STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

JOSEPH BURGESS and THOMAS FULLMAN,	)	
Petitioners,	)	
vs.	)	**OGC CASE NO. 11-0548**
	)	**DOAH CASE NO. 11-2016**
MARTIN COUNTY BOARD OF COUNTY COMMISSIONERS and DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
Respondents.	)	

CONSOLIDATED FINAL ORDER

An Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH"), on November 7, 2011, submitted his Recommended Order ("RO") to the Department of Environmental Protection ("DEP" or "Department") in the above captioned proceeding. The RO is attached hereto as Exhibit A. The RO indicates that copies were sent to counsel for the Petitioners, Joseph Burgess and Thomas Fullman, and to counsel for the Co-Respondents, Martin County Board of County Commissioners ("Martin County" or "County") and the Department. On November 22, 2011, the Petitioners and the County filed Exceptions to the RO. The County and the Department responded to the Petitioners' Exceptions on November 29 and December 2, 2011,

respectively. The Department responded to the County's Exceptions on December 2, 2011. This matter is now before the Secretary for final agency action.[1]

BACKGROUND

Martin County applied on December 24, 2009, for an Environmental Resource Permit ("ERP") and a Sovereignty Submerged Lands Lease ("SSL") to construct and operate a public mooring field and dinghy dock ("Project"). The proposed mooring field would occupy 34.29 acres of the Jensen Beach to Jupiter Inlet Aquatic Preserve ("Aquatic Preserve") in the Indian River Lagoon ("Lagoon"), just south of the Jensen Beach Causeway. It would consist of 51 permanently anchored buoys to accommodate vessels of 20 feet to 60 feet in length. The project would also authorize the construction and operation of a 1,832 square-foot L-shaped dinghy dock within an additional 0.178-acre area in the Aquatic Preserve to accommodate up to 18 vessels.

On February 22, 2011, the Board of Trustees of the Internal Improvement Trust Fund ("BOT" or "Board") determined pursuant to rule 18-20.004(1)(b) that it is in the public interest to lease approximately 34.47 acres of sovereignty submerged lands to the County for 25 years for the Project. The Department issued a Consolidated Notice of Intent to issue the ERP and SSL on March 4, 2011. On March 17, 2011, the County published the Department's Consolidated Notice of Intent to Issue in the Stuart News.

The Petitioner Burgess, through counsel, filed on March 31, 2011, a request for extension of time to file a petition for administrative hearing challenging the project. On

[1] The Secretary of the Department is delegated the authority to review and take final agency action on applications to use sovereignty submerged lands when the application involves an activity for which the Department has permitting responsibility. *See* Fla. Admin. Code R. 18-21.0051(2).

April 5, 2011, the Department granted an extension of time until April 14, 2011, to the Petitioner Burgess. On April 14, 2011, the Petitioners Burgess and Fullman filed a petition for administrative hearing, which was forwarded to DOAH. The assigned ALJ conducted the final hearing on June 14-17, 2011, in Stuart, Florida. The hearing transcript was filed with DOAH on July 6, 2011. The parties timely submitted their proposed recommended orders, and the ALJ issued the RO on November 7, 2011.

RECOMMENDED ORDER

The issues for determination by the ALJ were whether the petition that initiated this case was timely as to the Petitioner Fullman and if so, whether the Petitioner Fullman has standing; whether the Petitioner Burgess has standing; and whether the record demonstrates reasonable assurances for approval of Martin County's application to construct and operate a public mooring field in the Jensen Beach to Jupiter Inlet Aquatic Preserve and to construct and operate a dinghy dock immediately south of the Jensen Beach Causeway to support the mooring field. (RO page 2).

Timeliness of Fullman's petition

The ALJ found that the Petitioner Burgess obtained a valid extension of time to file the petition that initiated this case and the petition was filed within the time allowed by the order granting the extension. (RO ¶¶ 22, 23). The Petitioner Fullman, however, did not seek an extension of time to file the petition in writing, and the order granting the extension of time to Burgess did not extend the time for filing a petition to Fullman. (RO ¶¶ 22, 23, 24, 106). The ALJ concluded that the Petitioner Fullman should be dismissed as a petitioner. (RO ¶ 107).

Standing of Petitioner Burgess

The ALJ found that the Petitioner Burgess lives in Jensen Beach and visits the area of the Project several times a week. The Petitioner Burgess frequently takes his grandchildren and out-of-town friends to the area to appreciate the beauty of the Aquatic Preserve, watch the fishermen, and enjoy the environmental diversity of the Lagoon. (RO ¶¶ 12, 13). The Petitioner Burgess is concerned that the Project will destroy habitat for marine life and the birds which nest and feed in the ecosystem of the Aquatic Preserve and the Lagoon. (RO ¶ 16). The ALJ concluded that Petitioner Burgess had a substantial interest that reasonably could be affected by the agency action in question, and that the injury is of the type that the proceeding is designed to protect. (RO ¶ 109). Thus, the ALJ concluded that the Petitioner Burgess had standing to initiate this proceeding pursuant to sections 120.569 and 120.57, Florida Statutes. (RO ¶¶ 109, 110).

SSL authorization

The ALJ found that the County and the Department presented evidence that a mooring field in the proposed location was consistent with the applicable management plan, namely, the Indian River Lagoon Aquatic Preserves Management Plan adopted on January 22, 1985. The County also presented evidence that the mooring field was consistent with the Conceptual State Management Plan. The ALJ found that the Petitioners did not present contrary evidence of equivalent quality to rebut a determination that the Project was consistent with the management plans. (RO ¶¶ 94, 95, 115).

