Florida Department of Environmental Protection
Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

Charlie Crist
Governor

Jeff Kottkamp
Lt. Governor

Michael W. Sole
Secretary

August 13, 2009

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

Re: Hancock Bridge Marina, LLC vs. DEP & FWCC
DOAH Case No.: 08-3984
DEP/OGC Case No.: 07-2719

Dear Clerk:

Attached for filing are the following documents:

1. Agency Final Order
2. Petitioner's Exceptions to the Recommended Order
3. Respondents' Joint Exceptions to the Recommended Order

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

Sincerely,

Lea Crandall

Lea Crandall
Agency Clerk

Attachments

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

HANCOCK BRIDGE MARINA, LLC, Petitioner, vs. DEPARTMENT OF ENVIRONMENTAL PROTECTION AND FLORIDA FISH AND WILDLIFE CONSERVATION COMMISSION, Respondents.	)	OGC CASE NO. 07-2719 DOAH CASE NO. 08-3984

CONSOLIDATED FINAL ORDER

On May 15, 2009, an Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH") submitted a Recommended Order ("RO") to the Department of Environmental Protection ("DEP" or "Department") in the above captioned proceeding. A copy of the RO is attached hereto as Exhibit A. The RO indicates that copies were sent to counsel for the Petitioner, Hancock Bridge Marina, LLC ("Hancock"). Copies of the RO were also provided to counsel for the Co-Respondents, Florida Fish and Wildlife Conservation Commission ("FWC" or "Commission") and the Department. On May 29, 2009, the Petitioner, Hancock, filed its Exceptions to the Recommended Order. On June 8, 2009, the Co-Respondents filed their Joint Responses to the Petitioner's Exceptions. This matter is now before me as Secretary of the Department for final agency action.

BACKGROUND

The Petitioner, Hancock, is a limited liability corporation that purchased a 5.51-acre parcel of property in Lee County in 2004. The Petitioner planned to construct and operate a 400-slip marina and amenities. (Hancock subsequently revised its plan by reducing the number of slips from 400 to 352.) The cost of the property was around $2.5 million. The property is located in an unincorporated part of the County on the north side of the Caloosahatchee River, a Class III water of the state. There is currently a 30-wet slip marina with 13 finger piers and a 4-slip T-dock at the property. The remainder of the parcel is essentially vacant. The parcel borders Hancock Creek, a tributary of the Caloosahatchee River. Hancock Creek is a man-altered tidal creek branching off of the Caloosahatchee River in a northwest direction, and the North Key Canal, which extends east from Hancock Creek for approximately one-half mile.

On September 12, 2005, the Petitioner filed an application for an Environmental Resource Permit ("ERP") and a modified lease to use sovereign submerged lands (a proprietary approval) with the Department. The application sought authority to expand the existing 30-slip facility in two phases. The first phase would generally authorize the construction of a 198-slip upland dry storage facility and reconfiguration of the existing docks. In phase 2, Hancock would add 154 dry slips and construct a 5,000-square-foot marina building. Because the docks are proposed for construction on and over sovereign submerged lands, a proprietary authorization is necessary. The Department forwarded a copy of the application to the Commission for its recommendation. After receiving the Commission's comments, the Department issued a Consolidated Notice of Denial [of] Environmental Resource Permit and Lease to Use Sovereign Submerged

Lands ("Notice of Intent") advising the Petitioner that its application for a Permit/Water Quality Certification and Authorization to Use Sovereign Submerged Lands had been denied. Because of a federal consistency objection[1] regarding the potential impacts on manatees lodged by the Respondent, FWC, that agency was made a Co-Respondent in this proceeding. *See* § 373.428, Fla. Stat. (2008) ("[a]n agency which submits a determination of inconsistency to the permitting agency shall be an indispensable party to any administrative or judicial proceeding in which such determination is an issue"). The grounds for denial stated that the project was sited in an area of very high manatee use and the project would increase local boat traffic, resulting in significant adverse effects on the manatee. The manatee is listed by the state and federal governments as an endangered species.

After three extensions of time to file a request for a hearing were granted, on June 16, 2008, the Petitioner filed its Petition for Formal Administrative Hearing ("Petition") to contest the Department's preliminary determination. The Petition was forwarded to DOAH with a request that an administrative law judge be assigned to conduct a hearing. The assigned ALJ conducted the final hearing on February 24-25, 2009, in Ft. Myers. The two-volume Hearing Transcript was filed on March 13, 2009. By agreement of the parties, the time for filing proposed findings of fact and conclusions

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[1] The Commission is the agency with constitutional regulatory authority over "wild animal life and fresh water aquatic life and shall also exercise regulatory and executive powers of the state with respect to marine life." *See* Art. IV, § 9, Fla. Const. The Commission's authority for the regulation of manatees is derived from the Florida Manatee Sanctuary Act, which is codified in Section 379.2431, Florida Statutes. Under Sections 373.428 and 380.23, Florida Statutes, it also has authority to review ERP applications for federal consistency purposes pursuant to the federally approved Florida Coastal Management Program.

of law was extended to April 17, 2009. They were timely filed and the ALJ subsequently issued his RO on May 15, 2009.

THE RECOMMENDED ORDER

In the RO the ALJ recommended that the Department enter a final order denying the Petitioner's application for an ERP and authorization to use sovereign submerged lands to expand the existing marina on Hancock Creek. (RO page 27). He concluded that "the more credible and persuasive evidence supports a conclusion that [Hancock] has failed to provide reasonable assurances that the project will not violate the applicable statutes and rules." (RO ¶ 45). He further determined that the evidence did not support the Petitioner's claim of equitable estoppel against the Department. (RO ¶¶ 12, 18, 46-48). The ALJ found that the Petitioner failed to provide reasonable assurances that the proposed facility would not adversely affect manatees; and its proposed mitigation measures, even if implemented, would not offset the impacts from 198 additional slips expected with phase one of the project. (RO ¶¶ 22-24, 29, 30, 35, 36).

STANDARDS OF REVIEW OF DOAH RECOMMENDED ORDERS

Section 120.57(1)(l), Florida Statutes, prescribes that an agency reviewing a recommended order may not reject or modify the findings of fact of an ALJ, "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2008); *Charlotte County v. IMC Phosphates Co.*, -- So.2d --, 34 Fla. L. Weekly D357, 2009 WL 331661 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So.2d 61 (Fla. 1st DCA 2007). The term "competent substantial evidence"

does not relate to the quality, character, convincing power, probative value or weight of the evidence. Rather, "competent substantial evidence" refers to the existence of some evidence (quantity) as to each essential element and as to its admissibility under legal rules of evidence. *See e.g., Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm'n*, 671 So.2d 287, 289 n.3 (Fla. 5th DCA 1996).

A reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See e.g., Rogers v. Dep't of Health*, 920 So.2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep't of Envtl. Prot.*, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands County Sch. Bd.*, 652 So.2d 894 (Fla. 2d. DCA 1995). These evidentiary-related matters are within the province of the ALJ, as the "fact-finder" in these administrative proceedings. *See e.g., Tedder v. Fla. Parole Comm'n*, 842 So.2d 1022, 1025 (Fla. 1st DCA 2003); *Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Also, the ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. *See e.g., Collier Med. Ctr. v. State, Dep't of HRS*, 462 So.2d 83, 85 (Fla. 1st DCA 1985); *Fla. Chapter of Sierra Club v. Orlando Utils. Comm'n*, 436 So.2d 383, 389 (Fla. 5th DCA 1983).

A reviewing agency thus has no authority to evaluate the quantity and quality of the evidence presented at a DOAH formal hearing, beyond making a determination that the evidence is competent and substantial. *See, e.g., Brogan v. Carter*, 671 So.2d 822, 823 (Fla. 1st DCA 1996). Therefore, if the DOAH record discloses any competent

substantial evidence supporting a challenged factual finding of the ALJ, I am bound by such factual finding in preparing this Final Order. *See, e.g., Walker v. Bd. of Prof. Eng'rs,* 946 So.2d 604 (Fla. 1st DCA 2006); *Fla. Dep't of Corr. v. Bradley*, 510 So.2d 1122, 1123 (Fla. 1st DCA 1987). In addition, an agency has no authority to make independent or supplemental findings of fact. *See, e.g., North Port, Fla. v. Consol. Minerals*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994).

Section 120.57(1)(l), Florida Statutes, authorizes an agency to reject or modify an ALJ's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." *See Barfield v. Dep't of Health,* 805 So.2d 1008 (Fla. 1st DCA 2001); *L.B. Bryan & Co. v. Sch. Bd. of Broward County*, 746 So.2d 1194 (Fla. 1st DCA 1999); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So.2d 1140 (Fla. 2d DCA 2001). If an ALJ improperly labels a conclusion of law as a finding of fact, the label should be disregarded and the item treated as though it were actually a conclusion of law. *See, e.g., Battaglia Properties v. Fla. Land and Water Adjudicatory Comm'n*, 629 So.2d 161, 168 (Fla. 5th DCA 1994). However, neither should the agency label what is essentially an ultimate factual determination as a "conclusion of law" in order to modify or overturn what it may view as an unfavorable finding of fact. *See, e.g., Stokes v. State, Bd. of Prof'l Eng'rs*, 952 So.2d 1224 (Fla. 1st DCA 2007).

