STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EMMETT AND LINDA HILDRETH,	)	
	)	
Petitioners,	)	
	)	
vs.	)	Case No. 08-1243RU
	)	
FLORIDA FISH AND WILDLIFE CONSERVATION COMMISSION,	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

A duly-noticed final hearing was held in this case by Administrative Law Judge T. Kent Wetherell, II, on August 26-27, 2008, in Tallahassee, Florida.

APPEARANCES

For Petitioners: Thomas G. Tomasello, Esquire
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and

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For Respondent: Stanley M. Warden, Esquire
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STATEMENT OF THE ISSUE

The issue is whether the Fish and Wildlife Conservation Commission (FWCC) has a policy of asserting that seawalls located more than 20 feet seaward of the foundation of the structure to be protected will result in a "take" of marine turtle habitat, and if so, whether the policy is an unadopted rule.

PRELIMINARY STATEMENT

On March 12, 2008, Petitioners filed a Petition to Determine Invalidity of Agency Statement with the Division of Administrative Hearings (DOAH). The petition alleges that FWCC has "a policy of asserting that any seawall that is located more than 20 feet from the foundation of the structure to be protected will result in a 'take' of marine turtles," and that the policy is a rule that has not been adopted pursuant to the rulemaking procedures in Section 120.54, Florida Statutes.

A telephonic scheduling conference was held on March 20, 2008, at which the parties waived the statutory deadline for conducting the final hearing. The hearing was initially scheduled for June 3-4, 2008, but it was rescheduled for August 26-27, 2008, upon Petitioners' unopposed motion.

FWCC was ordered to provide notice of this proceeding to the Department of Environmental Protection (DEP) pursuant to Florida Administrative Code Rule 28-106.109, which it did on

March 28, 2008. The notice advised DEP that this proceeding may affect its interests and that DEP may be entitled to intervene. DEP did not file a petition to intervene in accordance with Florida Administrative Code Rule 28-106.205, but a DEP attorney appeared at the final hearing and made an ore tenus motion to intervene and reschedule the hearing. The motion was denied at the hearing. See Transcript (Tr.) 67, 69.

The parties filed separate pre-hearing statements prior to the final hearing, but on October 8, 2008, the parties filed a Supplement to Prehearing Stipulation that sets forth the facts agreed to by the parties. The stipulated facts are included in the Findings of Fact below.

At the final hearing, Petitioners presented the testimony of Eugene Chalecki, Kipp Frohlich, and Dr. Robbin Trindell, and FWCC presented the testimony of Dr. Trindell. Petitioners' Exhibits (Pet. Ex.) 1, 3, 8 through 12, 14 through 18, 21 through 24, 26 through 28, 38, 44 through 46, 52, 61, 62, 64, 66, 70 through 73, 75, 80, 82, 88, 90, 91, 93, 95, 97, 98, 100 through 102, 113, 113-A, 114, 117, 117-A, and 118, were received into evidence, as were FWCC Exhibits 5, 8, 10 through 13, 20, 21, and 23. Official recognition was taken of Sections 120.52, 120.54, 120.56, and 370.12, Florida Statutes (2007); Sections 20.331 and 379.2431, Florida Statutes (2008); Section 10 of the federal Endangered Species Act, 16 USC § 1532(10); and Florida

Administrative Code Rules 62B-33.002, 62B-33.005, and 62B-33.0051.[1/]

The four-volume Transcript of the final hearing was filed on September 11, 2008. The parties requested and were given 30 days from that date to file proposed final orders (PFOs). The PFOs were timely filed on October 13, 2008, and have been given due consideration.

FINDINGS OF FACT

A. Parties

1. Petitioners are the owners of a two-story duplex located on a beachfront lot in the Blue Mountain Beach area of south Walton County.

2. FWCC is a state agency created by Article IV, Section 9 of the Florida Constitution. It has exclusive, constitutional regulatory authority over "wild animal life and fresh water aquatic life." It also has constitutional regulatory authority over "marine life," but its regulatory authority over marine turtles is derived from statute and is shared with DEP.

