STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROLAND GUIDRY, AS CO-TRUSTEE OF THE GUIDRY LIVING TRUST, AND OCEANIA OWNER'S ASSOCIATION, INC.,	)	
Petitioners,	)	
vs.	)	Case No. 10-5348RU
DEPARTMENT OF ENVIRONMENTAL PROTECTION AND BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND,	)	
Respondents.	)	
DAVID H. SHERRY, REBECCA R. SHERRY, AND JOHN S. DONOVAN,	)	
Petitioners,	)	
vs.	)	Case No. 10-6205RU
DEPARTMENT OF ENVIRONMENTAL PROTECTION AND BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND,	)	
Respondents.	)	

MARCLA LTD, II, LIMITED PARTNERSHIP; H. JOSEPH HUGHES, AS TRUSTEE OF THE BETTY PRICE HUGHES QUALIFIED VACATION RESIDENCE TRUST; AND KERSHAW MANUFACTURING COMPANY, INC.,	)	
Petitioners,	)	
vs.	)	Case No. 10-8197RU
DEPARTMENT OF ENVIRONMENTAL PROTECTION AND BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND,	)	
Respondents.	)	

FINAL ORDER

These consolidated cases were heard by David M. Maloney, Administrative Law Judge, on August 2-5, 2010, and August 24-25, 2010, in Fort Walton Beach, Florida, and September 20, 2010, in Tallahassee, Florida.

APPEARANCES

For Petitioners: D. Kent Safriet, Esquire
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For Respondents: Kelly L. Russell, Esquire
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BACKGROUND

The Petitioners allege in these consolidated cases that the Department made statements that violate Section 120.54(1)(a), Florida Statutes. The cases arise from a common source: the application by Okaloosa County (the "County") to the Department of Environmental Protection and the Board of Trustees of the Internal Improvement Trust Fund (collectively, the "Department") for authority to conduct beach restoration west of Destin, Florida (the "Western Destin Project" or the "Project").

In response to the application, the Department sent the County a Consolidated Notice of Intent to Issue Joint Coastal Permit, Variance and Authorization to Use Sovereign Submerged Lands (the "NOI"). Attached was a Draft Consolidated Joint Coastal Permit and Sovereign Submerged Lands Authorization (the "Draft Permit"). The Draft Permit was revised on two occasions during the course of the proceedings (the "First Revised Draft Permit" and the "Second Revised Draft Permit").

The various draft permits contain "Specific Conditions." These consolidated cases concern two of them: Specific Condition 1 as it appeared in the Draft Permit and the First Revised Draft Permit ("Original Specific Condition 1") and Specific Condition 5 as it appears in the First Revised Draft Permit and the Second Revised Draft Permit.

Original Specific Condition 1 contains several requirements. In general, the County must record a certificate before the commencement of construction associated with the restoration. The certificate is required to describe all upland properties along the shoreline of the Project. The certificate must be accompanied by a survey of the pre-project Mean High Water Line (the "Pre-project MHWL") along the entire length of the Project's shoreline.

In addition to allegations related to Original Specific Condition 1, the petition in Case No. 10-5348RU alleges that the Department made another statement that is an unadopted rule: "that an Erosion Control Line (the 'ECL') is not required to be established pursuant to Section 161.161, Florida Statute, for a beach restoration project unless 'state funds' are used for the construction (as opposed to just the design) of a beach restoration project." Case No. 10-5348RU, Petition for an Administrative Determination Concerning Unadopted Rules, at 2. As found below, the Department developed a position with regard to when ECLs are required in beach restoration projects (the "Department ECL Position").

In general, the statement in Specific Condition 5 which is alleged to constitute an unadopted rule in Specific Condition 5 advises the County that no beach restoration work can be performed on private upland property unless authorization from

the owner of the property has been obtained and submitted to the Department. There is an exception: the permitted party can submit a judgment from a court that such an authorization is not required.

Original Specific Condition 1, the Department ECL Position and Specific Condition 5 have not been adopted as rules pursuant to Section 120.54, Florida Statutes.

STATEMENT OF THE ISSUES

All Three Cases

Whether the Petitioners have standing to bring their respective challenges pursuant to Section 120.56(4), Florida Statutes?

Case No. 10-5348RU

Whether either or both Original Specific Condition 1 and the Department ECL Position constitute a rule?

Case Nos. 10-6205 and 10-8197

Whether Specific Condition 5 constitutes a rule?