An agency's review of legal conclusions in a recommended order is restricted to those that concern matters within the agency's field of expertise. *See, e.g., Charlotte County v. IMC Phosphates Co.*, -- So.2d --, 2009 WL 331661 (Fla. 2d DCA 2009); *G.E.L. Corp. v. Dep't of Envtl. Prot.*, 875 So.2d 1257, 1264 (Fla. 5th DCA 2004). An agency has the primary responsibility of interpreting statutes and rules within its

regulatory jurisdiction and expertise. *See, e.g., Pub. Employees Relations Comm'n v. Dade County Police Benevolent Ass'n*, 467 So.2d 987, 989 (Fla. 1985); *Fla. Public Employee Council, 79 v. Daniels*, 646 So.2d 813, 816 (Fla. 1st DCA 1994). Considerable deference should be accorded to these agency interpretations of statutes and rules within their regulatory jurisdiction, and such agency interpretations should not be overturned unless "clearly erroneous." *See, e.g., Falk v. Beard*, 614 So.2d 1086, 1089 (Fla. 1993); *Dep't of Envtl. Regulation v. Goldring*, 477 So.2d 532, 534 (Fla. 1985). Furthermore, agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be the only reasonable interpretations. It is enough if such agency interpretations are "permissible" ones. *See, e.g., Suddath Van Lines, Inc. v. Dep't of Envtl. Prot.*, 668 So.2d 209, 212 (Fla. 1st DCA 1996).

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

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

RULINGS ON EXCEPTIONS

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

PETITIONER'S EXCEPTIONS

General Exception

At the end of its twelve numbered exceptions to the RO, the Petitioner generally objects to the ALJ's recommendation that I enter a final order denying its application.

See Petitioner's Exceptions at page 5. Based on my rulings on the Petitioner's twelve numbered exceptions below, the exception to the ALJ's recommendation is denied.

Exception No. 1

The Petitioner takes exception to the ALJ's finding of fact in paragraph 22, which states that "the number of manatee watercraft-related deaths in the [Caloosahatchee] River has steadily increased over the years." (RO ¶ 22). The Petitioner contends that the finding is not supported by competent substantial record evidence. However, as noted in the Respondents' joint response, the finding is supported by the record (T. 280-282; Commission Ex. 23). The Petitioner argues that I should reweigh the record evidence by pointing to the evidence it presented at the hearing. I have no authority to reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. These evidentiary-related matters are within the province of the ALJ, as the "fact-finder" in these administrative proceedings. *See e.g., Tedder v. Fla. Parole Comm'n,* 842 So.2d 1022, 1025 (Fla. 1st DCA 2003); *Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985).

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

Exception No. 2

The Petitioner takes exception to all the factual findings in paragraph 24, except the first sentence, on the basis that they are not supported by competent substantial evidence. However, there is competent substantial record evidence supporting the ALJ's findings in paragraph 24 (T. 200-201, 243-244, 278-279, 296, and 302). Therefore, based on the standard of review outlined above, the Petitioner's Exception No. 2 is denied.

Exception No. 3

The Petitioner takes exception to the last sentence of paragraph 25 on the basis that it is an "illogical inference and unsupported by substantial competent evidence." *See* Petitioner's Exceptions at page 2. Paragraph 25 consists of a series of findings that are supported by competent substantial record evidence (T. 269, 278-279, 296; Commission Ex. 30), including expert opinion (T. 296, 302). The ALJ then concludes that "[t]he logical inference is that if the new slips are allowed, boat traffic and the associated adverse impacts on manatees will likewise increase." (RO ¶ 25). The finding is both a logical inference from the evidence and the opinion of an expert (T. 296, 302). Under the applicable standard of review it is well established that a finding of fact may be reasonably inferred from the evidence of record. *See, e.g., Heifetz v. Dept. of Business Regulation*, 475 So.2d 1277, 1281-82 (Fla. 1st DCA 1985); *Greseth v. Dept. of Health and Rehabilitative Services,* 573 So.2d 1004 (Fla. 4th DCA 1991). Also, the ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting the decision. *See e.g., Collier Med. Ctr. v. State, Dep't of HRS*, 462 So.2d 83, 85 (Fla. 1st DCA 1985); *Fla. Chapter of Sierra Club v. Orlando Utils. Comm'n*, 436 So.2d 383, 389 (Fla. 5th DCA 1983).

The Petitioner did not take exception to the crucial findings of fact underlying the ALJ's ultimate determination in paragraph 25. (RO ¶ 25). Instead, the Petitioner argues that "[t]he evidence in the record indicates that there is no direct correlation" between boat registrations, dock approvals and manatee deaths. To support this contention the

Petitioner points to one of its own exhibits and also a lack of evidence. *See* Petitioner's Exceptions at page 2. In essence, the Petitioner does not agree with the ALJ's inference and attempts to point to other record evidence that allegedly supports its argument. However, there is no opportunity here to reweigh the evidence or interpret the evidence to fit Petitioner's desired ultimate findings. *See, e.g., Heifetz v. Dept. of Business Regulation*, 475 So.2d 1277 (Fla. 1st DCA 1985).

Therefore, based on the foregoing, the Petitioner's Exception No. 3 is denied.

Exception No. 4

The Petitioner takes exception to the second sentence of paragraph 26 where the ALJ found that "[a] boat has the same risk to a manatee whether stored in a wet or dry facility." (RO ¶ 26). The Petitioner contends that the finding is unsupported by substantial competent evidence. However, as pointed out by the Respondents joint response, the finding is supported by the competent substantial record evidence, namely the testimony of the Commission's expert witnesses. (T. 201-203, 297:13-18). Therefore, based on the applicable standard of review, the Petitioner's Exception No. 4 is denied.

Exception No. 5

The Petitioner takes exception to the second sentence of paragraph 29 where the ALJ found that "[a]ssuming this to be true, manatees are nonetheless an endangered species, and there is no minimal amount of death that is considered acceptable." (RO ¶ 29). This finding is directly supported by competent substantial record evidence. (T. 244). Also, this finding followed the ALJ's first sentence in paragraph 29 where he described the opinion of the Petitioner's expert that "one manatee death over the next

twenty years, . . . would amount to no more than a de minimus impact on the overall population." (RO ¶ 29). Clearly, the ALJ did not find this expert's opinion to be persuasive. This is evidenced by the final sentence of paragraph 29 where the ALJ concluded that "[o]n the issue of impacts to manatees, the testimony of the Commission witnesses is deemed to be the most credible and persuasive." (RO ¶ 29). The testimony from the Commission's experts established that adverse impacts to manatees include not only death, but also harassment, disturbance, and sub lethal boat strikes. (T. 228, 237, 243-244). The Commission considers many factors and all available data when reviewing a proposed project to determine if there's potential adverse effects on manatees. (T. 228, 234-235, 283; Petitioner's Ex. 6). The Commission found that the proposed project would result in increased boat traffic and therefore have an adverse impact to manatees in the immediate vicinity of the project as well as the surrounding waterways. (T. 274, 279; Petitioner's Ex. 6).

The Petitioner argues that this factual finding (though directly supported by the testimony of the Commission's expert witness: T. 244) is inconsistent with the Final Order in the case of *Sheridan v. Dep't of Envtl. Prot.,* DOAH Case No. 03-0540 (Fla. Dept. of Env. Prot. January 15, 2004). The Petitioner argues that the ALJ in the instant case "incorrectly failed to balance the benefits of the project, including improved water quality (Transcript Volume I, page 183) and recreational and economic benefits, against the de minimis risk created to the manatee population, as required by the [*Sheridan*] Final Order." *See* Petitioner's Exceptions at page 3. The Petitioner's reliance on the *Sheridan* case is misplaced for at least three obvious reasons. First, the record of this case contains no evidence providing any comparison of the Hancock Bridge marina

proposed project with the marina (Deep Lagoon) in the *Sheridan* case. Also, former Secretary Struhs stated in the *Sheridan* Final Order that "[e]ach application for a new or upgraded marina will be considered individually, and the costs and benefits of the application will be balanced in accordance with applicable rules and statutes." *Sheridan* Final Order at page 24. I find that that Secretary Struhs' statement remains the correct interpretation of the Department's regulatory and proprietary responsibilities under the applicable statutes and rules, and is adopted in this Final Order. Second, nowhere in the *Sheridan* Final Order did Secretary Struhs ultimately conclude that the identified risk to manatees was de minimis. *See Sheridan* Final Order at pages 21-24. Third, it is well established, and also reflected in the *Sheridan* Final Order, that the ERP permitting criteria require the Department take into consideration any adverse effect of the proposed project on endangered or threatened species, or their habitat, "even if the adverse effect is not so great as to jeopardize the continued existence of the species." *Metropolitan Dade County v. Coscan Fla., Inc.,* 609 So.2d 644, 650 (Fla. 3d DCA 1992). This consideration is one of the seven factors that I have the ultimate authority and responsibility for balancing as part of the regulatory public interest test. *See* § 373.414(1)(a)2, Fla. Stat. (2008). However, my final determination must be based on and be consistent with the applicable underlying factual findings of the ALJ that are supported by the competent substantial record evidence. *See Kramer v. Dep't of Envtl. Protection,* DOAH Case No. 00-2873, 2002 WL 1774316 (Fla. Dept. of Env. Prot. April 29, 2002).