B. Background

3. Prior to 2005, DEP processed (and FWCC commented on) a relatively small number of coastal armoring permits each year.

4. The number of coastal armoring permit applications increased significantly in late-2005 and early-2006 as a result of Hurricane Dennis, which made landfall in the Florida

panhandle in July 2005, causing severe erosion to beaches and dunes. In some areas of Walton County, the dunes were eroded all the way back to and even underneath the upland structures.[2/]

5. DEP issued a declaration of emergency shortly after Hurricane Dennis that authorized Walton County to issue emergency permits for temporary coastal armoring structures under Section 161.085, Florida Statutes (2005).

6. Several hundred "temporary" armoring structures were installed pursuant to the Walton County emergency permits between July 2005 and April 2006. The number of emergency armoring structures constructed in Walton County over this period exceeds the number of armoring structures in all other counties in Florida.

7. In January 2006, the U.S. Fish and Wildlife Service (USFWS) recommended that Walton County obtain a county-wide Incidental Take Permit and prepare a Habitat Conservation Plan (HCP) to address the impacts on marine turtles and other listed species caused by the coastal armoring structures permitted by the county after Hurricane Dennis. The letter stated that "every temporary armoring permit issued by Walton County, depending on its type, location, and method of installation, may result in incidental take of protected species . . . ."

8. In June 2006, after almost all the temporary armoring structures in Walton County had already been installed, DEP

published “interim guidelines” to “provide answers to important questions when a local government elects to issue emergency permits for temporary coastal armoring.” Among other things, the guidelines state that “[g]enerally the temporary armoring should be sited no farther than 20 feet from the seawardmost foundation corner of a threatened building.” (Emphasis in original).

9. In June 2007, FWCC, DEP, and Walton County entered into an Intergovernmental Agreement (IGA) to formalize the permitting relationship between the parties and to expedite the completion of a county-wide Incidental Take Permit and HCP to offset the impacts to marine turtles and other listed species from the armoring structures installed after Hurricane Dennis. The IGA effectively prohibits DEP from issuing an after-the-fact coastal construction control line (CCCL) permit for an armoring structure if FWCC has determined that the structure is “reasonably certain to cause take of marine turtles” unless the permit applicant receives an Incidental Take Permit from USFWS.

10. Petitioners and others challenged various aspects of the IGA, including the provision requiring an Incidental Take Permit before DEP can issue after-the-fact permits for existing coastal armoring structures in Walton County. The challenges are pending as DOAH Case Nos. 07-4767RX and 08-3130RU.

C. Coastal Armoring Permitting, Generally

11. DEP, not FWCC, is the state agency responsible for permitting coastal armoring and other construction seaward of the CCCL.

12. Coastal armoring is defined by DEP's rules as 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." Seawalls and retaining walls are types of coastal armoring.

13. Generally, coastal armoring is authorized only for the protection of "eligible" and "vulnerable" structures, as those terms are defined in DEP's rules, or to close a "gap" of less than 250 feet between existing armoring structures.

14. Local governments are authorized to issue emergency permits for temporary coastal armoring structures upon a declaration of emergency by DEP.

15. A temporary armoring structure installed pursuant to an emergency permit issued by a local government must be removed within 60 days unless the structure receives an after-the-fact CCCL permit from DEP.

16. Generally, in order to receive an after-the-fact permit, the armoring structure must be sited as far landward as practicable and must meet the design standards in DEP's rules.

17. DEP is prohibited by Section 379.2431(1)(h), Florida Statutes, from issuing a CCCL permit if the permitted activity will result in a "take"[3/] of marine turtles unless such taking is incidental to, and not the purpose of the permitted activity. Similarly, DEP's rules require it to deny a CCCL permit application for an activity that will result in "significant adverse impacts," which are defined as impacts of such a magnitude that they would, among other things, "[c]ause a take . . . unless the take is incidental . . . ."

18. DEP does not make an independent determination as to whether a permitted activity will result in a "take." It defers to the "take" determination made by FWCC.

19. FWCC makes "take" determinations pursuant to its commenting authority in Section 20.331(10), Florida Statutes. That statute requires FWCC's comments to be based upon "credible, factual scientific data."

D. Petitioners' Seawall

20. Hurricane Dennis severely eroded Petitioners' property, leaving Petitioners' home vulnerable to damage from subsequent storm events. Petitioners had to take immediate action to protect their home.