Attorney's Fees

Whether an order should be entered against the Department for costs and attorney's fees under Section 120.595(4), Florida Statutes?

PRELIMINARY STATEMENT

a. Posture of the Cases

On July 13, 2010, Roland Guidry, as Co-Trustee of the Guidry Living Trust and Oceania Owners' Association, Inc. (the "Oceania Petitioners") filed their Petition for an Administrative Determination Concerning Unadopted Rules. The petition was assigned Case No. 10-5384RU.

On July 26, 2010, the Department filed a "Notice of Filing Request for Modification and Revised, Draft Joint Coastal Permit" (the "First Revised Draft Permit"). The First Revised Draft Permit made two changes to the Draft Permit.

The first change is summarized in a section of the Revised Draft Permit entitled "Activity Location." It excludes the Oceania members' common elements property from the fill placement area.

The second change adds the language to the Draft Permit's Specific Condition 5 with regard to the required authorizations from owners of private upland property on which work will be performed during the restoration.

The Oceania Petitioners moved for the case to be consolidated with two cases that challenged the Draft Permit: DOAH Case Nos. 10-0515 and 10-0516 (the "Permit Challenge Cases"). The motion was granted.

On July 26, 2010, David H. Sherry, Rebecca R. Sherry, and John S. Donovan, (the "Sherry Petitioners") filed pursuant to Section 120.56(4), Florida Statutes, their Petition for Administrative Determination Concerning Unadopted Rules. The petition was assigned DOAH Case No. 10-6205RU.

In a second order entered July 27, 2010, the Oceania Petitioners were granted leave to amend their petition in Case No. 10-5348RU to add the allegations in Case No. 10-6205RU. An order was entered consolidating Case No. 10-6205RU with the Permit Challenge Cases and Case No. 10-5348RU. The cases proceeded to final hearing with the two Permit Challenges and the two Unadopted Rule Challenges (Case Nos. 10-5348RU and 10-6205RU) consolidated.

On August 18, 2010, during the course of the final hearing of the four consolidated cases, the Department filed a notice of a second set of revisions to the proposed joint coastal permit (the "Second Revised Draft Permit"). The Department revised Original Specific Condition 1 to delete references to the requirement of a Pre-project MHWL and instead to require that an ECL be set in accordance with the procedures of Sections 161.141-161.211, Florida Statutes, specifically recognizing that the Oceania common elements had been excluded from the Project.

On August 23, 2010, MACLA Ltd. II, Limited Partnership ("MACLA"), and Joseph H. Hughes as Trustee of The Betty Price

Hughes Qualified Vacation Residence Trust and Kershaw Manufacturing Company, Inc. (the "MACLA Petitioners") filed their Petition for an Administrative Determination Concerning Unadopted Rules. The petition alleges that Specific Condition 5 is an unadopted rule.

The petition was assigned Case No. 10-8197RU and was consolidated with the two other Unadopted Rule Challenges and the two Permit Challenges so that the five consolidated cases continued together in the hearing that had commenced three weeks earlier.

b. The Hearing

The final hearing in the four consolidated cases commenced on August 2, 2010. The hearing took place over six days. The final hearing on the three Unadopted Rule Challenges ended September 20, 2010, before the conclusion of the final hearing in the Permit Challenge Cases.

After the County and the Holiday Isle Intervenors presented their cases in the Permit Challenges, the Department presented its case. Testimony relevant to the Unadopted Challenges came from Ellen McLain Edwards, Ph.D. Petitioners called William Dally, Ph.D; Roland Guidry; David Sherry; Rebecca Sherry; John Donovan; and Michael Barnett.

Over the objection of the Department, the Petitioners re-called Michael Barnett and called West Gregory in reference to

the Unadopted Rule Challenges. Petitioners called Dr. Joseph Hughes, Royce Kershaw, and Louise Brooker, on August 25, 2010, two days after the filing of the petition in Case No. 10-8197RU to establish the standing of the petitioners in that case.

On September 20, 2010, the Department called Dr. Edwards in rebuttal in the MACLA Unadopted Rule Challenge (Case No. 10-8197RU).

c. Severance

The three Unadopted Rule Challenges remain consolidated but they have been severed from the Permit Challenges.

FINDINGS OF FACT

The Draft Permit

1. The Draft Permit (and its revisions) authorizes the County "to construct the work outlined in the activity description and activity location of this permit and shown on the approved permit drawings, plans and other documents attached hereto." Joint Exhibit, Vol. III, Tab 9, page 3 of 26.