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

Exception No. 6

The Petitioner takes exception to the fourth sentence in paragraph 29 where the ALJ found that "[i]n formulating his recommendations, however, Hancock's expert relied on mathematical models and statistics while ignoring the principles of manatee behavior and biology." (RO ¶ 29). This finding is directly supported by competent substantial record evidence. (T. 67, 87-88, 96; Petitioner's Ex. 7). Therefore, based on the applicable standard of review, this exception is denied.

Exception No. 7

The Petitioner takes exception to the fifth sentence in paragraph 29 where the ALJ found that the Petitioner's "expert agreed that the greater the number of boats in the water, the greater the likelihood that a manatee could be accidentally crushed." (RO ¶ 29). This finding is directly supported by competent substantial record evidence. (T. 116:18-25–117:1). Therefore, based on the applicable standard of review, this exception is denied.

Exception No. 8

The Petitioner takes exception to the first and second sentences of paragraph 30 where the ALJ ultimately finds that:

> The more persuasive evidence supports a finding that the marina will be located in an area adjacent to the River, that large numbers of manatees use the River, and that the project is expected to increase boat traffic. This in turn will lead to a higher incidence of boating-related manatee casualties in the area.

The Petitioner contends that these findings are unsupported by substantial competent evidence. To the contrary, the competent substantial record evidence supports the ALJ's ultimate findings. (T. 274, 278; Petitioner's Ex. 6; T. 200-201, 243-244, 278-279,

296, and 302). Therefore, based on the applicable standard of review and my ruling in Exception No. 2 above, the Petitioner's Exception No. 8 is denied.

Exception No. 9

The Petitioner takes exception to the last sentence in paragraph 30 where the ALJ ultimately found that "[o]n balance, then, the project is contrary to the public interest." (RO ¶ 30). Based on my ruling in Exception No. 5 above, I reject the Petitioner's contention that the *Sheridan* case mandates a certain result for the regulatory public interest balancing test with respect to manatees. I have the ultimate authority and responsibility for balancing the regulatory public interest test. *See* § 373.414(1)(a)2, Fla. Stat. (2008). However, my final determination must be based on and be consistent with the applicable underlying factual findings of the ALJ that are supported by the competent substantial record evidence. *See Kramer v. Dep't of Envtl. Protection,* DOAH Case No. 00-2873, 2002 WL 1774316 (Fla. Dept. of Env. Prot. April 29, 2002). Since I've concluded that the ALJ's findings are supported by the competent substantial record evidence, I adopt the ALJ's conclusion that, on balance, the project is contrary to the public interest. I also adopt the ALJ's ultimate determination in paragraph 45, to which the Petitioner did not take exception that, based on the evidence "the application must be denied." (RO ¶ 45). *See, e.g., Envtl. Coalition of Fla., Inc. v. Broward County*, 586 So.2d 1212, 1213 (Fla. 1st DCA 1991)(Having filed no exceptions to certain findings of fact the party has thereby expressed its agreement with, or at least waived any objection to, those findings of fact.); *see also Colonnade Medical Ctr., Inc. v. State of Fla., Agency for Health Care Admin.,* 847 So.2d 540, 542 (Fla. 4th DCA 2003).

Therefore, based on the foregoing and my ruling in Exception No. 5 above, the Petitioner's Exception No. 9 is denied.

Exception No. 10

The Petitioner takes exception to the third sentence of paragraph 36 where the ALJ found that "given the location of the project, even with additional law enforcement and boater education, the impacts would not be offset due to the level of traffic already existing on the [Caloosahatchee] River at that site, and the importance of the area to manatees." (RO ¶ 36). This finding is directly supported by competent substantial record evidence. (T. 271-272, 285). Therefore, based on the applicable standard of review, this exception is denied.

Exception No. 11

The Petitioner takes exception to paragraphs 37 through 42 where the ALJ made ultimate findings and concludes that the more persuasive evidence shows that the project does not meet the applicable criteria for a proprietary authorization. The Petitioner argues that these findings are "legally flawed" for the reasons set forth in its Exception Nos. 1 through 10. This exception fails to "clearly identify the disputed portion of the recommended order by page number or paragraph," "does not identify the legal basis for the exception," and "does not include appropriate and specific citations to the record." *See* § 120.57(1)(k), Fla. Stat. (2008). I am not legally obligated to rule on this exception. *Id.* However, based on my rulings in Exception Nos. 1 through 10 above, this exception is also denied.

Exception No. 12

The Petitioner takes exception to paragraphs 46 through 48 on the basis that these conclusions of law are "legally incorrect." *See* Petitioner's Exceptions at pages 4-5. In paragraphs 46 through 48 the ALJ applies the general legal doctrine of "equitable estoppel" to the facts he found, and rejected the Petitioner's claim that the Department was estopped from denying the application. *See, e.g., Circle K General, Inc. v. Hillsborough Cty.*, 524 So. 2d 1143 (Fla. 2d DCA 1988). My review of the legal conclusions in a recommended order are restricted to those that concern matters within this agency's field of expertise or "substantive jurisdiction." *See, e.g., Charlotte County v. IMC Phosphates Co.*, -- So.2d --, 34 Fla. L. Weekly D357, 2009 WL 331661 (Fla. 2d DCA 2009); *G.E.L. Corp. v. Dep't of Envtl. Prot.*, 875 So.2d 1257, 1264 (Fla. 5th DCA 2004). I conclude that the general legal doctrine of "equitable estoppel" is not a matter within the "substantive jurisdiction" of this agency. *See also Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So.2d 1140, 1142 (Fla. 2d DCA 2001)(Agencies do not have the authority to modify or reject conclusions of law that apply general legal concepts typically resolved by judicial or quasi-judicial officers).

Therefore, based on the foregoing, the Petitioner's Exception No. 12 is denied.

CONCLUSION

Having considered the applicable law in light of my rulings on the Petitioner's Exceptions, and being otherwise duly advised, it is

ORDERED that:

A. The Recommended Order (Exhibit A) is adopted in its entirety and incorporated herein by reference.

B. The Petitioner Hancock Bridge Marina, LLC's, application for a consolidated ERP and lease to use sovereign submerged lands is DENIED. This denial is without prejudice to the Petitioner's filing applications for permits and/or approvals for a project that meets all applicable Department rules.

JUDICIAL REVIEW

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rules 9.110 and 9.190, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the clerk of the Department.

DONE AND ORDERED this 13th day of August, 2009, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

MICHAEL W. SOLE
Secretary

Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

FILED ON THIS DATE PURSUANT TO § 120.52, FLORIDA STATUTES, WITH THE DESIGNATED DEPARTMENT CLERK, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.

Lea Crandall — CLERK

8/13/09 — DATE

CERTIFICATE OF SERVICE

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

Matthew D. Uhle, Esquire
Knott, Consoer, Ebelini,
Hart & Swett, P.A.
1625 Hendry Street
Fort Myers, FL 33901-2969

Stanley M. Warden, Esquire
Florida Fish and Wildlife
Conservation Commission
620 Meridian Street
Tallahassee, FL 32399-1600

James E. Moon, Esquire
Alvarez, Sambol, Winthrop & Madson, P.A.
3451 Bonita Bay Boulevard
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Bonita Springs, FL 34134-4354

by electronic filing to:

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

and by hand delivery to:

Kelly K. Samek, Esquire
Amanda G. Bush, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this 13th day of August, 2009.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

for _____
FRANCINE M. FFOLKES
Administrative Law Counsel

3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000
Telephone 850/245-2242

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HANCOCK BRIDGE MARINA, LLC, Petitioner, vs. DEPARTMENT OF ENVIRONMENTAL PROTECTION and FLORIDA FISH AND WILDLIFE CONSERVATION COMMISSION, Respondents.	)	Case No. 08-3984

RECOMMENDED ORDER

Pursuant to notice, this matter was heard before the Division of Administrative Hearings by its assigned Administrative Law Judge, Donald R. Alexander, on February 24 and 25, 2009, in Fort Myers, Florida.

APPEARANCES

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EXHIBIT "A"

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For Respondent: (Commission)
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STATEMENT OF THE ISSUE

The issue is whether an application by Petitioner, Hancock Bridge Marina, LLC (Petitioner or Hancock), for an Environmental Resource Permit (ERP) and sovereign submerged lands lease to expand an existing docking facility on Hancock Creek near the Caloosahatchee River in unincorporated Lee County (County), Florida, should be approved.