21. Petitioners and five of their neighbors installed a composite steel sheet pile upland retaining wall ("the seawall")

seaward of their homes pursuant to an emergency permit issued by Walton County on July 14, 2005.

22. The seawall is located seaward of the CCCL, approximately 35 feet seaward of Petitioners' home, and a similar distance seaward of the neighbors' homes.

23. The entire seawall is approximately 460 feet long. The portion of the seawall on Petitioners' property is 79 feet long. It cost $177,466 to install.

24. Petitioners placed beach-compatible sand landward and seaward of the seawall and planted the area with native salt-tolerant vegetation at a cost of $192,287. The seawall is buried under this sand and vegetation, and is not visible from the surface.

25. On September 6, 2005, Petitioners applied for an after-the-fact CCCL permit from DEP to allow them to keep the seawall as a permanent structure. DEP's file number for the application is WL-817 AR ATF.

26. FWCC provided comments on the application in a letter dated September 30, 2007. The letter stated in pertinent part:

> In evaluating coastal armoring projects, the FWC, in coordination with [USFWS], looks to minimize potential take of marine turtles by locating the armoring as close as practicable to the structure to be protected. In most cases, walls can be located within 20 feet of the structure. . . . .
>
> According to the survey for this project, the seawall is sited approximately 35 feet seaward of

> the houses and at or within the eroded scarp. The seawall . . . extends into areas that could reasonably be expected to provide nesting habitat for marine turtles. Turtles that emerge to nest on the beach in front of this wall will either be deterred from successful nesting at the steep slope of sand fill or the wall itself if exposed, or they will nest at a location that is further seaward and therefore at greater risk of storm or tidal inundation. Therefore, FWC staff has concluded that the referenced project is reasonably certain to result in take as defined in Florida Statutes 370.12(1)(c) for marine turtles attempting to nest in this area.

27. DEP has not yet taken action on Petitioners' permit application based, at least in part,[4/] upon FWCC's determination that the seawall is "reasonably certain to result in a take . . . for marine turtles attempting to nest in this area."

28. Whether Petitioners are entitled to a permit for their seawall is not at issue in this proceeding. If DEP denies Petitioners' permit application -- whether based upon FWCC's "take" determination, the IGA, or some other reason -- Petitioners will have an opportunity at that time to challenge that preliminary agency action in a proceeding under Section 120.57(1), Florida Statutes.

E. The Challenged Policy

29. FWCC submitted comment letters to DEP on numerous CCCL permits in Walton County starting in September 2005.

30. From September 2005 to early February 2006, FWCC consistently stated in its comment letters that it would not

object to the project so long as DEP determined that the coastal armoring structure was located as close as practicable to the upland structure being protected. The comment letters further stated that the failure to locate the armoring as close as practicable to the upland structure could result in a "take" that would require an Incidental Take Permit from the USFWS.

31. In an e-mail dated February 13, 2008, USFWS staff objected to the practice reflected in the comment letters. According to USFWS staff, FWCC's practice of linking its "take" determination to DEP's siting determination was essentially a transfer of FWCC's responsibility to make the "take" determination to DEP, which was not authorized by the delegation agreement between USFWS and FWCC under the Endangered Species Act.

32. In the e-mail, USFWS staff took the position that "any armoring structure that is installed more than 20 feet seaward of the structure to be protected would incidentally take sea turtle nesting habitat" even if the location of the armoring structure is as close as practicable to the structure being protected. The e-mail concluded with a statement that "any determination by [FWCC] that is inconsistent with the accepted 20-foot seaward installation of armoring (negligible effect) on sea turtle nesting habitat will be considered as inconsistent

with the sec[tion] 6 agreement of the ESA between the State of FL and [USFWS]."

33. In an e-mail dated February 14, 2006, Dr. Robbin Trindell, the FWCC biologist responsible for reviewing CCCL permit applications, offered the following justification for this 20-foot standard:

> The value of the sandy beach immediately under or adjacent to a habitable dwelling, such as a house, as nesting habitat is probably diminished by the proximity of the structure as well as human and feral animal activity. Therefore, coastal armoring located in this area, somewhere from 1 to 20 feet seaward of the house, would most likely not be considered to cause a significant loss of high quality marine turtle nesting habitat. Adopting **20 feet** from the structure as a **standard siting location** for coastal armoring appears to reduce the potential for significant impacts to marine turtles and their nesting habitat while facilitating protection of the upland property.[5/]

34. Dr. Trindell is the only person that reviews coastal armoring permit applications for FWCC. She drafted all of the FWCC comment letters on the after-the-fact coastal armoring permit applications in Walton County, even though some of the letters were signed by her supervisor, Kipp Frohlich, who is the leader of the Imperiled Species Section at FWCC.