2. The "activity description" and the "activity location" are detailed on the first page of the Draft Permit. See Joint Exhibit, Vol. III, Tab 9 (first page of 26). The drawings, plans and other documents attached to the Draft Permit are contained under Tab 10 of Volume III of the Joint Exhibit.

The Parties

3. Petitioner Guidry is co-trustee of the Guidry Living Trust (the "Guidry Living Trust"). He has independent authority to protect, conserve, sell, lease, encumber or otherwise dispose of trust assets. Those assets include a condominium unit in the Oceania Condominium. The condominium unit owned by the Guidry Living Trust includes an undivided interest held with all other unit owners in the common property at the Oceania Condominium. The common property includes real property that fronts the Gulf of Mexico located at 720 Gulf Shore Drive in the City of Destin, Florida. The real property has the MHWL of the Gulf of Mexico as its southern boundary.

4. Petitioner Oceania is a condominium association established pursuant to Florida's Condominium Act, Chapter 718, Florida Statutes. It does not own any real property. Mr. Guidry testified that he is authorized in his capacity as president of the Association to initiate and pursue this administrative proceeding on its behalf. No documents were entered in evidence reflecting that Oceania's Board of Directors approved the filing of the petition.

5. The owners of condominium units at the Oceania Condominium, including the Guidry Trust, comprise the membership of Oceania. The unit owners all own undivided shares in the Oceania Condominium common property including the real estate

that extends at its southern boundary to the MHWL of the Gulf of Mexico. The owners did not vote on whether to file the petition in Case No. 10-05348RU.

6. Petitioners David and Rebecca Sherry are leaseholders of real property where they reside. Located at 554 Coral Court, Number 511, Fort Walton Beach, Florida 32548, the property is in an area in Okaloosa County on Santa Rosa Island that is known as Okaloosa Island. The property leased by the Sherrys is not within the Western Destin Project.

7. Petitioner John Donovan is a leaseholder of real property located at 909 Santa Rosa Boulevard, Numbers 131-132, El Matador Condominium, Fort Walton Beach, Florida 32548, in the same area as the Sherry's residence.

8. Petitioner MACLA II, Ltd., is a Texas Limited Partnership. Louise Brooker is its president. It owns real property which fronts the Gulf of Mexico located at 620 Gulf Shore Drive, Destin, Florida. The southern boundary of the property is the MHWL of the Gulf of Mexico. The MACLA property is located adjacent to the shoreline that is the subject of the Western Destin Project.

9. The Betty Price Hughes Qualified Vacation Residence Trust (the "Hughes Trust") owns real property at 612 Gulf Shore Drive. Its southern boundary is deeded the MHWL of the Gulf of Mexico. The property is located adjacent to the shoreline

subject to the Western Destin Project. Petitioner H. Joseph Hughes is a trustee of the Hughes Trust.

10. Petitioner Kershaw Manufacturing Company, Inc., an Alabama corporation, is the owner of real property located at 634 Gulf Shore Drive, Destin, Florida. Its southern boundary the property is the MHWL of the Gulf of Mexico. The property is located adjacent to the shoreline subject to the Western Destin Project. Royce Kershaw is the president of the Kershaw Manufacturing Company. He testified that as president of the company, he has the authority to act on behalf of the company and has the power to bind the corporate entity.

11. The Department of Environmental Protection is responsible for the administration of Chapter 161, Florida Statutes, Parts I and II, the "Beach and Shore Preservation Act." § 161.011, Fla. Stat. The Board of Trustees of the Internal Improvement Fund is responsible for stewardship of its public trust properties under Chapter 253, Florida Statutes. Included among those properties is the sovereignty submerged lands along the coast of the Gulf of Mexico.

The ECL and the MHWL

12. In the context of the Beach and Shore Preservation Act, the MHWL and the ECL were discussed by the Florida Supreme

Court in Walton County v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102 (Fla. 2008) (the "Walton County Supreme Court Case"):

> Pursuant to section 161.141, when a local government applies for funding for beach restoration, a survey of the shoreline is conducted to determine the MHWL for the area. Once established, any additions to the upland property landward of the MHWL that result from the restoration project remain the property of the upland owner subject to all governmental regulations, including a public easement for traditional uses of the beach. § 161.141.
>
> After the MHWL is established, section 161.161(3) provides that the Board must determine the area to be protected by the project and locate an ECL. In locating the ECL, the Board "is guided by the existing line of mean high water, bearing in mind the requirements of proper engineering in the beach restoration project, the extent to which erosion or avulsion has occurred, and the need to protect existing ownership of as much upland as is reasonably possible." § 161.161(5).
>
> Pursuant to section 161.191(1), this ECL becomes the new fixed property boundary between public lands and upland property after the ECL is recorded. And, under section 161.191(2), once the ECL has been established, the common law no longer operates "to increase or decrease the proportions of any upland property lying landward of such line, either by accretion or erosion or by any other natural or artificial process."