PRELIMINARY STATEMENT

This matter began on December 10, 2007, when Respondent, Department of Environmental Protection (Department), issued a Consolidated Notice of Denial [of] Environmental Resource Permit and Lease to Use Sovereign Submerged Lands (Notice of Intent) advising Petitioner that its application for a Permit/Water Quality Certification and Authorization to Use Sovereign Submerged Lands had been denied. Because of a federal consistency objection regarding the potential impacts on manatees lodged by Respondent, Florida Fish and Wildlife

Conservation Commission (Commission), that agency was made a co-respondent. See § 373.428, Fla. Stat. (2008)[1] ("[a]n agency which submits a determination of inconsistency to the permitting agency shall be an indispensable party to any administrative or judicial proceeding in which such determination is an issue").

After three extensions of time to file a request for a hearing were granted, on June 16, 2008, Petitioner filed its Petition for Formal Administrative Hearing (Petition) to contest the Department's preliminary determination. The Petition was forwarded by the Department to the Division of Administrative Hearings on August 18, 2008, with a request that an administrative law judge be assigned to conduct a hearing.

By Notice of Hearing dated September 30, 2008, the matter was scheduled for final hearing on October 15-17, 2008, in Fort Myers, Florida. Petitioner's Unopposed Motion for Continuance filed on October 10, 2008, was granted, and the matter was continued to February 24-26, 2009, at the same location. However, the hearing was concluded on February 25, 2009.

On February 10, 2009, the Department filed a Motion to Strike and Motion in Limine seeking to strike, or preclude the introduction of evidence in support of, paragraph 17 in the Petition, which alleged that the Department is estopped to deny a permit for Phase I of the marina in light of its acquiescence in the approval of a Development of Regional Impact (DRI) by the

County. The Motion was denied by Order dated February 16, 2009, and Petitioner was allowed to introduce evidence on that issue at hearing. On February 16, 2009, the Commission filed a Motion in Limine seeking to preclude evidence on Petitioner's allegation that the Manatee Protection Plan (MPP) adopted by the County and later incorporated into its Comprehensive Plan was not based "on adequate data and analysis." The Motion was granted at the outset of the final hearing.[2]

On February 20, 2009, the parties filed a Joint Pre-Hearing Stipulation. At the final hearing, Petitioner presented the testimony of Dr. Thomas R. Cuba, a scientist and President of Delta Seven, Inc., and accepted as an expert; Steven Boutelle, Operations Manager for the Marine Program of the County's Division of Natural Resources; Donald Epler, one of two shareholders in Hancock; and Christopher R. Langen, an attorney for Stefan Heinke, the other shareholder in Hancock. Also, it offered Petitioner's Exhibits 1-8, which were received in evidence. The Department presented the testimony of Elizabeth A. Gillen, an Environmental Manager with the Department's South District Office and accepted as an expert. Also, it offered Department's Exhibit 1, which was received in evidence. The Commission presented the testimony of Mary Duncan, an Environmental Specialist III with the Imperiled Species Management Section and accepted as an expert, and Richard Kipp

Frohlich, Leader of the Imperiled Species Management Section and accepted as an expert. Also, it offered Commission's Exhibits 1, 2, 5, 16, 18, 20, 23, 24, 26-28, 30, 32-34, and 37, which were received in evidence. Finally, the Department's Request for Official Recognition was granted and the following matters were officially recognized: Sections 253.002, 253.77, 373.4132, 373.414, 373.428, 373.2431, and 380.23, Florida Statutes (2008); Florida Administrative Code Rule Chapters 18-21, 62-330, and 68A-27; Florida Administrative Code Rules 62-343.075, 40E-4.301, and 40E-4.302 (effective October 3, 1995); Section 4.2.7 of the South Florida Water Management District Basis of Review for Environmental Resource Permit Applications Within the South Florida Water Management District (1995); and the Conceptual State Lands Management Plan adopted March 17, 1981, and referenced in Florida Administrative Code Rule Chapter 18-21.

The Transcript of the hearing (two volumes) was filed on March 13, 2009. By agreement of the parties, the time for filing proposed findings of fact and conclusions of law was extended to April 17, 2009. They were timely filed and have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the evidence presented by the parties, the following findings of fact are made:

A. Background

1. Hancock is a limited liability corporation with two shareholders: Donald Epler and Stefen Heinke. After conducting a feasibility study, on April 26, 2004, Hancock purchased a 5.51-acre parcel of property in the County with the expectation of constructing and operating a 400-slip marina and a 5,000-square-foot building housing a restaurant, ship's store, and other sundry items needed for operation. (Hancock has subsequently revised its plan by reducing the number of slips requested from 400 to 352.) The cost of the property was around $2.5 million.

2. The property is located in an unincorporated part of the County on the north side of the Caloosahatchee River (River), a Class III water, south of Hancock Bridge Parkway, east of the City of Cape Coral, and west of U.S. Highway 41 and the City of North Fort Myers. The property currently contains a 30-wet slip marina with 13 finger piers and a 4-slip T-dock. The remainder of the parcel is essentially vacant. The parcel borders a River tributary named Hancock Creek, which is a man-altered tidal creek branching off of the River in a northwestern direction, and the North Key Canal, which extends east from Hancock Creek for approximately one-half mile. Access to the River, which is no more than a hundred yards or so south of the parcel, is by traversing North Key Canal and Hancock Creek.

3. The Department is the state agency with the authority under Part IV of Chapter 373, Florida Statutes, to issue an ERP. In addition, the Department has authority from the Board of Trustees of the Internal Improvement Trust Fund to review and take final agency action on requests to authorize activities in sovereign submerged lands. See § 253.002(1), Fla. Stat.

4. The Commission is the agency with constitutional regulatory authority over "wild animal life and fresh water aquatic life and shall also exercise regulatory and executive powers of the state with respect to marine life." See Art. IV, § 9, Fla. Const. The Commission's authority for the regulation of manatees is derived from the Florida Manatee Sanctuary Act, which is codified in Section 379.2431, Florida Statutes. Under Sections 373.428 and 380.23, Florida Statutes, it also has authority to review ERP applications for federal consistency purposes pursuant to the federally approved Florida Coastal Management Program.

5. On September 12, 2005, Petitioner filed an application for an ERP (a regulatory approval) and a lease to use sovereign submerged lands (a proprietary approval) with the Department's South District Office in Fort Myers, Florida. (For unknown reasons, the application was resubmitted to the Department on August 14, 2006.) The two requests are linked, and the Department cannot approve one without approving the other. See

Fla. Admin. Code R. 62-343.075(2). The application seeks authority to expand in two phases the existing 30-slip facility. The first phase would generally authorize the construction of a 198-slip upland dry storage facility and reconfiguration of the existing docks. In phase 2, Hancock would add 154 dry slips and construct a 5,000-square-foot marina building. Because the docks are constructed on and over sovereign submerged lands, a proprietary authorization is necessary.

6. Before making a decision on the application, the Department forwarded a copy to the Commission for its recommendation. After receiving the Commission's comments, which consist of 89 pages, including transmittal letters, on December 10, 2007, the Department issued its Notice of Intent to deny the ERP and proprietary authorization on the grounds the project area is sited in an area of very high level of manatee use and the project will increase local boat traffic, resulting in significant adverse effects on the manatee, which is listed by the state and federal governments as an endangered species. A more detailed description of the reasons for denial is found in the Notice of Intent. See Petitioner's Exhibit 6, pages 4 through 9; Department's Exhibit 1.b., pages 4 through 9. The Department acknowledges that its decision was based wholly upon the Commission's determination that the project, as proposed, would have an adverse impact on manatees.

B. The DRI and Estoppel

7. In its Petition, Hancock contends that the Department is "estopped to deny a permit for Phase 1 of the marina in light of its acquiescence to the approval of DRI 2-8990-99."

8. By way of background, in 1990, Hancock's predecessor in interest (Waterway Group, Inc.) applied with the County for a DRI which included, among other things, 400 dry boat spaces on the property. DRI 2-8990-99 was approved by the County on July 8, 1991, and has been amended three times. See Petitioner's Exhibit 3. The original terms of approval contained several conditions that specifically addressed manatee protection. One separated the project into two phases of 200 spaces, the first of which was authorized without additional studies, while the second was subject to additional study and review by the Florida Department of Natural Resources (DNR).

9. When the DRI was approved, the State's manatee protection program was under the jurisdiction of the DNR. That agency reviewed the DRI and recommended manatee protection conditions. The conditions in the final approval were consistent with the program's recommendation.

10. On June 29, 2004, the County adopted a resolution approving a MPP for the County. See Petitioner's Exhibit 4. It was not adopted as an ordinance, and individual notice was not provided to interested property owners, including Hancock's

principals. After adoption, the County incorporated the MPP into its Comprehensive Plan. The MPP is a planning document that provides a comprehensive review of manatee and boating data on a county-wide basis. It is developed, reviewed, and approved by local, state, and federal governments and is used for guidance when considering appropriate levels of slip densities within a county. The County is one of thirteen counties directed to adopt a MPP.