35. Dr. Trindell and Mr. Frolich are authorized to sign and submit the comment letters on behalf of FWCC, and as a result, the letters represent the official position of FWCC.

36. FWCC conformed its practice to the position stated by USFWS staff almost immediately.

37. In an e-mail dated February 21, 2006, Dr. Trindell informed the CCCL permit review staff at DEP that "FWS has determined that any wall sited more than 20-feet from the habitable structure would be considered a take of marine turtle nesting habitat."

38. Starting in late-February 2006, the comment letters sent by FWCC no longer linked the "take" determination to DEP's siting determination. Instead, FWCC based its "take" determination on the distance of the armoring structure from the foundation of the structure being protected, and consistent with the position expressed by USFWS staff, if the armoring structure was located more than 20 feet from the foundation, FWCC advised DEP that the project is "reasonably certain to result in a take . . . for marine turtles attempting to nest in this area" and that it will require an Incidental Take Permit from USFWS.

39. The numerous comment letters received into evidence show that it has been FWCC's standard practice since late February 2006 to issue a "take" determination for armoring structures in Walton County located more than 20 feet seaward of the structure being protected and to not object to armoring structures located less than 20 feet seaward of the structure.

40. This practice was confirmed by Mr. Frolich and Eugene Chalecki, who is an administrator in the Bureau of Beaches and Shores at DEP. On this issue, Mr. Chalecki testified that "[i]t has certainly been my impression that walls sited within 20 feet will generally be considered acceptable . . . [to FWCC] in terms of the turtle take issue"; that FWCC will issue a "take notice" if the wall is not within 20 feet; and that he did not recall any exceptions to this practice in Walton County as it relates to after-the-fact coastal armoring projects.

41. Dr. Trindell's testimony that the 20-foot standard is merely a "starting point" that FWCC uses in evaluating whether an armoring structure in Walton County will result in a "take" was not persuasive, nor was her testimony that each of the comment letters issued by FWCC for the after-the-fact coastal armoring projects in Walton County were based upon site-specific, case-by-case evaluations.[6/]

42. The more persuasive evidence establishes that starting in late February 2006, FWCC had a policy of using the 20-foot standard articulated by USFWS staff as the determinative factor as to whether an armoring structure in Walton County will result in a "take" of marine turtle habitat.

43. This policy was most clearly articulated in a "briefing document" prepared for the FWCC commissioners by

Dr. Trindell and Mr. Frohlich in January 2007. The document stated in pertinent part:

> To facilitate permit review of the unprecedented number of applications in Walton County, FWC and FWS staff in consultation agreed to consider walls that were sited twenty (20) feet or less from the foundation of the habitable structure not to constitute "take".
>
> Temporary armoring structures sited more than twenty (20) feet from the home would be considered to cause "take" due to a reasonable certainty that such structures would interfere with female turtles attempting to nest, or the presence of the wall would result in the turtle depositing eggs closer to the water and thus would result in increased mortality of nests from high water events.

44. FWCC has not adopted this 20-foot standard through the rulemaking process in Section 120.54, Florida Statutes.

45. FWCC's use of the 20-foot standard is not limited to Walton County. The standard has been used in Indian River, Gulf,[7/] Franklin, Volusia, and St. Johns Counties, although not as consistently as it has been used in Walton County.

46. The reference to the 20-foot standard was removed from FWCC's comment letters after this case was filed, and it is unclear how, if at all, FWCC is currently using that standard in its review of applications for coastal armoring permits.

CONCLUSIONS OF LAW

47. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to Section 120.56(4), Florida Statutes.