Walton County, at 1108.

The Pre-project MHWL in This Case and the ECL

13. The Pre-project MHWL called for by Original Specific Condition 1 was never established.

14. No evidence was introduced as to where the Pre-project MHWL would have been located had it been set and in particular, where it would have been located in relation to an ECL.

15. Rod Maddox is a long-time surveyor with the Department's Division of State Land in the Bureau of Survey & Mapping. See P-244. Mr. Maddox testified about his experience with pre-project MHWLs and where they are located in relation to ECLs. Familiar with the term "pre-project mean high water line," Mr. Maddox defined it as the mean high water line prior to the placement of fill used in a beach restoration project. See id. at 29. He testified that pre-project MHWLs have been required in the many beach restoration cases with which he is familiar. He testified further that when it comes to location, there is no difference between a pre-project MHWL and an ECL. The denominations may be different but Mr. Maddox testified "as to how . . . established, I see them as one and the same." Id. at 30.

Original Special Condition 1: the Pre-project MHWL

16. On December 31, 2009, the Department issued the NOI. Attached to it was the Draft Permit. The Draft Permit contained the following paragraph as Special Condition 1:

> Prior to construction of the beach restoration project, the Permittee must record in the official records of Okaloosa County a Certificate, approved by the Department, which describes all upland properties (including their owners of record) along the entire shoreline of the permitted project, with an attached completed survey of the pre-project Mean High Water Line ("Mean High Water Line Survey") conducted along the entire permitted project shoreline length. The Mean High Water Line Survey must have been completed in a manner complying with Chapter 177, Florida Statutes, as determined by the Department. No construction work pursuant to this joint coastal permit shall commence until the Certificate and attached Mean High Water Line Survey have been approved and archived by the Department's Bureau of Survey and Mapping, and the Department has received proof of recording of such documents (see Specific Condition No. 4.c.). The approved Certificate and attached Mean High Water Line survey shall be attached to, and kept as part of this joint coastal permit and authorization to use sovereign submerged lands. If in the future the Permittee seeks reimbursement from the State for costs expended to undertake (construct) the permitted project, then, prior to, and as a condition of receipt of any authorized and approved reimbursement, the Board of Trustees will establish an ECL consistent with the provisions of Chapter 161, Florida Statutes. The Permittee shall be required to record such a line in the Okaloosa County official records.

Joint Exhibit, Vol. III, No. 9.

17. The Oceania Petitioners, as landowners within the Project area, challenged the issuance of the Draft Permit on January 14, 2010. See Case No. 10-0516. Among the bases for

the challenge was that the Department lacked authority to implement Original Special Condition 1 and, in particular, its requirement that the County record a completed survey of the pre-project MHWL in lieu of the establishment of an ECL.

18. On July 26, 2010, the Department revised the Draft Permit to eliminate from the Project the common property owned by the unit owners of the Oceania Condominium. The change was supported by a letter from Michael Trudnak, P.E., of Taylor Engineering, Inc., on behalf of the County which stated: "On behalf of Okaloosa County, Taylor Engineering submits this request to modify the project area and Draft Joint Coastal Permit for the Western Destin Beach Restoration Project [file nos. excluded]. The applicant has decided to remove the Oceania Condominium property from the beach fill placement area." Joint Exhibit, Vol. III, Tab 15, Exhibit A. The revised project, as described in permit drawings enclosed with Mr. Trudnak's letter includes two reaches: Reach 1 extends from the east jetty of East Pass to approximately 600 ft east of FDEP reference monument R-22 (R22.6) and Reach 2 extends from approximately 200 ft east of R-23 (R-23.2) to R-25.5. The Oceania Condominium property is in the gap between the two beaches. Additionally, the letter requested that the Department modify Specific Condition 1 of the Draft Permit to reflect the modified project

area so that the MHWL Survey requirement of Specific Condition 1 would exclude the Oceania Condominium property.