11. On October 20, 2004, Hancock filed with the County an application to amend its DRI. The application included requests to extend the DRI approval a third time and to revise the site plan. The site plan changes included a reduction in the total number of dry spaces from 400 to 352. On June 20, 2005, the County approved the DRI amendment. The Development Order included a finding of fact that the marina was exempt from the requirements of the MPP because Section 8.4 of the MPP "exempts existing projects with valid permits and Chapter 380 vested status for the construction of slips (wet or dry) that have not been constructed at the time the MPP was adopted by the Board of County Commissioners." See Petitioner's Exhibit 3, Third Development Order Amendment for Hancock Bridge Marina, page 4, paragraph H. Hancock then filed the instant application on September 12, 2005. To date, Hancock has expended $1,731,000.00

in its permitting efforts, including the DRI extension and ERP application.

12. There is no evidence that during the DRI process, the Department or Commission made any representations to Hancock about its ability to obtain an ERP or sovereign submerged lands authorization. Also, neither agency was consulted during that period of time, presumably because the DRI and ERP processes are separate and independent of one another.

C. Permitting Criteria

13. Section 373.414, Florida Statutes, contains the standards and criteria governing the approval of an ERP. Subsection (1) requires that the applicant provide reasonable assurance that the regulated activity is "not contrary to the public interest." In determining whether this test is met, paragraph (1)(a) requires that the Department consider and balance the following criteria:

> 1. Whether the activity will adversely affect the public health, safety, or welfare or the property of others;
>
> 2. Whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;
>
> 3. Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;
>
> 4. Whether the activity will adversely affect the fishing or recreational values or

marine productivity in the vicinity of the activity;

5. Whether the activity will be of a temporary or permanent nature.

6. Whether the activity will adversely affect or will enhance significant historical and archaeological resources under the provisions of s. 267.061; and

7. The current condition and relative value of functions being performed by areas affected by the proposed activity.

14. These same factors are found in Florida Administrative Code Rule 40E-4.302, an ERP rule adopted by the South Florida Water Management District. This rule has been adopted by reference by the Department to be used when it considers ERP applications within the geographical jurisdiction of that water management district. See Fla. Admin. Code R. 62-330.200(4). An additional requirement in the rule is that an applicant give reasonable assurance that the project will not cause unacceptable cumulative impacts. See Fla. Admin. Code R. 40E-4.302(1)(b).

15. Besides the foregoing requirements, additional conditions for the issuance of an ERP are found in Florida Administrative Code Rule 40E-4.301, also adopted by reference by the Department. Relevant here are requirements that the applicant give reasonable assurances that the proposed activity (a) will not adversely impact the value of functions provided to

fish and wildlife and listed species by wetlands and other surface waters, and (b) will not cause adverse secondary impacts to the water resources. See Fla. Admin. Code R. 40E-4.301(1)(d) and (f).

16. Section 373.414(1)(b), Florida Statutes, provides that if an applicant is unable to meet the above criteria, the Department shall consider measures proposed by or acceptable to the applicant to mitigate adverse effects that may be caused by the regulated activity. In this case, mitigation measures have been proposed by Hancock and are discussed below.

17. Finally, Section 373.4132, Florida Statutes, requires that the Department evaluate applications for dry storage facilities for ten or more vessels in the same manner as any other ERP application, including that the applicant demonstrate that the facility will not be harmful to the water resources, provides reasonable assurance that the secondary impacts from the facility will not cause adverse impacts to the functions of the wetlands and surface waters, and meets the public interest test in Section 373.414(1)(a), Florida Statutes.

18. There are no rules or statutes which require that the Department consider the status of, or otherwise take into account, a DRI in evaluating an application for an ERP or proprietary authorization.

D. Impacts on Manatees

19. After reviewing the application for an ERP, the Department determined that the project, as proposed, should be denied because of direct, secondary, and cumulative effects it would have on manatees. The Department further determined that the applicant had not met the applicable requirements under Florida Administrative Code Rule Chapter 18-21 for authorization to use sovereign submerged lands. In making these determinations, the Department considered not only potential deaths of manatees, but also potential impacts such as harassment, disturbance, and sub-lethal boat strikes. The latter strikes may cause permanent injury and can affect reproduction and behavior.

20. The State is a refuge and sanctuary for the manatee. See § 379.2431(2), Fla. Stat. The manatee is a marine mammal that can live as long as sixty years. It is unable to tolerate prolonged exposure to temperatures below around sixty-one degrees, which makes it susceptible to cold-related stress and death. Consequently, the manatees typically seek warm water when temperatures drop below sixty-eight degrees, migrating seasonally over extensive geographic areas.

21. Hancock's marina is located just off the River. The River is one of the most studied and significant habitats for manatees on the west coast of Florida. The County's water

bodies, including the River, provide manatees with submerged aquatic vegetation for foraging, fresh water sources, and several warm-water sites to use as refuges during colder weather. Hancock Creek, which is used to access the River from the marina, is an area used by manatees because it provides fresh water and a quiet environment. Manatees also use the River as a major travel corridor between the Florida Power and Light Company (FPL) power plant on the Orange River, a tributary of the River located around eight miles upstream from the project site, and the estuaries found downstream where foraging resources are abundant. Hundreds of manatees go up and down the River throughout the year, and those traveling to and from the warm water around the FPL plant must travel past Hancock Creek.

22. Manatee deaths have occurred within a five mile radius of the project site. Also, the number of manatee watercraft-related deaths in the River has steadily increased over the years. According to a 1998 study of boating activity in the County, vessels use the River more as a travel corridor to the bays and estuaries outside of the River than as a destination itself, and that on weekends there is almost constant traffic with vessels leaving or entering the mouth of the River every thirty-five seconds. The majority of the boats leaving the project site are expected to travel downstream through the mouth of the River, an area with substantial vessel congestion. This

travel pattern, in conjunction with the typical travel patterns of manatees, indicates that there is a great potential for boat/manatee overlap in the River, increasing the likelihood of impacts to manatees.

23. Besides manatee deaths, there are sub-lethal effects of increased boat traffic in the area. Increased traffic in important manatee areas may create disturbances which will alter behaviors such as feeding, suckling, or resting, or it may separate mothers from their calves. Also, vessel traffic may cause them to leave preferred habitats. Finally, as noted above, vessel collisions with manatees produce non-lethal injuries as well, causing pain and extreme scarring, which can alter natural behaviors and affect reproduction.

24. The single biggest known cause of death to manatees is impacts from boats. The project would increase the risk of watercraft collisions with manatees in this region. As the level of boat traffic increases, the probability of boat and manatee collisions is also likely to increase. Because the project is located along the travel corridor between the largest wintering aggregation of manatees on Florida's west coast and their local foraging habitat, the expected secondary impacts from increased vessel traffic associated with the project is expected to reduce the value of the functions of the River as a travel corridor. Therefore, the secondary impacts of vessel

traffic from the expansion of the marina are expected to result in adverse impacts to manatees.

25. In 1990, the DNR reviewed the proposed DRI for this site under the state manatee program. It found that during the preceding thirteen years (1976-February 1990), thirty-six manatees had died from water-related injuries in the County. Within a five-mile radius of the site, four manatees had died from watercraft-related injuries. DNR concluded that since the manatee protection speed zones for the River had just been established, they were expected to offset the impact of the additional 198 slips. From March 1990 until September 2006, however, twenty-five additional manatees have died from watercraft-related injuries within a five-mile radius of the site. Therefore, the number of deaths had increased without the additional 198 slips. The logical inference is that if the new slips are allowed, boat traffic and the associated adverse impacts on manatees will likewise increase.

26. The fact that dry slips will be used does not change the Department and Commission's evaluation of the project. A boat has the same risk to a manatee whether stored in a wet or dry facility. Marine industry groups suggest that an average usage rate is between ten and fifteen percent at any time, and that usage is likely to increase on the weekends. Thus, as density increases so does the risk.

27. In addition to its own analysis, the Commission reviewed the County MPP, which indicated that nine additional slips at this location would be acceptable, for a total of thirty-nine. This number was calculated by using a slip density of three slips for every one hundred feet of shoreline owned. (The actual linear feet of shoreline owned by Hancock is unclear. The Commission concedes that Hancock "may own a total of 1,214 linear feet of shoreline.") A MPP typically allows for higher boat densities in areas that pose less risk to manatees and lower boat densities in higher risk locations. Had the MPP not been considered, the number of allowable slips would remain at thirty since the MPP provides for a countywide strategy instead of a case-by-case review. To date, the Commission has never recommended approval of a marina application in the County that would authorize more docks than the MPP would authorize.

28. The Commission initially makes an independent assessment of the application without regard to the MPP. In this case, based upon mortality data, aerial surveys, telemetry data, rescue data, and boat studies, the Commission determined that no further slips are appropriate. Therefore, even if the County's MPP is based upon outdated data and analysis, as Hancock contends, approval of the application would not be warranted.