48. FWCC is required to comply with the Administrative Procedure Act (APA) when exercising its regulatory authority over marine turtles because that authority is derived from statute, not the Florida Constitution. See Caribbean Conservation Corp. v. Fish & Wildlife Conservation Comm'n, 838 So. 2d 492 (Fla. 2003); § 20.331(6)(c)1. Fla. Stat.

49. FWCC does not contest Petitioners' standing to challenge the 20-foot standard at issue in this case, and the evidence establishes that Petitioners are "substantially affected" by the standard because their seawall has not been permitted by DEP based, at least in part, on the standard. See § 120.56(4), Fla. Stat. ("Any person substantially affected by an agency statement may seek an administrative determination that the statement violates s. 120.54(1)(a).").

50. Section 120.54(1)(a), Florida Statutes, provides:

> Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable.
>
> 1. Rulemaking shall be presumed feasible unless the agency proves that:
>
> a. The agency has not had sufficient time to acquire the knowledge and experience reasonably necessary to address a statement by rulemaking; or
>
> b. Related matters are not sufficiently resolved to enable the agency to address a statement by rulemaking.

> 2. Rulemaking shall be presumed practicable to the extent necessary to provide fair notice to affected persons of relevant agency procedures and applicable principles, criteria, or standards for agency decisions unless the agency proves that:
>
> a. Detail or precision in the establishment of principles, criteria, or standards for agency decisions is not reasonable under the circumstances; or
>
> b. The particular questions addressed are of such a narrow scope that more specific resolution of the matter is impractical outside of an adjudication to determine the substantial interests of a party based on individual circumstances.

51. The initial issue is whether FWCC has the non-rule policy challenged in the petition. See Dept. of Highway Safety & Motor Vehicles v. Schulter, 705 So. 2d 81, 89 (Fla. 1st DCA 1997) (Benton J., dissenting). Petitioners have the burden of proof on this issue.

52. FWCC argues that it does not have a policy of finding a "take" of marine turtles whenever the seawall is located more than 20 feet seaward of the foundation of the structure to be protected. However, as detailed in the Findings of Fact, the more persuasive evidence establishes that FWCC does indeed have a policy of issuing a "take" determination for armoring structures in Walton County located more than 20 feet seaward of the structure being protected, and of not objecting to armoring

structures located less than 20 feet seaward of the structure being protected.

53. The next issue is whether this 20-foot standard is a "rule." Petitioners have the burden of proof on this issue.

54. A "rule" is defined as:

> each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule.

§ 120.52(16), Fla. Stat.

55. The 20-foot standard need not apply statewide to be considered a statement of general applicability. The fact that the standard has been consistently and uniformly applied by FWCC in its review of coastal armoring projects in Walton County since late-February 2006 is sufficient to establish that it is a statement of general applicability. However, the general applicability of the 20-foot standard is not sufficient, in and of itself, to establish that the standard is a rule.

56. More than 30 years ago in Department of Administration v. Harvey, 356 So. 2d 323 (Fla. 1st DCA 1977), the court explained:

> Whether an agency statement is a rule turns on the effect of the statement, not on the agency's characterization of the statement . . . . An agency statement is a rule if it

> purports in and of itself to create certain rights and adversely affect others or serves by its own effect to create rights, or to require compliance, or otherwise have the direct and consistent effect of law.

Id. at 325 (citations and internal quotations omitted).

57. Harvey is still good law, and in several recent decisions, the First District Court of Appeal re-emphasized that agency statements that are not self-executing and do not by their own effect create rights, require compliance, or otherwise have the direct and consistent effect of law are not rules. See Agency for Health Care Admin. v. Custom Mobility, Inc., 33 Fla. L. Weekly D2113 (Fla. 1st DCA Sep. 4, 2008); Dept. of Financial Services v. Capital Collateral Regional Counsel-Middle Region, 969 So. 2d 527 (Fla. 1st DCA 2007) (hereafter "CCRC-M").

58. In Custom Mobility, the court held that a sampling methodology used by the agency when auditing Medicaid providers is not a rule because the methodology "does not itself establish that the service provider owes money." In CCRC-M, the court held that statements in an agency investigative report were not rules because the statements were "never self-executing or capable of granting or taking away rights of any person by [their] own terms."