19. In accord with the request, Special Condition 1 was amended to add the following language: "With respect to the shoreline seaward of the Oceania Owner's [sic] Association, Inc., members' common elements property, neither a pre-project Mean High Water Line survey, nor a Certificate with a description of the pre-project Mean High Water Line shall be recorded in conjunction with this coastal permit." Joint Exhibit, Vol. III, Tab 15, the First Revised Draft Permit, Page 5 of 26.

20. On August 4, 2010, as the Department neared the end of its case in the third day of the hearing, it announced that the Revised Draft Permit would "be revised [again, this time] to require the establishment of an ECL under the applicable statute." Tr. 621.

21. The draft permit, accordingly, was revised for a second time (the "Second Revised Draft Permit"). The Department carried out the second revision in a notice filed at the Division of Administrative Hearings on August 18, 2010 (the August 18, 2010, Notice).

22. The August 18, 2010, Notice contains two changes to the First Revised Draft Joint Permit.

23. The first change deletes the existing language in Original Specific Condition 1 (the language challenged in Case No. 10-5348RU) in its entirety. It substitutes the following language:

> Prior to construction of the beach restoration project, the Board of Trustees will establish an Erosion Control Line along the shoreline of the beach restoration project. The Erosion Control Line shall be established consistent with the provisions of ss. 161.141-161.211, Florida Statutes. An Erosion Control Line shall not be established in conjunction with this joint coastal permit with respect to the shoreline seaward of the Oceania Owner's [sic] Association, Inc. members' common elements property. In lieu of conducting a survey, the Board of Trustees may accept and approve a survey as initiated, conducted, and submitted by Okaloosa County if said survey is made in conformity with the appropriate principles set forth in ss. 161.141-161.211.

Department of Environmental Protection's and Board of Trustees of the Internal Improvement Fund's Notice of Revisions to the Proposed Joint Coastal Construction Permit, page 3 of 4.

24. The second change is made with respect to Specific Condition No. 4(c) of the First Revised Draft Permit, one of a list of items to be submitted to the Department for approval prior to the commencement of construction and the issuance of a Notice to Proceed by the Department. The existing language is

deleted in its entirety and the following language is substituted:

> Written documentation that the Erosion Control Line required by Special Condition Number 1 has been filed in the public records of Okaloosa County.

Id.

The Department ECL Position

a. Chapter 161: Beach and Shore Preservation

25. Chapter 161, Florida Statutes, governs "Beach and Shore Preservation." "Parts I and II of this chapter may be known and cited as the 'Beach and Shore Preservation Act.'" § 161.011, Fla. Stat.

26. Part I governs "Regulation of Construction, Reconstruction, and Other Physical Activity." Sections 161.011 through 161.241 comprise Part I. The Department developed its position on ECLs claimed by Petitioners to be an Unadopted Rule by considering Part I, in particular Sections 161.088 (which declares the public policy to properly manage and protect Florida's beaches) through 161.211.

27. At some point in 2009, the Department saw a distinction related to ECLs in Sections 161.088-161.211 between beach restoration projects where state funding was used for construction and projects where no state funds were used. The former seemed to require ECLs, the latter not.

28. Several statutory provisions were viewed as particularly relevant. For example, Section 161.141, Florida Statutes, declares that it is the public policy of the state "to cause to be fixed and determined, pursuant to beach restoration . . . projects, the boundary line between sovereignty lands . . . and the upland properties adjacent thereto . . . ."

29. The section that mainly governs ECLs is Section 161.161. It provides the procedure for approval of projects for the restoration and maintenance of critically eroded beaches, subject to a beach management plan which is funded, in part, by the state.

30. With regard to ECLs, the statute provides:

> (3) Once a project [for the restoration and maintenance of a critically eroded beach] is determined to be undertaken, a survey of all or part of the shoreline within the jurisdiction of the local government in which the beach is located shall be conducted in order to establish the area of beach to be protected by the project and locate an erosion control line.
>
> * * *
>
> (4) Upon completion of the survey depicting the area of the beach erosion control project and the proposed location of the erosion control line, the board of trustees shall give notice of the survey and the date on which the board of trustees will hold a public hearing for purpose of receiving evidence on the merits of the proposed erosion control line and, if approval is granted, of locating and establishing such requested erosion control line . . . in

> order that any persons who have an interest in the location of such requested erosion control line can be present at such hearing to submit their views concerning the precise location of the proposed erosion control line.
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> * * *
>
> (5) The board of trustees shall approve or disapprove the erosion control line for a beach restoration project. In locating said line, the board of trustees shall be guided by the existing line of mean high water, bearing in mind the requirements of proper engineering in the beach restoration project, the extent to which the erosion or avulsion has occurred, and the need to protect existing ownership of as much upland as is reasonably possible.