The ALJ also concluded that the SSL public interest assessment criteria for Aquatic Preserves required a cost/benefits balancing test taking into account "the quality and nature of the specific aquatic preserve." Fla. Admin. Code R. 18-20.004(2)(a)2. Thus, projects in less developed more pristine aquatic preserves (such as Apalachicola Bay) are subject to a higher standard than a more developed preserve, *Id.*, such as the Jensen Beach to Jupiter Inlet Aquatic Preserve. (RO ¶¶ 123, 124). The ALJ found that the Project's public interest benefits included enhancement to water quality in the Aquatic Preserve; the first-come, first-serve basis on which it will be open to the public; accessibility to the upland public amenities for patrons; protection of seagrass beds; and removal of dilapidated vessels in the area. (RO ¶¶ 43, 79, 80-83, 91, 102, 125). He concluded that the Project's environmental benefits of enhancing water quality and preventing damage to existing seagrass beds outweighed the environmental cost of diminishing the opportunity for seagrass to grow and expand in the Mooring Field. (RO ¶¶ 79, 80-83, 102, 125).

In applying the BOT rule criteria in rule 18-20.004(5)(a)2 that requires an applicant to minimize adverse impacts to resources, the ALJ found that the dinghy dock and the mooring field were downsized and relocated to avoid impacts to vegetation. (RO ¶¶ 28, 40, 41, 48, 49, 50, 73, 74, 78, 126). He also concluded that the impacts from shading caused by the dinghy dock will be minor. (RO ¶¶ 48, 50, 74, 126).

ERP Permit

The ALJ noted that section 373.414(1), Florida Statutes, requires the applicant to provide reasonable assurance that state water quality standards will not be violated. The ALJ concluded that the Project will not violate water quality standards but posed the

potential for enhancement of water quality in the Aquatic Preserve. (RO ¶¶ 79-82, 84-86, 127, 128). The ALJ specifically concluded that the Petitioners' expert's opinion that the concentration of boats in the mooring field created concern because of toxic substances that would leach from boat bottoms was outweighed by the County consultant's water quality analysis, the current conditions in the Project area that include adequate flushing and heavy vessel traffic, the number of boats typically moored in the area at any one time, and the dilapidated vessels sunken in the substrate. (RO ¶¶ 37, 38, 70, 84, 85, 129).

The ALJ noted that reasonable assurance must be provided that a proposed activity in, on, or over surface waters designated as Outstanding Florida Water "will be clearly in the public interest." § 373.414(1), Fla. Stat. The public interest test involves a balancing of the seven enumerated criteria listed in section 373.414(1)(a), Florida Statutes. (RO ¶ 130). The ALJ concluded that the County provided reasonable assurance that the Project was clearly in the public interest through the testimony at hearing, the conditions in the proposed permit, the supporting documentation in the application, and the County's removal of the dilapidated vessels from the Lagoon. (RO ¶ 131). The ALJ found that the Project would positively affect the public health, safety, welfare, and property of others. Boaters would be able to safely secure their vessels to a mooring buoy instead of anchoring in well-developed seagrass beds; the Project provides boaters safe navigation within the mooring field, to and from the dinghy dock, and to and from the Intracoastal Waterway; and the ecological and aesthetic value in the Lagoon will be enhanced through implementation of the management plan and removal of the dilapidated vessels. (RO ¶¶ 37, 38, 39, 41, 80-83, 96-101, 132).

The ALJ concluded that the Project would positively affect the conservation of fish and wildlife, including threatened or endangered species and their habitat. (RO ¶¶ 37, 38, 39, 62-67, 75, 133). The ALJ also concluded that the Project would positively affect navigation and would not adversely affect the flow of water or cause harmful erosion or shoaling. (RO ¶¶ 87-88, 134).

The ALJ further concluded that the Project would positively affect the fishing or recreational values or marine productivity in the vicinity of the Project. (RO ¶¶ 62-67, 135). He also found that the Project would have a positive effect on the current condition and relative value of functions being performed by areas affected by the Project. (RO ¶¶ 62-67, 135, 138). In addition, the ALJ concluded that the permanent nature of the Project would have a positive effect in the Lagoon. (RO ¶¶ 79-86, 136). Also, the Project would not adversely affect historical or archaeological resources in the area since there are none. (RO ¶¶ 76, 137).

The ALJ noted that Fla. Admin. Code R. 40E-4.301(1)(f) requires the County to provide reasonable assurance that the construction and operation of the surface water management system will not cause adverse secondary impacts to the water resources. He found that the evidence at hearing established that the Project would not result in secondary impacts to water resources in the Lagoon, but rather would improve water resources in the area. The ALJ concluded that the improvement would be accomplished through observance of the requirements in the management plan. (RO ¶¶ 79-82, 84-86, 127, 128, 139, 140).

Thus, the ALJ recommended that the Department enter a final order issuing the Consolidated ERP and SSL, (Department File No. 43-0298844-001 and Lease No.

430345996) to the County. He also recommended that the Consolidated ERP and SSL incorporate the current drawings and revised management plan submitted by the County after the application was deemed complete. (RO page 42 and ¶¶ 96-101).

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. (2011); *Charlotte County v. IMC Phosphates Co.*, 18 So.3d 1089 (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 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); *Nunez v. Nunez*, 29 So.3d 1191, 1192 (Fla. 5th DCA 2010).