59. The 20-foot standard is analogous to the investigative report at issue in CCRC-M and the sampling methodology at issue in Custom Mobility because the standard is not self-executing

and does not take away rights by its own terms. The "take" determination that results from the application of the 20-foot standard is only a recommendation for DEP to use in its permitting decision, and as the court stated in CCRC-M, a "recommendation that has not been acted upon is not a rule as that term is defined in the APA." CCRC-M, 969 So. 2d at 531.

60. The fact that DEP defers to FWCC's "take" determination as a matter of practice does not convert FWCC's recommendation into a rule. A similar argument was rejected in Volusia County School Board v. Volusia Home Builders Association, Inc., 946 So. 2d 1084, 1090 (Fla. 5th DCA 2006) (hereafter "VHBA").

61. The agency statement at issue in VHBA was a recommendation by the school board that the county council increase a school impact fee. After the recommendation was adopted by the county council, a builder's association filed a petition with DOAH challenging the school board's recommendation as an unpromulgated rule. The Administrative Law Judge agreed with the association, but the court reversed because the recommendation "had no immediate binding effect on either the County Council or VHBA" and because "the recommendation, standing alone, did not require compliance, create certain rights while adversely affecting others, or otherwise have the

direct and consistent effect of law." See VHBA, 946 So. 2d at 1090.

62. Addressing the argument that the county council's adoption of the recommendation converted the recommendation into a rule, the court stated:

> The County Council's February 2005 decision to impose the increased impact fees - which, in contrast to the recommendation, did affect the VHBA's rights – did not retroactively render the January 2005 recommendation into a rule with the direct and consistent force of law. Nor will we consider the School Board's recommendation and approval a rule, despite the VHBA's implication that the recommendation substantially affected its interests because Volusia County, though not legally required to do so, did in fact rely on the recommendation.

VHBA, 946 So. 2d at 1090.

63. DEP, not FWCC, is ultimately responsible for determining as part of its permitting decision whether an activity seaward of the CCCL will result in a "take". See §§ 161.053(5)(a) and (c), 379.2431(1)(h), Fla. Stat.; Fla. Admin. Code R. 62B-33.005(3), (4)(h).

64. DEP is not legally required to rely on the "take" determination made by FWCC pursuant to its commenting authority in Section 20.331(10), Florida Statutes. Indeed, the statute clearly states that "[c]omments provided by the commission are not binding on any permitting agency." Therefore, as was the

case with the county council's adoption of the school board's recommendation in VHBA, the fact that DEP adopts the "take" determination issued by FWCC based upon the 20-foot standard does not convert that standard into a rule.

65. In sum, the 20-foot standard is not a rule because it is not self-executing and does not by its own effect create rights, require compliance, or otherwise have the direct and consistent effect of law.[8/]

66. In light of this conclusion, it is not necessary to determine whether it was infeasible or impracticable for FWCC to adopt the 20-foot standard as a rule. See § 120.54(1)(a)1. and 2., Fla. Stat.

67. That said, and although technically not a defense under Section 120.54(1)(a)1. or 2., Florida Statutes, it does not appear that FWCC has the authority to adopt the 20-foot standard (or any other "take" standard) as a rule.

68. This is significant because the purpose of a proceeding under Section 120.56(4), Florida Statutes, is "to force . . . agencies into the rule adoption process." See Osceola Fish Farmers Ass'n v. Div. of Admin. Hearings, 830 So. 2d 932, 934 (Fla. 4th DCA 2002). If FWCC does not have the necessary statutory rulemaking authority to adopt the 20-foot standard as a rule, FWCC would be in a "Catch 22" situation if it was determined that the standard was an unadopted rule.

69. Section 20.331(10), Florida Statutes, gives FWCC the authority to submit comments to DEP on CCCL permit applications, but that statute does not grant FWCC authority to adopt rules concerning the matters upon which FWCC is commenting.

70. The only specific grant of rulemaking authority that FWCC has concerning marine turtles is in Section 379.2431(1)(d)4., Florida Statutes, which provides:

> The commission shall have the authority to adopt rules pursuant to chapter 120 to prescribe the terms, conditions, and restrictions for marine turtle conservation, and to permit the possession of marine turtles or parts thereof.