§ 161.161, Fla. Stat.

b. Development of the Department's Position on ECLs

31. Prior to 2009, the Department's established ECLs for beach restoration projects whether the project's construction was supported by state funding or not. There was an exception: when the property landward of the MHWL was owned by the state. In such a case, the Department saw no need to set an ECL since both the sovereignty lands and the adjacent uplands property are owned by the state.

32. This position held at least through January 15, 2009, when the Department held a workshop and hearing pursuant to Section 161.161, Florida Statutes, in Okaloosa County to establish an ECL for the Western Destin Project. The hearing

officer who conducted the ECL hearing was West Gregory, Department Assistant General Counsel.

33. While consideration of where the ECL should be established for the Western Destin Project was underway, there were ongoing discussions by e-mail and in briefings of whether the statute required an ECL. The discussion was prompted when Mr. Gregory, as Department Assistant General Counsel, drafted a memorandum (the "Draft Memorandum") to Michael Barnett, Chief of the Bureau of Beaches and Coastal Systems (the Bureau) to be sent through Paden Woodruff, an Environmental Administrator. The memorandum related to another beach restoration project in Okaloosa County: a project involving Eglin Air Force Base.

34. The Draft Memorandum shows a date of January "XX", 2009, and is stamped "DRAFT." P-119. It presents the question "Should . . . [the Department] require the United States Air Force (USAF) to establish an erosion control line (ECL) for the beach restoration project located on Eglin AFB?" Id.

35. The Draft Memorandum provides a brief answer: "No, . . . because the beach . . . is not critically eroded." Id.

36. The memorandum recognizes the public policy of the state to fix the boundary between public and private lands for beach restoration projects in Section 161.141, Florida Statutes, and a requirement that the Board of Trustees "must establish the line of mean high water prior to the commencement of a beach

restoration project," id., leading to the suggestion that each and every beach restoration project must establish an ECL.

37. The Draft Memorandum, however, construes Section 161.141, Florida Statutes, with Section 161.161, Florida Statutes, and draws support from an Attorney General Opinion and the Walton County Florida Supreme Court case to conclude that it is only when a project is undertaken with state funding that an ECL must be established. In the case of the Eglin AFB beach restoration projects, the Draft Memorandum concludes:

> This determination not to establish an ECL on the Eglin AFB beach restoration project would not preclude the USAF from obtaining a JCP permit. Rather, it precludes the USAF from receiving state funding assistance.

Id.

38. The Draft Memorandum was not sent to the intended recipients. It was submitted to two other lawyers in the Department. Mr. Gregory did not receive comments from them.

39. Although no comments were made to Mr. Gregory after the draft of the memorandum was sent to other members of the legal staff, the subject remained under discussion in the Department in early 2009.

40. Sometime in early 2009, based on a legal analysis of Department attorneys, the Department took the position that an ECL is required to be set when state funds are used for the construction of a project. The converse of this position, that

an ECL is not required to be set when no state funds are involved, is the statement alleged to be an unadopted rule.

41. Two permits were issued that did not require an ECL: one for the Eglin AFB beach restoration project in March of 2009, and another that was an emergency permit for Holiday Isle. As with Specific Condition 1 in the Western Destin Project, the determination to not require an ECL was because of the lack of state funding. As Mr. Barnett testified about the two permits, there "is no State cost share for construction . . . [and] that's the reason [the Department] didn't require establishment of an ECL." Tr. 1279.

42. Mr. Gregory's Draft Memorandum was never finalized. The Department issued three permits or draft permits (including for the Western Destin Project) with specific conditions that required pre-project MHWLs and that did not require ECLs. Otherwise, the Department has not committed the Department ECL Position to writing. Nonetheless, the Department ECL Position was stated in a deposition taken in this case on July 26, 2010.

43. On July 26, 2010, the deposition of Janet Llewellyn, the Director of Water Resources Management was taken by Petitioners. Director Llewellyn is "responsible ultimately for all the projects that are processed and actions taken out of [the] division." P-223 at 10. These include permits issued by

the Bureau and in particular, the Draft Permit, First Revised Draft Permit and the Second Draft Permit for the Project.

44. When asked about the Department's statement that an ECL is not required when there is not state funding, Ms. Llewellyn preferred to rephrase the Department position as to when an ECL is required rather than when it is not required. She then testified that an ECL is required when there is "state funding involved through [the Department's] funding program." Id. at 13.