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); *Helfetz 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., Peace River/Manasota Regional Water Supply Authority v. IMC Phosphates Co.*, 18 So.3d 1079, 1088 (Fla. 2d DCA 2009); *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). Therefore, if the DOAH record discloses any competent substantial evidence supporting a challenged factual finding of the ALJ, the agency is bound by such factual finding in preparing a 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). 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.*, 18 So.3d 1089 (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).

Agencies do not have jurisdiction, however, to modify or reject rulings on the admissibility of evidence. Evidentiary rulings of the ALJ that deal with "factual issues susceptible to ordinary methods of proof that are not infused with [agency] policy considerations," are not matters over which the agency has "substantive jurisdiction."

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

RULINGS ON EXCEPTIONS

The case law of Florida holds that parties to formal administrative proceedings must alert reviewing agencies to any perceived defects in DOAH hearing procedures or in the findings of fact of ALJs by filing exceptions to DOAH recommended orders. *See, e.g., Comm'n on Ethics v. Barker*, 677 So.2d 254, 256 (Fla. 1996); *Henderson v. Dep't of Health, Bd. of Nursing*, 954 So.2d 77 (Fla. 5th DCA 2007); *Fla. Dep't of Corrs. v. Bradley*, 510 So.2d 1122, 1124 (Fla. 1st DCA 1987). Having filed no exceptions to certain findings of fact the party "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Envtl. Coalition of Fla., Inc. v. Broward County*, 586 So.2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Medical Ctr., Inc. v. State of Fla., Agency for Health Care Admin.*, 847 So.2d 540, 542 (Fla. 4th DCA 2003). Even when exceptions are not filed, however, an agency head reviewing a recommended order is free to modify or reject any erroneous conclusions of law over which the agency has substantive jurisdiction. *See* § 120.57(1)(l), Fla. Stat. (2011);

Barfield v. Dep't of Health, 805 So.2d 1008 (Fla. 1st DCA 2001); *Fla. Public Employee Council, 79 v. Daniels*, 646 So.2d 813, 816 (Fla. 1st DCA 1994).

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. (2011). 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.*

PETITIONERS' EXCEPTIONS

Exception No. 1

The Petitioners take exception to the last sentence in paragraph 8 of the RO where the ALJ found that "[b]oats now commonly anchor in the area in a random, un-regulated manner and will continue to do so without the permit and the lease." (RO ¶ 8). The Petitioners assert that the latter part of the sentence is not supported by "substantial competent evidence that if a permit is issued, boats will no longer continue to anchor in the area outside the mooring field." *See* Petitioners' Exceptions at page 2. The Petitioners further asserts that the statement is contrary to the evidence that showed Martin County did not have an ordinance in effect at the time of the hearing that regulates anchoring "outside permitted mooring fields." *See* Petitioners' Exceptions at page 1.

Contrary to the Petitioners' assertions the contested portion of the second sentence of paragraph 8 is supported by competent substantial record evidence. (Tr. Vol. 1, pgs. 56-67, 66-67, 110-111; Vol. 2, pgs. 215-217, 220-223; Vol. 3, pgs. 436-437;

Vol. 4, pgs. 479-481; MC Exh. 3, App'x B, Figs. 1-3; MC Exh. 5, App'x E [Attachments 2 & 4] & App'x G; MC Exh. 9: Applicant's Response to DEP R.A.I. #1, pgs. 12, 15, 17-18, 24, App'x A, Sheets 2-5 & 15 [of 16], & App'x I, and Applicant's Response to US-ACE. R.A.I. #1, pgs. 4-8.) The ALJ found that boats "will continue to do so [anchor in the Project area in a random, un-regulated manner] without the permit and the lease." (RO ¶ 8). This is a reasonable inference from the record evidence and cannot be rejected. *See* § 120.57(1)(l), Fla. Stat. (2011).

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

Exception No. 2

The Petitioners take exception to paragraph 31 where the ALJ found that "[t]he proposed site of the Mooring Field is an area that was dredged for the filling of submerged lands to create the nearby west island of the [Jensen Beach] Causeway." The Petitioners argue that although one of the County's experts testified that the mooring field appears to be a "historic dredge hole" (Tr. Vol. 7, p. 964-965), that the Petitioner's expert testified that it is a "relatively undisturbed location." (Tr. Vol. 7, pp. 908-909). Thus, the Petitioners argue that there is no competent substantial record evidence to support the ALJ's finding. The ALJ's decision, however, 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 his decision. *See e.g., Peace River/Manasota Regional Water Supply Authority v. IMC Phosphates Co.*, 18 So.3d 1079, 1088 (Fla. 2d DCA 2009).

Because competent substantial record evidence supports the ALJ's finding (Tr. Vol. 7, pp. 964-965; MC Ex. 32), the Petitioners' Exception No. 2 is denied.

Exception Nos. 3 and 5[there is no Exception No. 4]

The Petitioners take exception to paragraphs 35 and 85, which both contain the ALJ's finding that the relief bridge and strong currents promote flushing and water circulation otherwise impeded by the Jensen Beach Causeway. (RO ¶¶ 35, 85). The Petitioners assert that their experts "were the only qualified witnesses to offer testimony regarding the level of water circulation and flushing in the project site area, and both of them opined that flushing and circulation were poor." *See* Petitioners' Exceptions at page 4.

