle might take from atop an exposed basket, and, third, entrapment. As for entrapment, Dr. Witherington opined, "it may look to many that the open HESCO baskets don't leave much opportunit[y] for the sea turtle to become entrapped, but one thing we learned is that sea turtles

often make their own traps," id., when presented with situation similar to that of an exposed HESCO basket.

87. There is another hazard to sea turtles posed by a HESCO basket if the baskets were buried beneath where a nesting turtle was digging its nest. If the turtle were to dig into the basket and strike it, it could cause the turtle to abandon the site and return to the sea.

88. If the dune that the HESCO Baskets support were to be washed away in a storm and the basket structure were to fail, the debris left would be a "particularly pernicious tangle of wire and mesh that would very much have the potential to ensnare sea turtles." Tr. 507.

#### A Sea Turtle Take

89. In Dr. Witherington's opinion, HESCO baskets constitute significant habitat modification or degradation that could significantly impair the essential behavioral pattern of breeding. If HESCO baskets killed or injured a marine turtle, therefore, they would constitute a "Take," as defined by Section 373.2431(1)(c)2., Florida Statutes: "'Take' means an act that actually kills or injures marine turtles, and includes significant habitat modification or degradation that kills or injures marine turtles by significantly impairing essential behavioral patterns, such as breeding, feeding, or sheltering."

90. "Any person . . . that illegally takes . . . any marine turtle species, or the eggs or nest of any marine turtle species . . . commits a third degree felony, punishable as provided [by law.]" § 379.2431(1)(e)5., Fla. Stat.

CONCLUSIONS OF LAW

91. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding pursuant to Sections 120.569 and 120.57, Florida Statutes.

92. In the Beach and Shore Preservation Act (Parts I and II of Chapter 161, Florida Statutes), the Legislature recognized that the beaches in this state and the coastal barrier dunes adjacent to them, "by their nature, are subject to frequent and severe fluctuations and represent one of the most valuable resources of Florida . . .". § 161.053(1)(a), Fla. Stat. In support of that recognition, the Legislature instituted the establishment of coastal construction control lines under Section 161.053(2)(a), Florida Statutes.

93. Section 161.053(5)(a)3., Florida Statutes, authorizes the Department to issue permits when "[p]otential impacts of the location of such structures or activities including potential cumulative effects of any proposed structures or activities upon such beach-dune system, which, in the opinion of the Department clearly justify such a permit."



94. Ordinarily, applicants for permits in administrative proceedings in Florida bear the burden of proving by a preponderance of the evidence that their permit application be approved. Fla. Dep't of Transp. v. J.W.C., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). The burden on the Stovalls and Buntins is further refined by the General Criteria found in Florida Administrative Code Rule 62B-33.005(4) applicable to CCCL permits:

The Department shall issue a permit for construction [seaward of the CCCL] which an applicant has shown to be clearly justified by demonstrating that all standards, guidelines and other requirements set forth in the applicable provisions of Part I, Chapter 161, F.S., and this rule chapter are met . . .

(emphasis added)

95. In addition to the General Criteria, specific criteria related to coastal armoring and related structures are found in Florida Administrative Code Rule 62B-33.0051.

#### Coastal Armoring

96. Certainly, the Department is to be given deference in its interpretation and application of its own rules and statutes. Dep't of Env'tl. Reg. v. Goldring, 477 So. 2d 532 (Fla. 1985). 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 "vulnerability," "eligibility" and "design" criteria as explained by Mr. McNeal at hearing. The system does not protect eligible structures in that the Buntin and Stovall houses are conforming structures. The structures, therefore, cannot be "vulnerable" as defined by Florida Administrative Code Rule 62B-33.002(64). The understory parking, moreover, is a minor structure, in the Department's view, not an expendable major structure.

97. But the Department's interpretation of the definition of "armoring" in Florida Administrative Code Rule 59C-33.001(5) so as to declare the HESCO Basket System installed by the Stovalls and Buntins to be "armoring" is not entirely reasonable under the circumstances of this case.

98. The HESCO Basket System, no doubt, is a "manmade structure." It was designed to retain the sand in the understory parking areas of the house and keep it from slipping away. While there is no contention that the HESCO Basket System would add sand to the beach and dune system in the manner that a jetty or a groin might, the system is unquestionably "other construction" that adds sand to the beach and dune system. In fact, the ultimate result of the construction of the HESCO Basket System is dune restoration in the form of a vegetated dune.