29. Petitioner's expert posited that the proposed project would only result in one manatee death over the next twenty years, which would amount to no more than a de minimus impact on the overall population. Assuming this to be true, manatees are nonetheless an endangered species, and there is no minimal amount of death that is considered acceptable. The witness also opined that Hancock is entitled to an unlimited number of slips under the MPP due to flawed data and analysis underpinning that document. In formulating his recommendations, however, Hancock's expert relied on mathematical models and statistics while ignoring the principles of manatee behavior and biology. Finally, the expert agreed that the greater the number of boats in the water, the greater the likelihood that a manatee could be accidentally crushed. On the issue of impacts to manatees, the testimony of the Commission witnesses is deemed to be the most credible and persuasive.

30. The more persuasive evidence supports a finding that the marina will be located in an area adjacent to the River, that large numbers of manatees use the River, and that the project is expected to increase boat traffic. This in turn will lead to a higher incidence of boating-related manatee casualties in the area. Therefore, the proposed activity adversely affects the conservation of wildlife and marine productivity in the vicinity of the project; it adversely affects the marine

productivity in the area; it is permanent in nature; and it diminishes the current condition and relative value of functions performed by areas affected by the activity. On balance, then, the project is contrary to the public interest.

31. Based on the evidence presented, Hancock has not provided reasonable assurance that the project will not cause adverse secondary impacts to water resources, as required by Florida Administrative Code Rule 40E-4.301(1)(f).

32. Similarly, based on the evidence presented, Hancock has not provided reasonable assurance that the project will not result in unacceptable cumulative impacts upon wetlands and other surface waters, as required by Florida Administrative Code Rule 40E-4.302(1)(b).

33. By failing to provide reasonable assurances that the facility will not be harmful to water resources, that the secondary impacts from the facility will not cause adverse impacts to the functions of wetlands and surface waters, and that the project meets the public interest test, Hancock has failed to satisfy the requirements of Section 373.4132, Florida Statutes.

E. Mitigation

34. If an applicant cannot meet the requirements of Section 373.414(1)(a), Florida Statutes, the Department "shall consider measures proposed by or acceptable to the applicant to

mitigate adverse effects that may be caused by the regulated activity." As noted in Finding of Fact 27, supra, the Department is willing to approve an additional nine slips that would be allowed under the County MPP, for a total of thirty-nine. According to Hancock, this number is not acceptable because more slips are needed to make the project financially feasible.

35. Although a copy of the application is not a part of this record, the testimony suggests that in its application, Hancock proposed certain measures to mitigate the impacts on manatees. In a letter to the Department dated November 8, 2007, however, the Commission stated that "[i]f the Applicant propose[s] changes to the project to minimize fish and wildlife resource impacts that are consistent with the Lee County MPP, such a project would be consistent with Chapter 370.12(2), F.S." (The Legislature has subsequently consolidated this statute into Section 379.2431, Florida Statutes.) Despite this lack of clarity in the record, sometime during the application process, and presumably before the Notice of Intent was issued, the Commission staff discussed with Hancock whether the following mitigation measures would offset or adequately reduce the impacts: placing a size restriction on boats docking at its facility; providing boater education; installing speed zone marking and making it a requirement for all boats at the marina

to be equipped with a speed zone map or a Global Positioning Satellite unit with speed zone mapping; implementing a volunteer watch program to enforce speed limits; making a cash donation to study manatee population dynamics; and installing sonar avoidance technology on vessels.

36. The Commission established that these measures, even if implemented, would not offset the impacts from 198 slips expected with phase 1 of the project. For example, the research associated with sonar technology is not yet completed, and devices are not available for boaters. Also, given the location of the project, even with additional law enforcement and boater education, the impacts would not be offset due to the level of traffic already existing on the River at that site, and the importance of the area to manatees. The middle of the River is a high-speed corridor (with a twenty-five miles per hour speed limit) and even with one hundred percent compliance in that zone, a small boat can still hit and kill a manatee.

F. The Proprietary Authorization

37. Because denial of the ERP is being recommended, the proprietary authorization must likewise be denied. See Fla. Admin. Code R. 62-373.075(2). Even so, for the purpose of addressing all issues in this Recommended Order, a discussion of the application for proprietary authorization is set forth below.

38. Florida Administrative Code Rule Chapter 18-21 contains the rules that implement the administrative and management responsibilities of the Department in authorizing activities in sovereignty submerged lands. Florida Administrative Code Rule 18-21.004 establishes the specific standards and criteria to be applied by the Department in determining whether Hancock should be allowed to use sovereign submerged lands. Paragraph (1)(a) provides that "[f]or approval, all activities on sovereignty lands must be not contrary to the public interest." The public interest is defined as "demonstrable environmental, social, and economic benefits which would accrue to the public at large as a result of a proposed action, and which would clearly exceed all demonstrable environmental, social, and economic costs of the proposed action." See Fla. Admin. Code R. 18-21.003(43). The more persuasive evidence supports a finding that, on balance, the project is contrary to the public interest based upon the standards in the rules.

39. Florida Administrative Code Rule 18-21.004(2)(a) provides that "[a]ll sovereignty lands shall be considered single use lands and shall be managed primarily for the maintenance of essentially natural conditions, propagation of fish and wildlife, and traditional recreational uses such as fishing, boating, and swimming. Compatible secondary purposes

and uses which will not detract from or interfere with the primary purpose may be allowed." The evidence does not show that Hancock's proposed marina expansion constitutes a secondary use not interfering with the propagation of wildlife. Therefore, the project is not consistent with this rule.

40. Florida Administrative Code Rule 18-21.004(2)(b) provides that "unless there is no reasonable alternative and adequate mitigation is proposed," activities which result in significant adverse impacts to sovereignty lands and associated resources shall not be approved. As previously found, the mitigation measures proposed by Hancock are not adequate.

41. Paragraph (2)(i) of the rule further provides that activities in submerged lands "shall be designed to minimize or eliminate adverse impacts on fish and wildlife habitat, and other natural or cultural resources. Special attention and consideration shall be given to endangered and threatened species habitat." Because Hancock failed to prove that the project would not result in unmitigated adverse impacts to manatees, it fails to meet this criterion.

42. Paragraphs (7)(d) and (e) of the rule are general conditions for authorization and provide that activities "shall be constructed and used to avoid or minimize adverse impacts to sovereignty submerged lands and resources" and "shall not adversely affect any species which is endangered, threatened, or

of special concern." Here the more persuasive evidence shows that neither condition has been met.

CONCLUSIONS OF LAW

43. The Division of Administrative Hearings has jurisdiction over this matter pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

44. The burden of proof is on the party asserting the affirmative of an issue before an administrative tribunal. See, e.g., Balino v. Department of Health & Rehabilitative Servs., 348 So. 2d 349, 350 (Fla. 1st DCA 1977). Therefore, Petitioner has the burden of proving by a preponderance of the evidence that the proposed activity satisfies the requirements for an ERP and a sovereign submerged lands lease.

45. For the reasons set forth in the Findings of Fact, the more credible and persuasive evidence supports a conclusion that the applicant has failed to provide reasonable assurances that the project will not violate the applicable statutes and rules. Therefore, the application must be denied.

46. Finally, in order to invoke the doctrine of equitable estoppel, Hancock must prove the following elements: (1) a representation by the first party as to a material fact that is contrary to a later-asserted position; (2) a reliance on that representation by the second party; and (3) a change in position by the first party that is detrimental to the second party.

Council Brothers, Inc. v. City of Tallahassee, 634 So. 2d 264, 266 (Fla. 1st DCA 1994). There is no evidence that the Department or Commission made a representation to Hancock during the DRI process that it would be entitled to an ERP or proprietary authorization.

47. It should also be noted that the doctrine of equitable estoppel may be asserted against a governmental entity only under rare and exceptional circumstances. Associated Industries Insurance Co., Inc. v. Department of Labor and Employment Security, 923 So. 2d 1252, 1254-55 (Fla. 1st DCA 2006). To invoke it against the Department, Hancock must demonstrate that the Department's conduct exceeds mere negligence, that its act will cause serious injustice, and that the imposition of estoppel will not unduly harm the public interest. See Council Brothers, supra at 264. Such a showing was not made here. Moreover, the doctrine does not apply to "transactions that are forbidden by statute or that are contrary to public policy." Dade County v. Gayer, et al., 388 So. 2d 1292, 1294 (Fla. 3d DCA 1980). The approval of the application here would be contrary to the State and federal government policies of protecting an endangered species, the manatee.