As pointed out by the Department and the County in their responses, however, the ALJ's finding is based on competent substantial record evidence including expert testimony (Tr. Vol. 1 pp. 63-64; Vol. 2, p. 230; Vol. 3, p. 396; Vol. 4, pp. 508, 510-511; MC Exs. 9, 18, 22). *See* § 120.57(1)(l), Fla. Stat. (2011); *Peace River/Manasota Regional Water Supply Authority v. IMC Phosphates Co.*, 18 So.3d 1079, 1088 (Fla. 2d DCA 2009)(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).

Therefore, based on the foregoing reasons, the Petitioners' Exception Nos. 3 and 5 are denied.

Exception No. 6

The Petitioners take exception to the second sentence in paragraph 99 of the RO where the ALJ finds that "[q]uadrant 4 is the quadrant with the seagrass." The Petitioners argue that this finding is inaccurate since the ALJ found in paragraph 60 that

seagrass is present in two (northwest and southwest) of the four quadrants that comprise the mooring field footprint. *See also* RO paragraph 59. A complete review of the competent substantial record evidence supports modifying the second sentence in paragraph 99 to reflect that Quadrant 4 (the southwest quadrant of the mooring field) contains the most seagrass of the two quadrants with seagrass (MC Ex. 11 at page 3 "Conclusion" and Sheet 5 of 16; Tr. Vol. 1 pp. 73, 149-150; Vol. 2, pp. 189-193; Vol. 5 p. 583; Vol. 6, p. 861). Therefore, based on the foregoing reasons, the Petitioners' Exception No. 6 is granted.

Exception No. 7

The Petitioners take exception to paragraphs 106 and 107 in the RO where the ALJ concluded that only the Petitioner Burgess obtained a valid extension of time to file a petition from the Department. The Petitioners argue that the ALJ erroneously concluded that Mr. Fullman did not obtain an extension of time to file a petition, thus making the petition for administrative hearing timely as to Mr. Fullman. As support, the Petitioners argue that the Request For Extension of Time to File a Petition filed on behalf of the Petitioner Burgess supports a conclusion that Mr. Fullman also filed a timely petition for administrative hearing (Pet. Ex. 31). *See* Petitioners' Exceptions at pages 6-8.

Contrary to the Petitioners' argument the ALJ found in paragraph 22 that "Mr. Fullman did not have a formal arrangement with Mr. Burgess regarding securing an extension of time for the filing of an administrative hearing." Paragraph 106 contains the factual finding that "Fullman, however, did not seek an extension of time to file the petition in writing and the order granting the extension of time to Mr. Burgess did not

extend the time for filing a petition to Mr. Fullman."[2] Also, in paragraph 24 the ALJ found that "[u]nlike Mr. Burgess, however, Mr. Fullman, had not been granted an extension of time for the filing of a petition on his behalf at the time the petition was filed." The Petitioners did not file exceptions to these and other crucial factual findings of the ALJ in paragraphs 22, 23, 24, 30 and 51, which support the conclusions in paragraphs 106 and 107. Having filed no exceptions to certain findings of fact the Petitioners in this case have thereby expressed agreement with, or at least waived any objection to, those findings of fact. *See, e.g., Envtl. Coalition of Fla., Inc. v. Broward County*, 586 So.2d 1212, 1213 (Fla. 1st DCA 1991).

The ALJ's unchallenged factual findings support his ultimate conclusion in paragraph 107 and the Petitioners did not provide an legal authority to the contrary. *See, e.g.,* Fla. Admin. Code Rule 62-110.106(3) and (4); *Somero v. Hendry Gen. Hosp.*, 467 So. 2d 1103 (Fla. 4th DCA 1985); *City of St. Cloud v. Dep't of Envtl. Regulation,* 490 So. 2d 1356 (Fla. 5th DCA 1986). Therefore, based on the foregoing reasons, the Petitioners' Exception No. 7 is denied.

Exception No. 8

The Petitioners take exception to the ALJ's lack of conclusions regarding Mr. Fullman's standing. The Petitioners assert that paragraphs 108, 109, and 110 conclude that the Petitioner Burgess has standing to initiate this proceeding under Sections 120.569 and 120.57, Florida Statutes, the same conclusions "should be made with

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[2] If an ALJ labels a conclusion of law as a finding of fact (or vice versa), the label should be disregarded and the item treated as though it were properly labeled. *See, e.g., Battaglia Properties v. Fla. Land and Water Adjudicatory Comm'n*, 629 So.2d 161, 168 (Fla. 5th DCA 1994).

respect to Petitioner Fullman, who also has standing to initiate this proceeding based upon findings of fact in Paragraphs 17-22 of the Recommended Order." *See* Petitioners' Exceptions at page 8.

As explained above, the ALJ correctly dismissed the Petitioner Fullman's petition for administrative hearing because it was not timely filed. Thus, under Rule 62-110.106(3), Florida Administrative Code ("F.A.C."), Mr. Fullman waived any right to initiate an administrative proceeding under Sections 120.569 and 120.57, Florida Statutes. *See* Fla. Admin. Code R. 62-110.106(3)(b). The ALJ was not required to make any further conclusions regarding Mr. Fullman's right to initiate an administrative proceeding under Sections 120.569 and 120.57, Florida Statutes. Therefore, based on the foregoing reasons, the Petitioners' Exception No. 8 is denied.

Exception No. 9

The Petitioners take exception to paragraph 115 of the RO where the ALJ concludes that:

> 115. The County and the Department presented evidence that a Mooring Field in the proposed location is consistent with the applicable management plan. The applicable management plan is the Indian River Lagoon Aquatic Preserves Management Plan adopted on January 22, 1985. The County also presented evidence that the Mooring Field is consistent with the Conceptual State Management Plan. The Petitioners did not present contrary evidence of equivalent quality to rebut a determination that the Project is consistent with the management plans.