71. Petitioners argue that this statute is sufficient to give FWCC authority to adopt standards to use in making "take" determinations as part of its duty to prescribe conditions for "marine turtle conservation." FWCC argues that the rulemaking authority in this statute would not allow it to adopt the 20-foot standard as a rule because the phrase "marine turtle conservation" must be read in conjunction with the preceding subparagraph giving FWCC the authority to issue permits for "conservation activities such as the relocation of nests, eggs or marine turtles away from construction sites." See § 379.2431(1)(d)3., Fla. Stat.

72. An agency only has the authority to promulgate rules that "implement, interpret, or make specific the particular

powers and duties granted by the enabling statue." See §§ 120.52(8), 120.536(1), Fla. Stat. An agency does not have the authority to adopt a rule simply because it is "reasonably related to the purpose of the enabling legislation" or "within the agency's class of powers and duties." Id. The enabling statute must contain "a specific grant of legislative authority for the rule." Southwest Florida Water Management Dist. v. Save the Manatee Club, Inc., 773 So. 2d 594, 599 (Fla. 1st DCA 2000). See also Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Ass'n, Inc., 794 So. 2d 696, 699-701 (Fla. 1st DCA 2001).

73. An agency's interpretation of the statute that it is charged to administer is entitled to deference as long as the agency's interpretation is not clearly erroneous and is within the range of possible and reasonable interpretations. See Sullivan v. Dept. of Environmental Protection, 890 So. 2d 417, 420 (Fla. 1st DCA 2004).

74. FWCC's interpretation of the grant of rulemaking authority in Section 379.2431(1)(d)4., Florida Statutes, is not clearly erroneous, and in light of the restrictive rulemaking standard in the APA, the undersigned agrees that the statute does not give FWCC authority to adopt the 20-foot standard (or any other "take" standard for marine turtles) through the rulemaking process.

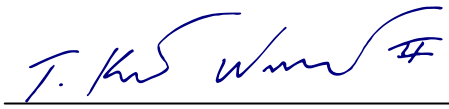
75. Finally, as was the case with the statements in the investigative report at issue in CCRC-M, Petitioners will have an opportunity to challenge the "take" determination (and the 20-foot standard on which it was based) in a de novo proceeding under Section 120.57(1), Florida Statutes, if DEP uses that determination to deny their after-the-fact permit application. See, e.g., Jackson, et al. v. Dept. of Environmental Protection, Case No. 06-4508, at ¶¶ 67-81 (DOAH Aug 21, 2008) (finding based upon the evidence presented at the hearing that the coastal armoring structure at issue did not cause a "take" of marine turtles notwithstanding the "take" determination issued by FWCC). FWCC can be joined as party in that proceeding and will have the burden to defend the scientific basis of its "take" determination. See § 20.331(10), Fla. Stat. ("If the commission comments are used by a permitting agency as a condition of denial, approval, or modification of a proposed permit, license, or authorization, any party to an administrative proceeding involving such proposed action may require the commission to join as a party in determining the validity of the condition. In any action in which the commission is joined as a party, the commission shall bear only the actual cost of defending the validity of the credible, factual scientific data used as a basis for comments.").

ORDER

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

ORDERED that the Petition to Determine Invalidity of Agency Statement is dismissed.

DONE AND ORDERED this 3rd day of November, 2008, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of November, 2008.

ENDNOTES

[1/] Unless otherwise indicated, all references to these statutes and rules are to the version officially recognized at the request of the parties, and all other statutory references are to the 2008 version of the Florida Statutes.

[2/] Because of this, FWCC contends that sea turtles were able to nest "up to and even underneath permanent structures" and that "sea turtle nesting habitat could exist all the way up to certain houses located in Walton County." See FWCC PFO, at ¶¶ 37, 42. Although beyond the scope of this proceeding, it is noted that the logic of FWCC's position on this issue was questioned in a recent case. See Jackson, et al. v. Dept. of Environmental Protection, Case No. 06-4508, at endnote 9 (DOAH Aug. 21, 2008) ("It simply makes no sense to suggest that there

has been a taking of sea turtle nesting habitat by the installation of an armoring structure where (all other things being equal) the width of the beach where the turtles nest is the same after installation of the structure as it was before the storm event creating the need for armoring.").