99. Once the construction is understood as resulting in a vegetated dune, it must be viewed as more than just a manmade structure. The structure ultimately is a dune that is supported not only by the manmade structure of the HESCO Baskets at its core, but also by natural systems such as the vegetation composed of seaoats, Seaside Evening Primrose and Beach Morning Glory. Thus, the ultimate result is a structure that is both manmade and the result of natural coastal processes.

100. The fact that the application submitted by Mr. Shin described the project as "coastal armoring," in the application for the after-the-fact CCCL Permit does not render the Department's interpretation reasonable. Words on the page of a permit application cannot alter the physical reality on the site of the Stovall/Buntin property.

101. There are other anomalies with the Department's interpretation. Florida Administrative Code Rule 62B-33.0051(1) encourages "dune restoration" as a method of protecting private structure and public infrastructure. The rule is consistent with the entire thrust of The Beach and Shore Preservation Act with which the Department is charged with administering. As the wording of the Act clearly states and as testimony from the Department established at hearing, Chapter 161, Florida Statutes, is "all about protection of the beach dune system." The Stovalls and Buntins in installing the HESCO Basket System

followed the encouragement of the Rule. If the HESCO Basket System were to be removed now, it would in all likelihood destroy the well-vegetated dune that it created. It would not be reasonable to destroy the dune in order to protect the beach dune system.

102. Finally, the impact of the HESCO Basket System and the dune that it supports on marine turtles is a multi-edged sword. For all the numerous threats that HESCO Baskets in nesting habitat pose for sea turtles, there is one advantage that came to light in the Commission's case: on a critically-eroding beach such as that seaward of the Stovall/Buntin property, the dune supported by 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.

#### Sea Turtle Impact

103. HESCO Baskets on the beach whether whole or in a jumble after encountering a storm are a threat to sea turtles. HESCO Baskets partially exposed and sticking out of a dune are also a threat to sea turtles. HESCO Baskets buried under sand less than three feet are a threat to sea turtles. But HESCO Baskets that are buried beneath more than three feet of sand and that remain permanently under more than three feet of sand are not a threat to sea turtles.

104. Among the requirements for a CCCL Permit to be issued is one found in Florida Administrative Code Rule 62B-33.005(4)(h): "The construction will not cause a significant adverse impact to marine turtles . . . ."

105. The HESCO Basket System as designed and installed poses the threat of a significant adverse impact to marine turtles. But it could have been designed to avoid the threat by calling for more than three feet of sand to separate any point in the system from the surface of the dune, something Mrs. Stovall indicated in her testimony that she would like to do if the HESCO Basket System were permitted.

106. To that end, the Stovalls and the Buntins in their proposed recommended order suggest that the Department adopt an approach in permitting their 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. That approach is found in Section 161.085(9), Florida Statutes. Section 161.085(9)

107. Section 161.085(9), Florida Statutes, (the "Section") provides in part as follows:

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:

\* \* \*

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 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 turtles and turtle hatchlings, consistent with s. 370.12.

\* \* \*

10. The United States Fish and Wildlife Service has approved an incidental Take Permit for marine turtles and other federally 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.

(emphasis added).

108. The Section does not square perfectly with the Stovall and Buntin proposal. For example, subparagraph (a)1., requires that the dune restoration project provide protection for an existing major structure or public infrastructure and the department regards the understory parking areas of the Stovall and Buntin homes to be minor structures. Several of the provisions in the section make reference only to geotextile

containers as if they should have no applicability to "similar structures proposed as the core of a dune feature." But 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.

109. The most important protective measure of the Section in the context of the facts found in this case with regard to marine turtles is that the core (the HESCO Baskets) of the restored dune feature remain continuously covered with 3 feet of native or beach-quality sand and stabilized with salt-tolerant vegetation. The Stovall and Buntins have agreed to meet this condition.

110. In their proposed recommended order, the Stovalls and Buntins have proposed issuance of the after-the-fact permit application with 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.

Petitioners' Proposed Recommended Order, at 11.



111. The addition of such conditions to the CCCL Permit will allow the permit to meet the General Criteria found in Florida Administrative Code Rule 62B-33.005. The additional criteria for coastal armoring found in Florida Administrative Code Rule 62B-33.0051 will not be met by such an approach. But it is recommended that the Department interpret its definition of "armoring" to exclude the Stovall/Buntin HESCO Basket System for the reasons outlined above.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that:

The Coastal Construction Control Line Permit applied for by the Stovalls and Buntins be issued with the conditions listed in paragraph 110, above.

DONE AND ENTERED this 30th day of November, 2009, in Tallahassee, Leon County, Florida.



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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this cause.