The Petitioners argue that the first and last sentence of paragraph 115 should be deleted because, "witnesses for the County and the DEP testified that they did not review the applicable preserve management plan or take into account the requirements

of the Indian River Lagoon Aquatic Preserves Management Plan that was adopted January 22, 1985." *See* Petitioners' Exceptions at page 8. The Petitioners argue that, in contrast, their expert "testified at length about specific inconsistencies between the Indian River Lagoon (Jensen Beach to Jupiter Inlet Aquatic) Preserve Management Plan and the mooring field project and location." *See* Petitioners' Exceptions at page 10.

Contrary to the Petitioners' characterization, the County and the Department presented competent substantial evidence, including two experts, that the siting of the mooring field in the Lagoon at the proposed location was consistent with the applicable 1985 Management Plan. (Tr. Vol. 2, p. 188, lines 6-11; Vol. 3, p. 309, line 17 - p. 312, line 16; Vol. 3, p. 468, line 5 - p. 469, line 20; Vol. 4, p. 478, lines 12-23; Vol. 4, p. 538, line 19 - p. 541, line 6; Vol. 4, p. 542, lines 15-20). In addition, the County and the Department presented expert testimony that the Project will have a positive environmental impact on the resources of the Indian River Lagoon Aquatic Preserve, which also supports the conclusion that the Project is consistent with the Indian River Lagoon Aquatic Preserves Management Plan. (RO ¶¶ 39, 41, 79-83, 91, 95; Tr. Vol. 4, pp. 480, 507-509, 517, 521-522, 527, 539-542, 544, 557, 596, 604-605; MC Exs. 16, 20, 23). 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 his decision. *See e.g., Peace River/Manasota Regional Water Supply Authority v. IMC Phosphates Co.*, 18 So.3d 1079, 1088 (Fla. 2d DCA 2009).

The Petitioners also attempt to argue that the Project will cause significant adverse impacts to sovereignty lands and associated resources and, therefore, the

Project could only be approved under Fla. Admin. Code R. 18-21.004(2)(b) (and Section E, Chapter III of the Indian River Lagoon Aquatic Preserves Management Plan) if the County proved that there were no reasonable alternatives available for the mooring field outside the aquatic preserve. *See* Petitioners' Exceptions at pages 10-11. The Petitioners' argument is without merit on the record in this case. The ALJ made numerous factual findings based on competent substantial evidence that the Project would not cause significant adverse impacts to sovereignty lands and associated resources (RO ¶¶ 28, 41, 45, 50, 62, 67, 71, 72, 73, 74, 126). In addition, the rule criteria in Fla. Admin. Code R. 18-20.004(1)(e) and 18-20.004(1)(g), and competent substantial record evidence support the conclusion that it was not necessary for the County to address reasonable alternative project locations outside the aquatic preserve. (RO ¶ 122; Tr. Vol. 3, pp. 302-304, 448-451; Vol. 4, pp. 532-534, 544.)

Therefore, based on the foregoing reasons, the Petitioners' Exception No. 9 is denied.

Exception No. 10

The Petitioners take exception to paragraph 118 in the RO where the ALJ concludes that:

> 118. The Project complies with the requirements of the rule except that it is in a Resource Protection Area 2. It is located, however, approximately 500 feet from the Intracoastal Waterway. It is within a reasonable distance of a publicly- maintained navigation channel. The Project, therefore, is eligible for approval under the statute.

The Petitioners argue that paragraph 118 erroneously concluded that the Project is eligible for approval under the statutory exception in Section 258.42(3)(e), Florida

Statutes, to the rule that prohibits docking facilities in Resource Protection Areas 1 or 2. *See* Fla. Admin. Code R. 18-20.004(5)(d)2 and RO ¶¶ 116, 117. The Petitioners argue that the Project is not consistent with the Indian River Lagoon Management Plan because Section A. 5, Chapter IX of the plan states marinas shall not be located within a Class 1 or 2 Resource Protection Area. Thus, the Petitioners argue that the Project cannot qualify for authorization under Section 258.42(3)(e), Florida Statutes. The statute provides that commercial docking facilities found to be consistent with the use or management criteria of the preserve may be approved if the facilities are located within a reasonable distance of a publicly maintained navigational channel.

In making their argument, the Petitioners choose, however, to ignore the effect of a statutory exception prescribed by Section 258.42(3)(e)3, Florida Statutes. Both the rule and the management plan prohibit docking facilities in Resource Protection Areas 1 or 2. *See* Fla. Admin. Code R. 18-20.004(5)(d)2 and MC Ex. 23, section A.5, chapter IX. The rule contains an exception to the prohibition "as allowed pursuant to Section 258.42(3)." *Id.* Although the management plan does not contain the exception, the "rule criteria shall prevail" where it "may differ with specific policies in the management plans." Fla. Admin. Code R. 18-20.004(7); Tr. Vol. 4, pp. 540-541. To allow the management plan's prohibition, which is the same as the rule's prohibition, to defeat the effect of the statutory exception, would be an absurd result. *See State v. Iacovone*, 660 So.2d 1371, 1373 (Fla. 1995)(Statutes, as a rule, will not be interpreted so as to yield an absurd result).

Therefore, based on the foregoing reasons, the Petitioners' Exception No. 10 is denied.