45. Ms. Llewellyn was unable to pinpoint the moment the Department reached such a position other than:

> [t]he question came up sometime in the last year or two -- I couldn't tell you when -- about what the statute actually required in terms of when it was proper to set an erosion control line or required. And our attorneys did a legal analysis, again, of the statute, and that was their legal opinion of what the statute required.

Tr. 14. Whatever the date that such a position was precisely firmed up, Ms. Llewellyn was able to testify on July 26, 2010, "that if state funding is going to a project, than an ECL needs to be set. That's what the statute requires." Id. This statement was based on the opinions of Department attorneys prior to their use in connection with the issuance of beach restoration permits in Okaloosa County.

46. The Department has not initiated rule-making with respect to its ECL Position. Whether rule-making would be initiated was not known by the Bureau Chief on August 24, 2010, during his testimony in the final hearing.

Change of Position

47. The Department modified its position on ECLs that it appeared to have at the time of Ms. Llewellyn's deposition on August 4, 2010. As detailed above, it announced that an ECL would be required for the Western Destin Project, after all. The modification was formalized with the filing of the Second Revised Draft Permit on August 18, 2010.

Specific Condition 5

48. Before the challenged language in Specific Condition 5 was added by the First Revised Draft Permit, the Department had relied on General Condition 6 to give notice to permittees that the permit did not allow trespass:

> This permit does not convey to the Permittee or create in the Permittee any property right, or any interest in real property, nor does it authorize any entrance upon or activities on property which is not owned or controlled by the Permittee. The issuance of the permit does not convey any vested rights or any exclusive privileges.

Joint Ex. 9.

49. Based on the petitions in the Permit Challenge Cases, the Department proposed in the First Revised Draft Permit to add

to Specific Condition 5 the language that is underscored in the following:

> The Permittee is advised that no work shall be performed on private upland property until and unless the required authorizations are obtained. Sufficient authorizations shall included: (1) written evidence of ownership of any property which will be used in carrying out the project; (2) authorization for such use from the property owner which upland of mean high-water; (3) construction and management easements from upland property owners; or (4) a judgment from a court of competent jurisdiction which reflects that such authorization, in whole or in part, is not required.
>
> The Permittee is also advised to schedule the pre-construction conference at least a week prior to the intended commencement date. At least seven (7) days in advance of a pre-construction conference, the Permittee shall provide the written authorizations for the portion of the project for which construction is about to commence, as required above, written notification, advising the participants (listed above) of the agreed-upon date, time and location of the meeting, and also provide a meeting agenda and a teleconference number.

Joint Exhibit, Volume III, Tab 15, the First Revised Draft Permit, Page 7 of 26.

50. There was no evidence that the language added to Specific Condition 5 by the First Revised Draft Permit had been in any other permits or that the Department intended to use the language in any other beach restoration permits.

51. Other than whatever might be gleaned from the Draft Permit, itself (and its revisions), there was no evidence offered that the property of any of the petitioners, in fact, would be used in the Western Destin Beach Project.

CONCLUSIONS OF LAW

52. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. § 120.56, Fla. Stat.

Standing

53. "Any person substantially affected by an agency statement may seek an administrative determination that the statement violates s. 120.54(1)(a)." § 120.56(4)(a), Fla. Stat.

54. To establish standing to challenge an agency statement under the "substantially affected" test, a party must show (1) that the rule or policy will result in a real and immediate injury in fact, and (2) that the alleged interest is within the zone of interest to be protected or regulated. Jacoby v. Fla. Bd. of Med., 917 So. 2d 358, 360 (Fla. 1st DCA 2005).

a. Original Specific Condition 1 and the Department ECL Position

55. Petitioners have failed to demonstrate that they are substantially affected by either Original Specific Condition 1 or the Department ECL Position. They did not demonstrate that

Original Specific Condition 1 or the Department ECL Position would result in a real and immediate injury in fact.

56. They did not show where a pre-project MHWL would be in relation to where an ECL would be. Mr. Maddox' testimony, moreover, indicated that there would be no difference in their location; they would be in the same place. Without a demonstration of where the two lines would be and how Petitioners would be affected by the setting of a Pre-project MHWL rather than an ECL, Petitioners have not demonstrated any injury in fact to them caused by Original Specific Condition 1 or the Department ECL Position.