[3/] A "take" is defined an "act that actually kills or injures marine turtles, and includes significant habitat modification or degredation that kills or injuries marine turtles by significantly altering essential behavioral patterns, such as breeding, feeding or sheltering." § 379.2431(1)(c)2., Fla. Stat.

[4/] A "screening chart" prepared by DEP indicates that Petitioners' home is "eligible" and "vulnerable" and that the seawall appears to be appropriately sited as far landward as practicable. See Pet. Ex. 113, at 15. However, each page of the chart includes the following statements in bold-faced type: "IMPORTANT: THIS INFORMATION IS INTENDED FOR SCREENING-LEVEL DECISIONS ONLY! IT IS NOT INTENDED FOR ANY FINAL DEPARTMENT ACTION." Findings related to these issues are beyond the scope of this proceeding.

[5/] Pet. Ex. 70 (emphasis supplied). This justification was adopted almost verbatim by USFWS in an April 20, 2006, letter to FWCC and DEP. See Pet. Ex. 98. That said, the record also includes evidence that the 20-foot standard was initially developed as part of an HCP for Indian River County in 2004, and that it was based upon engineering considerations, not biological considerations. See Pet. Ex. 101; Tr. 74-78, 134-36. The reasonableness and substantive validity of the 20-foot standard is beyond the scope of this proceeding.

[6/] In making this finding, the undersigned did not overlook Dr. Trindell's testimony that she spent considerable time in Walton County after Hurricane Dennis and that she was familiar with the conditions of the beach in the area. However, she also acknowledged that she did not do site inspections for every project and it is clear from her testimony as a whole that she considered nearly all of the armoring structures installed pursuant to the county permits to have been located in nesting habitat simply because the active beach in the areas of the projects extended all the way to the houses as a result of the severe erosion of the dunes caused by Hurricane Dennis.

[7/] See Pet. Ex. 80. This exhibit is an e-mail chain between DEP and FWCC concerning an armoring structure in Gulf County, File No. GU-445 AR, and is a clear example of the application of the 20-foot standard. According to the exhibit, FWCC issued a "take" determination based upon its understanding that the armoring structure was 25 to 35 feet seaward of the structure being protected. DEP staff subsequently determined that the armoring structure was only 18 feet seaward of the structure being protected and asked FWCC to "check this and revise your comments based on this." Dr. Trindell responded by stating that "[i]f the wall is within 20 feet . . . then an incidental take authorization would not be required and you can proceed to issue the permit with the conditions provided."

[8/] FWCC argued at page 16 of its PFO that the 20-foot standard is merely a recommendation that DEP was free to reject in making its permitting decision. On October 31, 2008, FWCC filed a "replacement page 16" of its PFO, which purports to "clarify" this argument and appears to draw a distinction between the 20-foot standard and the "take" determination resulting from the application of that standard. Specifically, the "replacement page" argues:

> [T]he challenged statement, that there is a 20 foot standard for determining whether a structure is reasonably certain to result in a "take" of marine turtles, is really just one of the many factors that the FWC considers in its case by case analysis of whether or not a specific project will result in a "take" . . . . Any reference to 20 feet in letters from FWC to DEP is simply a starting point or "rule of thumb" for DEP to begin with and consider in making its permitting decisions. The Department does not rely on this recommendation, but relies on the overall analysis and the conclusion of the FWC as to whether a structure is reasonably certain to cause a "take" of marine turtles . . . . [W]hen FWC concludes in its comment letters to the DEP that an armoring structure is reasonably certain to result in a take, DEP is legally bound by that conclusion and is prohibited by [Section 379.2431(1)(h), Florida Statutes] from issuing a permit.

As detailed in the Findings of Fact, the evidence does not support the first sentence of this argument; and, as to the remainder of the argument, FWCC is wrong as a matter of law that its "take" determination is legally binding on DEP. See § 20.331(10), Fla. Stat. The fact that DEP relies on the "take" determination as a matter of practice in making its permitting decision does not change the legal nature of the "take" determination or the 20-foot standard upon which it is based. Simply put, neither the 20-foot standard nor the "take" determination is a rule because they do not, standing alone, create or adversely affect rights; it is the subsequent use of the "take" determination by DEP in its permitting decision that affects Petitioners' rights.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the appellate district where the party resides. The Notice of Appeal must be filed within 30 days of rendition of the order to be reviewed.