Exception Nos. 11, 12, and 14

The Petitioners take exception to the conclusions in paragraphs 133, 135 and 138, where the ALJ concluded that:

> 133. The Project will positively affect the conservation of fish and wildlife, including threatened or endangered species and their habitat.
>
> 135. The Project will positively affect the fishing or recreational values or marine productivity in the vicinity of the Project.
>
> 138. The Project will have a positive effect on the current condition and relative value of functions being performed by areas affected by the proposed activity.

The Petitioners assert that these conclusions are erroneous and should be deleted because they are "not supported by substantial competent evidence and [are], in fact, contrary to the evidence presented during the final hearing." *See* Petitioners' Exceptions at pages 13-14.

Contrary to the Petitioners' assertions, the ALJ's conclusions are based on unchallenged factual findings[3] with competent substantial record support. (RO ¶¶ 28, 34, 37, 38, 39, 41, 43, 44, 45, 48, 49, 50, 55, 62, 67, 72, 73, 79-81, 82, 83, 88, 91, 100; Tr. Vol. 1, pp. 110; Vol. 2, p. 240; Vol. 3, pp. 369, 435-437; Vol. 4, pp. 503-504, 514-515, 517-519, 521-523; Vol. 5, pp. 615-616).

Therefore, based on the foregoing, the Petitioners' Exception Nos. 11, 12, and 14, are denied.

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[3] 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).

Exception No. 13

The Petitioners take exception to paragraph 136, where the ALJ concluded that:

> 136. The permanent nature of the Project will have a positive effect in the Lagoon.

The Petitioners assert that this conclusion is erroneous and should be deleted because it is "not supported by substantial competent evidence and is, in fact, contrary to the evidence presented during the final hearing." See Petitioners' Exceptions at page 14.

Contrary to the Petitioners' assertion the ALJ's conclusion is based on unchallenged factual findings[4] with competent substantial record support. (RO ¶¶ 37, 39, 41, 46, 49, 55, 79, 80, 81, 83, 87, 88, 125; Tr. Vol. 1, pp. 110, 228; Vol. 2, pp. 240, 325; Vol. 3, pp. 369, 435-437, 458-459, 461; Vol. 4, pp. 503-504, 514-515, 517-519, 521, 534-535, 546, 557; Vol. 5, pp. 596, 615-616). Therefore, based on the foregoing reasons, the Petitioners' Exception No. 13 is denied.

Exception No. 15

The Petitioners take exception to the ALJ's recommendation on page 42 of the RO. Based on the rulings in all the above exceptions that are incorporated herein, the Petitioners' Exception No. 15 is denied.

MARTIN COUNTY'S EXCEPTIONS

County Exception No. 1

The County takes exception to the portion of the Preliminary Statement on page 4 of the RO where the ALJ describes the exhibits offered by the County as "Martin

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[4] 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).

County offered 27 exhibits, marked for identification as MC Exhibits 1-6, 9-25, and 27-30." (RO at page 4 lines 20-21). The County asserts that this description omits MC Exhibits 26A and 32. *See* Martin County's Exceptions at pages 1-2.

The County points to the hearing transcript (Tr. Vol. 5, pp. 709-710), where the County argues that the ALJ received into evidence an aerial photograph identified as MC Exhibit 26A. Contrary to the County's assertion, however, the record shows that the County's attorney began his cross examination by handing the witness two photographs "that's been marked as County Exhibit Number 26." (Tr. Vol. 5, p. 707, lines 20-22). Thereafter, the witness wrote an "X" on one of the photographs (identified as Exhibit 26A) with a red pen (Tr. Vol. 5, p. 708, line 25). The County moved to substitute the photograph marked "X" for the ALJ's unmarked photograph (Tr. Vol. 5, p. 709, line 12 – p. 710, line 4). The record does not show, however, that the photograph marked as Exhibit 26A and with an "X" placed there by the witness, was received into evidence by the ALJ.

The County also points to the hearing transcript (Tr. Vol. 7, p. 996) where the ALJ received into evidence MC Exhibit 32 subject to a motion to strike if the Petitioners decided to recall a certain witness for cross examination. Thereafter, the Petitioners declined the ALJ's offer to recall that witness (Tr. Vol. 7, p. 1004, lines 15-17), and the ALJ concluded the hearing (Tr. Vol. 7, p. 1005, lines 7-8; p. 1013, lines 18-21).

Although the admissibility of evidence is a matter within the jurisdiction of the ALJ, the competent substantial record evidence supports a conclusion that the Preliminary Statement's recitation of the exhibits offered by the County is not complete

as to MC Exhibit 32. Therefore, based on the foregoing, the County's Exception No. 1 is granted as to MC Exhibit 32, but denied as to MC Exhibit 26A.

County Exception No. 2

The County takes exception to the ALJ's description of witness James Egan's professional affiliation in the Preliminary Statement on page 5. Mr. Egan is described as the "Executive Director of the Marine Resources Council of East Florida." *See* RO at page 5. The County argues that this description was contradicted by the witness' own testimony that he was not at the hearing representing the Marine Resources Council, but that he was representing his "private consulting firm: Just Earth, Incorporated." (Tr. Vol. 6, p. 834, lines 21-24). The County also points to the ALJ's confirmation: "he's not here representing the Marine . . . Marine Resources Council, ..." (Tr. Vol. 6, p. 841, lines 22-24). While Martin County's exception is technically correct, the record supports a finding that James Egan is the executive director for the Marine Resources Council.