57. Furthermore, United Wisconsin Life Insurance Company v. Fla. Dep't of Life Ins., 831 So. 2d 239 (Fla. 1st DCA 2002) states the following:

> United Wisconsin has no right to pursue a separate, collateral challenge to an alleged nonrule policy where an adequate remedy exists through a section 120.57 proceeding. United Wisconsin does not dispute the assertion that it was free to make, and in fact did make, the same arguments raised in this case in the then-pending section 120.57 proceeding. United Wisconsin has an adequate forum in the section 120.57, Florida Statutes, proceeding and the now-pending appeal of the Department's final order in that case.

United Wisconsion at 240. This holding of the court seems to have been approved by the Florida Legislature when it amended Section 120.57, Florida Statutes, to add the following language:

> An agency or administrative law judge may not base agency action that determines the substantial interests of a party on an unadopted rule. The administrative law judge shall determine whether an agency statement constitutes an unadopted rule.

§ 120.57(1)(e), Fla. Stat.

58. These challenges to Specific Condition 1 were litigated alongside the Section 120.57 Permit Challenges. Had the requisite showings been made that Petitioners substantial interests were affected by Original Specific Condition 1 and had the condition been shown to meet the definition of a "rule" in Section 120.52(16), Florida Statutes, the remedy called for by Section 120.57(1)(e), Florida Statutes, was achieved when the Department changed Specific Condition 1 to require and ECL rather than a Pre-project MHWL.

Specific Condition 5

59. Petitioners have not demonstrated that their interests will be substantially affected by Specific Condition 5.

60. As a first step in showing that they are substantially affected by Specific Condition 5, Petitioners must show that their property will be used during the Western Destin Project.

61. If they show that their property will be used by the County during the beach restoration activity, then they must show how they will be substantially affected if they are asked

for their authorization and any events that follow as the result of their decision.

62. The Sherrys and Mr. Donovan do not own property along the shoreline that is within the Western Destin Project. There is no potential for their property to be used for the Project. There are no circumstances related to the Project, therefore, when they will be asked for their authorization.

63. The Oceania Petitioners owned property along the shoreline of the Project when the Draft Permit was issued. But the shoreline adjacent to their property is now excluded from the Project. The Oceania Petitioners offered no evidence that their property in the gap between the two segments of the beach to be restored would be used during the restoration.

64. The MACLA Petitioners own property along the shoreline of the Project. Petitioners claim in their proposed recommended order that "[t]he Western Destin Project as designed and approved in the Draft JCP contemplates that the private property of Petitioners, MACLA, Hughes Trust and Kershaw will be used in carrying out the project." Para. 50 of Petitioners' Proposed Final Order at 19.

65. A review of the Draft Permit indicates that upland property along the shoreline will be used to complete the Project. There was no expert evidence, however, that explained the actual mechanics and logistics of beach restoration and

whether or not all upland property along a segment of beach to be restored had to be used to construct the Project. Nor was there evidence that if authorization was refused whether that meant the Project could not go forward.

66. On the assumption that the MACLA Petitioners' property must be used for the Project to proceed, that showing alone is not sufficient proof of standing. Okaloosa County is still required to seek the authorization of the MACLA Petitioners. The MACLA Petitioners have the apparent right to refuse (which each profess they will do). Being asked for authorization which is refused can hardly be said to amount to their interests being substantially affected.

67. Specific Condition 5 contemplates satisfaction of the condition if a court of competent jurisdiction rules that an authorization is not required. On the state of this record, however, it is speculative as to whether the County would sue the MACLA Petitioners to obtain a judgment to that effect should their property be needed for the Project and should they refuse authority to the County to use it.

68. Petitioners have failed to demonstrate any injury to them caused by Specific Condition 5. None of the Petitioners have proven that they have standing to seek a determination that Specific Condition 5 is an Unadopted Rule.

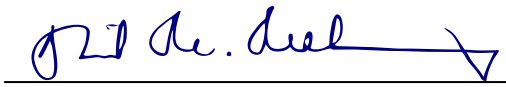
69. In light of the rulings in this order on the standing issues, there is no need to address the remaining issues related to violations of Section 120.54(1)(a), Florida Statutes.

70. Petitioners are not entitled to attorney's fees and costs under Section 120.595(4), Florida Statutes.

ORDER

The petitions in Case Nos. 10-5348RU, 10-6205RU, and 10-8197RU, are dismissed for lack of standing.

DONE AND ORDERED this 4th day of November, 2010, in Tallahassee, Leon County, Florida.



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NOTICE OF RIGHT OF 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 the original notice of appeal with the Clerk of the Division of Administrative Hearings and a 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 filed within 30 days of rendition of the order to be reviewed.