48. Hancock's reliance on the case of Sakolsky v. The City of Coral Gables, 151 So. 2d 433 (Fla. 1963), is not analogous to the facts presented here. In Sakolsky, the City had halted a

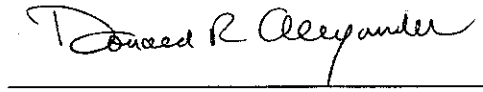
building permit to which it had given tentative approval without conditions. Unlike the instant proceeding, it was the City's action on the same authorization that gave rise to a colorable claim for estoppel. The instant case is closer to the facts in Circle K General, Inc. v. Hillsborough County, 524 So. 2d 1143 (Fla. 2d DCA 1988), where the court found equitable estoppel did not apply where the county approved a site plan yet later denied a driveway permit for the site. In rejecting the claim of estoppel, the court noted that "[t]he mere approval of the site plan was not a guarantee that the county would issue a driveway permit, and the applicant could not have reasonably relied upon it as such." Id. at 1144.

RECOMMENDATION

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

RECOMMENDED that the Department of Environmental Protection enter a final order denying Petitioner's application for an ERP and authorization to use sovereign submerged lands to expand an existing marina on Hancock Creek in Lee County, Florida.

DONE AND ENTERED this 15th day of May, 2009, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of May, 2009.

ENDNOTES

1/ All statutory citations are in the 2008 version of the Florida Statutes.

2/ This proceeding is not the proper forum in which to litigate alleged deficiencies (i.e., a lack of adequate data and analysis) in the County's MPP, a document incorporated into its Comprehensive Plan. Chapter 163, Florida Statutes, provides the exclusive remedy for doing so. Therefore, if these concerns are valid, they should be resolved by the County through an amendment to its MPP or Comprehensive Plan, or in some other action at the local level.

COPIES FURNISHED:

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NOTICE OF RIGHT TO FILE EXCEPTIONS

All parties have the right to submit written exceptions within 15 days of the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will render a final order in this matter.

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

HANCOCK BRIDGE MARINA, LLC,

Petitioner,

v.

OGC CASE NO: 07-2719
(DOAH CASE NO: 08-3984)

STATE OF FLORIDA, DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

_____/

PETITIONER'S EXCEPTIONS TO THE RECOMMENDED ORDER

Petitioner, HANCOCK BRIDGE MARINA, LLC, by and through its undersigned counsel and pursuant to Sections 120.57(1)(k), Florida Statutes, and Rule 28-106.217, Florida Administrative Code, files these exceptions to the Administrative Law Judge's (the "ALJ") Recommended Order entered on May 15, 2009 entered in this proceeding as follows:

EXCEPTIONS TO FINDINGS OF FACT

1. Exceptions to Finding of Fact 22: Petitioner objects to the finding that manatee watercraft-related deaths in the Caloosahatchee River have "steadily increased over the years" as being unsupported by substantial competent evidence, since this opinion is inconsistent with the raw data. The statement implies that there is a direct (and linear) correlation between boat use in the Caloosahatchee River and manatee deaths. In fact, Figures 7-9 on pages 15 and 16 of the Data and Analysis for the Hancock Bridge Marina ERP application show that watercraft deaths, both within a five mile radius of the project and in the river as a whole, have remained

stable or decreased since 1997. The apparent use of data prior to the adoption of any portion of the current manatee protection program for the Caloosahatchee River to support the statement is inappropriate.

2. Exceptions to Finding of Fact 24: Petitioner objects to all of the findings in this paragraph except the first sentence as being unsupported by substantial competent evidence because they are based on an assumption that all of the boats that will be entering the river from the proposed marina will be new boats. This assumption is inconsistent with the only testimony on the subject, which came from Mr. Epler, who stated that the marina would be marketed to existing boat owners (Transcript Volume I, pages 155-156).

3. Exceptions to Finding of Fact 25: Petitioner objects to the last sentence as being an illogical inference and unsupported by substantial competent evidence. The evidence in the record indicates that there is no direct correlation between boat registrations and manatee deaths (i.e., Petitioner's Exhibit 7, Page 44), and there is no evidence of any kind establishing a correlation between dock approvals and manatee deaths. In reality, manatee deaths are a function of a wide range of variables, including the existence or absence of speed zones, the degree of boater education, and the level of law enforcement.

4. Exceptions to Finding of Fact 26: Petitioner objects to the second sentence as being unsupported by substantial competent evidence because the unrebutted evidence shows that there are significant differences in usage between a wet and a dry slip marina. While it is true that a boat that is actually on the water that is typically stored at a dry slip is as dangerous to manatees as a boat stored at a wet

slip, it is significantly less likely that the boat from the dry slip will actually be used. (Petitioner's Exhibit 5).

5. Exceptions to Finding of Fact 29: Petitioner objects to the second sentence on the basis that it is inconsistent with the Final Order in Sheridan v. Department of Environmental Protection, DOAH Case No. 03-0540, which involved a marina on the south side of the Caloosahatchee River in an area that is more highly populated by manatees than Hancock Creek. The Secretary ultimately found in that case that the marina in question (Deep Lagoon) would be increasing its capacity by 85 boats, but that other factors in the F.S. 373.414 balancing test, particularly water quality improvements, outweighed the increased risk to manatees created by the additional capacity (Final Order, page 21). The ALJ in the instant case incorrectly failed to balance the benefits of the project, including improved water quality (Transcript Volume I, page 183) and recreational and economic benefits, against the de minimis risk created to the manatee population, as required in the above-described Final Order.

6. Exceptions to Finding of Fact 29: Petitioner objects to the fourth sentence as being an illogical conclusion which conflicts with other portions of the Recommended Order. The Data and Analysis for the Hancock Bridge Marina ERP and the Recommended Order itself both rely on statistical analyses involving manatee deaths. Dr. Cuba's review of the statistics was, therefore, completely appropriate.

7. Exceptions to Finding of Fact 29: Petitioner objects to the fifth sentence as being an incomplete and misleading description of Dr. Cuba's testimony on the issue of the likelihood of manatee deaths. Dr. Cuba actually testified that the mere presence of boats on the water would not inevitably result in manatee deaths.

8. Exceptions to Finding of Fact 30: Petitioner objects to the statement in the first and second sentence about an increase in boat traffic as being unsupported by substantial competent evidence. As noted in Exception #2 above, the record shows that the boats in the proposed marina will primarily be relocated from existing single-family homes, not new boats, so there will be no increase in boat traffic in the Caloosahatchee River as a whole.

9. Exceptions to Finding of Fact 30: Petitioner objects to the last sentence because it is clear from Finding of Fact 29 that the ALJ believed that "there is no minimal amount of death that is considered acceptable" and that no effort was made to balance the de minimis risk to manatees against water quality improvements, as required by the Final Order in the Sheridan case.

10. Exceptions to Finding of Fact 36: Petitioner objects to the third sentence as being an illogical conclusion that is not supported by substantial competent evidence. There is nothing in the record which shows that enhanced law enforcement would not address the impacts of the project.

11. Exceptions to Findings of Fact 37-42: Petitioner objects to these findings as being legally flawed, for the reasons set out in Exceptions 1-10 above.

EXCEPTIONS TO CONCLUSIONS OF LAW

12. Exceptions to Conclusions of Law 46-48: Petitioner objects to these conclusions as being legally incorrect. All of the substantial competent evidence in the record indicated that Petitioner, after conducting an appropriate due diligence, relied very substantially on the representations made by the State Manatee Protection Program in the original DRI Development Order, but has lost the ability to construct

the marina that was permitted in the DRI Development Order as a result of the denial of the ERP and the submerged lands lease. There was no representation made by DNR in 1991 that the project would be entitled to an ERP because there was no ERP process, and no further review of manatee impacts by state agencies, required of dry storage facilities at that time.

OBJECTION TO RECOMMENDATION

The Recommended Order contains findings of fact and conclusions of law which are clearly erroneous and are not supported by competent, substantial evidence. The DEP Secretary should grant the exceptions and authorize issuance of the ERP and the Submerged Lands Lease that are the subject of this proceeding.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic mail and U.S. mail this 29th day of May, 2009 to:

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STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

HANCOCK BRIDGE MARINA, LLC,

Petitioner,

vs.

DOAH Case No. 08-3984
OGC Case No. 07-2719

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION and FLORIDA FISH AND WILDLIFE CONSERVATION COMMISSION,

Respondents.
_____/

RESPONDENTS' JOINT RESPONSES TO PETITIONER'S EXCEPTIONS TO THE RECOMMENDED ORDER

Respondents, Florida Department of Environmental Protection (the Department) and the Florida Fish and Wildlife Conservation Commission (the Commission), file this response to Petitioner's Exceptions to the Recommended Order (RO) entered by the Division of Administrative Hearings (DOAH) on May 15, 2009.

Standard of Review of DOAH Recommended Orders

Section 120.57(1)(l), Florida Statutes, prescribes that an agency reviewing a recommended order may not reject or modify the findings of fact of an administrative law judge, "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value or weight of the evidence. Rather, "competent substantial evidence" refers to the existence of some evidence (quantity) as to each essential element and as to its admissibility under legal rules of evidence. *See e.g., Scholastic Book Fairs, Inc. v. Unemployment Appeals*, 671 So.2d 287, 289 n. 3 (Fla. 5th DCA 1996).

A reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See e.g., Rogers v. Dept. of Health*, 920 So.2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dept. of Environmental Protection*, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands Co. School Board*, 652 So. 2d 894 (Fla. 2d DCA 1995). Such evidentiary-related matters are the province of the ALJ as the fact-finder in administrative proceedings. See e.g., *Tedder v. Fla. Parole Commission*, 842 So.2d 1022, 1025 (Fla. 1st DCA 2003); *Heifetz v. Dept. of Business Regulation*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). The ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a

reviewing agency, absent a lack of competent substantial evidence in the record to support the ALJ's decision. See e.g., *Collier Medical Center v. State, Dept. of HRS*, 462 So.2d 83, 85 (Fla. 1st DCA 1985); *Fla. Chapter of Sierra Club v. Orlando Utilities Commission*, 436 So.2d 383, 389 (Fla. 5th DCA 1983).

A reviewing agency therefore lacks the authority to evaluate the quantity and quality of the evidence presented at a DOAH formal hearing, beyond making a determination that the evidence is competent and substantial. See e.g., *Brogan v. Carter*, 671 So.2d 822, 823 (Fla. 1st DCA 1996). Therefore, if the DOAH record reveals any competent substantial evidence supporting a factual finding of the ALJ, the agency head is bound by such factual finding in the Final Order. See e.g., *Walker v. Board of Prof. Engineers*, 946 So.2d 604 (Fla. 1st DCA 2006); *Fla. Dept. of Corrections v. Bradley*, 510 So.2d 1122, 1123 (Fla. 1st DCA 1987). Additionally, the agency head has no authority to make independent or supplemental findings of fact. See e.g., *North Port, Fla. v. Consolidated Minerals*, 645 So.2d 485, 487 (Fla. 2d DCA 1994).

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

Response to Exception No. 1

Petitioner's exception to Finding of Fact 22 should be rejected because while it states that the finding is unsupported by competent substantial evidence, the record reveals otherwise. (T.280:22-25 – T.281:1-21). The remainder of the Petitioner's exception beseeches the agency head to reweigh the evidence accepted by the ALJ and improperly replace the ALJ's finding of fact.

Response to Exception No. 2

Again, Petitioner's assertion that Finding of Fact 24 should be rejected as unsupported by competent substantial evidence is contravened by the record. (T.200:16 - T.201:7; T.243:14-25 - T.244:1-3; T.278:6-25 – T.279:1-18; T.296:19-23; T.302:2-10).

Further, Petitioner says that the contested finding is based on an assumption that "all of the boats that will be entering the river from the proposed marina will be new boats." There is no such assumption, explicit or implicit, in the finding. Finally, if, in fact, such an assumption had been made, Petitioner states that it would be inconsistent with the only testimony on the subject, citing its witness at pages 155 and 156 of the transcript. The transcript reveals that same witness immediately thereafter admitting that regardless of the intended marketing, a public facility would necessarily "be available to anyone." (T.157:2-13).

Response to Exception 3

Competent substantial evidence exists on the record supporting the ALJ's inference in Finding of Fact 25 that if new slips are allowed, boat traffic will increase and therefore boat-

related manatee impacts will increase. (T.278:6-25 – T.279:18; T.296:19-23). The remainder of Petitioner's exception mischaracterizes the finding, which makes no mention of correlations between boat registrations and dock approvals and manatee deaths, nor on what other variables may play a role in manatee mortality.

Response to Exception 4

The contention that there is no competent substantial evidence supporting the finding as written is false. The finding draws directly from testimony of the Commission's expert witnesses. (T.201:22-25 – T.202:1-5; T.275:13-24; T.297:13-18.)

Further, Petitioner's exception to Finding of Fact 26 mischaracterizes the finding as hinging on whether there is a significant difference in usage between a wet and dry marina. In fact, the challenged portion merely says a boat on the water poses the same risk to manatees regardless of how it is stored. Petitioner's exception amounts to an argument that the agency head should reweigh the evidence and find differently. As explained above in the preamble to the responses, there is no authority for granting the exception on that basis.

Response to Exception 5

In contesting Finding of Fact 29, Petitioner imposes upon the agency head a baseless responsibility to follow the decision in *Sheridan, et al. v. Deep Lagoon Boat Club and Dept. of Environmental Protection*, DOAH Case No. 03-0540. However, *Sheridan* set no precedent to be followed here, as the two cases are not identical, bearing crucial differences in facts, circumstances, and testimony. [1] All that matters in the resolution of this case is the testimony on the record concerning adverse impacts to manatees expected as a result of the project being proposed. The finder of fact clearly decided the Commission's plentiful testimony on these expected impacts is more credible and persuasive than the testimony offered by the Petitioner. Moreover, the ALJ put forth no finding that the impacts actually are de minimus as the Petitioner's expert contends; what the Recommended Order is saying is that even if one accepts the witness's characterization, the greater weight of the evidence shows that the impacts to endangered wildlife causes the proposal to fail the applicable public interest standard. Finally, although in the exception Petitioner lists one citation to the record regarding testimony about water quality, there are no appropriate and specific citations supporting other portions of this exception.

Response to Exception 6

This exception fails to contain any appropriate and specific citations to the record as contemplated by §120.57(1)(k), Fla. Stat., to trigger the obligation of the agency to rule upon it. Despite that, should the agency head decide to rule on the exception, it should be so to deny it. The challenged fourth sentence—saying that Petitioner's expert relied on statistics and modeling rather than principles of manatee biology and behavior in the formulation of his recommendations—is patently true and is not an "illogical conclusion." (T. 67:20-25; T.87:23-

[1] Notably, the Final Order in *Sheridan* noted that "no expert testified that the Consolidated Permit would adversely affect manatees." (See *Sheridan* Final Order at page 23).

25 - T.88:1-5). The statement neither conflicts with other portions of the Recommended Order, nor does it undermine the ALJ's critical determination in Finding of Fact 29 that the Commission witnesses were the more credible and persuasive (a determination the Secretary is without authority to overturn).

Response to Exception 7

This exception (also to Finding of Fact 29) likewise fails to contain appropriate and specific citations to the record as contemplated by §120.57(1)(k), Fla. Stat., to trigger the obligation of the agency to rule upon it. However, it is baseless since Petitioner's expert did, in fact, agree to the increased likelihood of manatee impacts with increased boats (T.116:18-25 – T.117:1). The ALJ has no obligation to provide a complete description of each witness's testimony if, upon consideration of the entirety of the evidence before him, he did not find it persuasive or germane to the finding being rendered.

Response to Exception 8

An examination of the record reveals competent substantial evidence supporting Finding of Fact 30 such that Petitioner's exception should be denied (Petitioner's Exhibit 6; T.274: 9-11; T.278: 17-18). Additionally, Petitioner's arguments about the composition of the vessels to be housed at the marina are without merit for the reasons explained in Response to Exception 2 above.

Response to Exception 9

This exception should be rejected for the same reasons outlined in Response to Exception 5 above.

Response to Exception 10

This exception should be rejected, as competent substantial evidence exists in the record to support the challenged finding. (T.271:12-25; T.272:1-8).

Response to Exception 11

Except by broad reference to the previous exceptions, Petitioner does not articulate a legal basis for this exception to Findings of Fact 37-42 and fails to provide any appropriate and specific citation to the record.

Response to Exception 12

Petitioner's exceptions to Conclusions of Law 46-48 should be denied. Respondents will agree the ERP was not yet in existence at the time of the genesis of the DRI. However, the ALJ's statement is still true, given that there is no evidence of any representation of entitlement to an environmental resource permit or state lands authorization during any of the multiple amendments (dated August 4, 1994; September 19, 2000; and June 20, 2005; see Petitioner's Exhibit 3) to the original 1991 DRI Development Order.

In determining that there was no representation about Petitioner's ability to obtain the permits at issue in this proceeding, the ALJ needed to proceed no farther than the first element (representation as to a material fact that is contrary to a later-asserted position) of the equitable estoppel test described in *Council Bros., Inc. v. City of Tallahassee*, 634 So.2d 264 (Fla. 1st DCA 1994).

However, Respondents note other flaws with Petitioner's exception for which it should be rejected. Petitioner claims within its exception that it conducted appropriate due diligence. There is no Finding of Fact in the Recommended Order concerning the Petitioner's exercise of due diligence and therefore no determination as to its appropriateness. Moreover, the ALJ's ultimate legal conclusions within the challenged Conclusions of Law are sound, supported by the authorities cited within and the Findings of Fact that precede them, and Petitioner advances no compelling legal rationale for why they can or should be replaced by the agency head.

Conclusion

Based on the foregoing, the Secretary is requested to enter a final order denying each of Petitioner's exceptions and adopting the Recommended Order in its entirety.

Submitted this 8th day of June, 2009.

STATE OF FLORIDA DEPARTMENT OF
ENVIRONMENTAL PROTECTION

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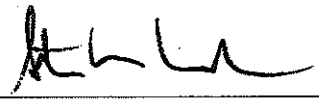

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on this 8th day of June, 2009.

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