Therefore, based on the foregoing, the County's Exception No. 2 is granted to the extent that the Preliminary Statement's description does not accurately reflect Mr. Egan's role at the final hearing.

County Exception No. 3

The County takes exception to the second sentence in paragraph 12 where the ALJ found that the Petitioner Burgess "has a direct view of the Lagoon from the rear deck of his home, approximately six-tenths of a mile west of the Project site." (RO ¶ 12). The County argues that the record supports a finding that his home is "approximately eight-tenths of a mile" west of the Project site. *See* Martin County's Exceptions at page 3.

The ALJ's finding is a reasonable inference from the competent substantial record evidence (Tr. Vol. 5, pp. 646, 648). If the DOAH record discloses any competent substantial evidence supporting a challenged factual finding of the ALJ, the agency is bound by such factual finding in preparing a 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).

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

County Exception No. 4

The County takes exception to paragraph 14 where the ALJ found that:

> 14. When Mr. Burgess drives to the area by way of the Jensen Beach Causeway (the "Causeway") he often finds it difficult to find a parking spot.

The County argues that the finding "misstates the difficulty that Petitioner Burgess has had finding a spot." See Martin County's Exceptions at page 3. The County points to testimony from the witness that could be construed to mean that parking is only difficult "[i]n the season" (Tr. Vol. 5, p. 651, lines 20-21). Where the DOAH record discloses any competent substantial evidence, however, supporting a challenged factual finding of the ALJ, the agency is bound by such factual finding in preparing a final order. *See, e.g., Walker v. Bd. of Prof. Eng'rs*, 946 So.2d 604 (Fla. 1st DCA 2006).

The County's exception essentially requests that this agency supplement the ALJ's factual findings. An agency has no authority, however, 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).

Therefore, based on the foregoing, the County's Exception No. 4 is denied.

County Exception No. 5

The County takes exception to the last sentence in paragraph 18 where the ALJ finds that Mr. Fullman's previous administrative challenge "was successful," as stated in the cited opinion *Reily Enterprises, LLC v. Fla. Dep't of Envtl. Prot.*, 990 So.2d 1248 (Fla. 4th DCA 2008). (RO ¶ 18). In the opinion at page 1251, the Fourth District Court of Appeal stated: '[h]aving determined that Fullman had standing, the Secretary issued a Final Order granting the petitioners' challenge and denying the proposed permit." *Id.* at 1251.

The County argues that the ALJ's finding in paragraph 18 "lacks any foundation in the admitted evidence in this case." *See* Martin County's Exceptions at page 4. 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). Thus, it is not necessary for the ALJ to find support in "admitted evidence," in order to state the obvious results of the *Reily* case in paragraph 18 of the RO.

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

County Exception No. 6

The County takes exception to the first sentence in paragraph 71 of the RO. In paragraph 71 the ALJ found:

> 71. That seagrass beds are expanding in the Project area is evident from a comparison of images provided by the South Florida Water Management District between 2006 and 2009. They show a doubling of the seagrass beds on the side of the channel opposite the Mooring Field site. Whether such expansion will, in fact, occur in the Mooring Field footprint, however, were the footprint free of shading and toxic substances leached from boat bottoms, is speculative. The sediment would still remain silty and unlikely to provide a good basis for seagrass root structure.

The County argues that the exhibits (Pets. Exs. 36A-D) and testimony of Mr. Egan (Tr. Vol. 6, p. 857-858), show an expansion of seagrass in the Indian River Lagoon generally between 2006 and 2009, but not within the "Project area." *See* Martin County Exceptions at page 4. The second sentence in paragraph 71 shows, however, that the ALJ understood the details of Mr. Egan's testimony regarding expansion of seagrass beds "on the side of the channel opposite the Mooring Field site." Thus, the ALJ's paragraph 71 is supported by the competent substantial record evidence. *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).

Therefore, based on the foregoing reasons, the County's Exception No. 6 is denied.

County Exception No. 7

In this exception the County asserts that paragraph 107 contains an erroneous citation. In paragraph 107 the ALJ concludes:

> 107. The petition that initiated this case was untimely as to Petitioner Fullman. Petitioner Fullman should be dismissed as a petitioner. See Fla. Admin. Code R. [62-]110.106(4); Somero v. Hendry Gen. Hosp., 467 So. 2d 1103 (Fla. 4th DCA 1985). (Emphasis added).

As the County points out the rule citation contains a scrivener's error and should read as "62-110.106." The County also argues that the citation should be to rule "62-110.106*(3)(b)*" and not "62-110.106*(4)*." Rule 62-110.106(3)(b) provides that "[f]ailure to file a petition within the applicable time period after receiving notice of agency action shall constitute a waiver of any right to request an administrative proceeding under Chapter 120, Florida Statutes."

The County is correct that Rule 62-110.106(3)(b) applies to the Petitioner Fullman. The ALJ determined in paragraph 106, however, that:

> 106. Petitioner Burgess obtained a valid extension of time to file the petition that initiated this case and the petition was filed within the time allowed by the order granting the extension. Petitioner Fullman, however, did not seek an extension of time to file the petition in writing and the order granting the extension of time to Mr. Burgess did not extend the time for filing a petition to Mr. Fullman. (Emphasis added).

Subsection (4) of Rule 62-110.106 provides the procedure for requesting an enlargement of the time to file a petition with the Department. Fla. Admin. Code R. 62-110.106(4). Thus, the ALJ's citation to subsection (4) of the rule is not clearly erroneous.

Therefore, based on the foregoing, the County's Exception No. 7 is granted in part.

County Exception No. 8

The County takes exception to paragraph 110 where the ALJ concluded that "[t]he proof offered by Mr. Burgess meets the test for standing." (RO ¶ 110). The County argues that this conclusion is not supported by the factual findings, and is contrary to a correct application of the case authorities cited in paragraph 109. *See* Martin County Exceptions at pages 5-6. Paragraphs 12-16 of the RO contain some of the factual findings supporting the ALJ's legal conclusion:

> 12. Petitioner Joseph Burgess resides with his wife in an unincorporated area of the County known as Jensen Beach. He has a direct view of the Lagoon from the rear deck of his home, approximately six-tenths of a mile west of the Project site. Mr. Burgess's wife holds record title to the property, acquired before their marriage. He has a spousal interest in the homestead. He helped his wife to design and build their home on the property and the two have lived there for the past 14 years. They intend to live there for the foreseeable future.
>
> 13. Mr. Burgess visits the area of the Project several times a week. He frequently takes his grandchildren and out-of-town friends to the area to appreciate the beauty of the Aquatic Preserve, watch the fishermen, and enjoy the environmental diversity of the Lagoon.
>
> 14. When Mr. Burgess drives to the area by way of the Jensen Beach Causeway (the "Causeway") he often finds it difficult to find a parking spot.
>
> 15. Mr. Burgess attended community meetings when the Mooring Field was proposed and discussed its impact to the area with other members of the community including Petitioner Fullman. He contacted the Department regarding the status of the Project and requested notice of permit activity. Notice, however, was not provided to him directly; he learned of the Department's intent to issue the permit from counsel.

> 16. Mr. Burgess has a number of concerns about the Project. He fears it will diminish his way of life and the character of the area in which he resides. He worries that it will add congestion to a near-by rotary for vehicular traffic that he negotiates to get to and from his home nearly every day. He is concerned that the Project will destroy habitat for marine life and the birds which nest and feed in the ecosystem of the Aquatic Preserve and the Lagoon.

(Emphasis added).

The ALJ described in paragraph 109 the applicable legal standard:

> 109. In order for a Mr. Burgess to demonstrate that he meets the definition of a "party" and therefore has standing to initiate an administrative proceeding, he must meet the two-pronged test of Agrico Chemical Corp. v. Dep't of Envtl. Reg., 406 So. 2d 478 (Fla. 2d DCA 1981), as clarified by St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist., 54 So. 3d 1051 (Fla. 5th DCA 2011), that is, that he has a substantial interest that reasonably could be affected by the agency action in question and that the injury is of the type that the proceeding is designed to protect.

Based on the applicable legal standard and case authorities, the facts that support the ALJ's conclusion are found in paragraphs 12, 13, and 16 above (underlined portions). The other factual findings (that are not underlined) do not constitute substantial environmental interests that "reasonably could be affected by the agency action in question" and are not injuries "of the type that the proceeding is designed to protect."[5] *See, e.g., St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist.*, 54 So. 3d 1051, 1055 (Fla. 5th DCA 2011); *Palm Beach Cty. Envtl. Coal. v. Fla. Dep't of Envtl. Prot.*, 14 So. 3d 1076, 1078 (Fla. 4th DCA 2009); *Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1082 (Fla. 2d DCA 2009); *Reily*

[5] This agency has substantive jurisdiction over the ALJ's conclusions of law in paragraphs 109 and 110. *See Reily Enters., LLC v. Fla. Dep't of Envtl. Prot.*, 990 So. 2d 1248 (Fla. 4th DCA 2008).

Enters., LLC v. Fla. Dep't of Envtl. Prot., 990 So. 2d 1248, 1251 (Fla. 4th DCA 2008). *See also* § 403.412(5), Fla. Stat. ("A citizen's substantial interests will be considered to be determined or affected if the party demonstrates it may suffer an injury in fact which is of sufficient immediacy and is of the type and nature intended to be protected by this chapter. No demonstration of special injury different in kind from the general public at large is required. A sufficient demonstration of a substantial interest may be made by a petitioner who establishes that the proposed activity, conduct, or product to be licensed or permitted affects the petitioner's use or enjoyment of air, water, or natural resources protected by this chapter.").

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

CONCLUSION

Having considered the applicable law and standards of review in light of the findings and conclusions set forth in the RO, and being otherwise duly advised,

It is therefore ORDERED:

A. The ALJ's Recommended Order (Exhibit A), as modified in the above rulings in this Consolidated Final Order, is adopted and incorporated by reference herein.

B. Thomas Fullman is DISMISSED as a petitioner, since the petition that initiated this case was untimely as to Thomas Fullman.

C. Martin County's application for an Environmental Resource Permit in Department File No. 43-0298844-001 is GRANTED.

D. Martin County's application for a Sovereign Submerged Lands Lease (Lease No. 430345996) is GRANTED.

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 December, 2011, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

HERSCHEL T. VINYARD JR.
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.

CLERK 12/13/11
DATE

CERTIFICATE OF SERVICE

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

Virginia P. Sherlock, Esquire
Howard K. Helms, Esquire
Littman, Sherlock & Helms, P.S.
Post Office Box 1197
Stuart, FL 34995-1197

David A. Action, Esquire
Martin County
2401 Southeast Monterey Road
Stuart, FL 34996-3322

by electronic filing to:

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

and by hand delivery to:

Ronald Woodrow Hoenstine, III, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this 14th day of December, 2011.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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