

**STATE OF FLORIDA
FISH AND WILDLIFE CONSERVATION COMMISSION**

WILLIAM G. CLEMENTS,

Petitioner,

DOAH CASE NO: 14-0199

FWC CASE NO: 13-0064

vs.

ST. AUGUSTINE PORT, WATERWAY
AND BEACH DISTRICT AND FLORIDA
FISH AND WILDLIFE CONSERVATION
COMMISSION,

Respondent,

and

FRIENDS OF SUMMER HAVEN
RIVER, INC.,

Intervenor.

FINAL ORDER

The Honorable E. Gary Early Administrative Law Judge (“ALJ”) with the Division of Administrative Hearings (“DOAH”), on June 26, 2014, submitted a recommended Order (“RO”) to the Florida Fish and Wildlife Conservation Commission (“Commission”), in the above captioned proceeding. A copy of the RO is attached hereto as Exhibit A. The RO indicates that copies were sent to counsel for Respondent Commission, Counsel for Respondent St. Augustine Port, Waterway and Beach District (“District”), the Petitioner William G. Clements (“Petitioner”), and counsel for the Intervenor Friends of Summer Haven River Inc. (“Intervenor”). No party filed exceptions to the RO. This matter is now before the COMMISSION for final agency action.

STATEMENT OF THE ISSUES

Whether Respondent District is entitled to issuance of a permit by the Commission for the incidental take of the least tern, subject to mitigation, related to the restoration of the Summer Haven River in St. Augustine, Florida.

PROCEDURAL BACKGROUND

On October 18, 2013, the Commission issued Listed Species Incidental Take permit No. LSIT-13-00009 (“Permit”) to the District for the incidental take of least tern resulting from habitat modification or degradation expected to occur during restoration of the Summer Haven River. The Permit did not authorize the killing of birds or destruction of nests or eggs.

On December 19, 2013, Petitioner filed a series of documents dated December 4, 2013 and December 17, 2013, requesting a hearing. No party challenged the timeliness of the Petition and the matter was referred to DOAH on January 14, 2014.

The final hearing was held on March 18, 2014, in Tallahassee, Florida as scheduled and was partially completed. The Commission misunderstood the level of detail the ALJ would need to make findings as to the effectiveness of the mitigation plan. Therefore, the hearing was recessed, with its completion scheduled for April 28, 2014 by videoconference with sites located in Tallahassee, Florida and Jacksonville, Florida.

Respondents and Intervenor on April 24, 2014, filed a joint supplemental exhibit containing a Least Tern Nesting Habitat Mitigation Plan. On April 25, 2014, the Commission filed an amended version of the Permit, with an effective date of April 24, 2014, containing the Least Tern Nesting Habitat Mitigation Plan, with this final revision forming the basis for the proceeding.

At the April 28, 2014 continuation of the hearing, the District, Commission, and Intervenor jointly called as witnesses Steven Schropp, Ricardo Zambrano, Alexander Kropp, Adam Kent, and Timothy Keyes, who were all tendered and accepted as experts. The District, Commission, and Intervenor also jointly called Linda Ginn as a witness. Joint exhibits as well as Commission exhibits were received in evidence.

Petitioner testified on his own behalf and Petitioner's exhibits were received in evidence.

The transcript of the final hearing was partially filed on April 21, 2014, and filing completed on May 21, 2014. The parties filed Proposed Recommended Orders and the ALJ entered the RO on June 26, 2014 that allowed for written exceptions to be submitted within 15 days of the date of the RO. No party submitted any exceptions.

SUMMARY OF THE RECOMMENDED ORDER

Evidence showed that the Summer Haven River ("River") had experienced severe storm activity beginning in 2008 that destroyed the preexisting open water and wetland estuarine system, the beach/dune system, and associated habitat used by numerous species, some of which endangered or threatened.

Evidence depicted the goal of the District's River restoration project, as restoring the river to its pre-2008 condition which would require removal of the relatively new least tern nesting area and that is why an incidental take permit was sought.

Evidence presented, described the least tern nesting area that is the subject of this proceeding on the uplands, bordering the River, and noted that it was first documented in 2010 with about 100 nesting pairs of least terns. Since then, the viability of the site has deteriorated due to predation, humans and pet interference, and further severe weather events, with about 36 nesting pairs as of 2013.

Testimony and other evidence presented, illustrate the mitigation plan that the District intends to utilize in the River restoration project. Restoration will occur outside of least tern nesting season and therefore no active nests, eggs, or chicks will be physically harmed or killed. The mitigation plan includes creating two new and more sustainable nesting habitats within a mile of the existing nest site that will be designed to lessen predation, lessen human and pet interference, attract least terns, and maximize quality nesting habitat. The plan also calls for observation during nesting season to confirm the efficacy of some design elements of the new nesting sites.

The ALJ found the evidence in the case persuasive that, the proposed mitigation would provide better nesting habitat and would offset the take of least terns caused by the River restoration project, resulting in no net injury. Specifically, the ALJ found that evidence presented demonstrated that, applying the factors in Rule 68A-27.007(2)(b) F.A.C. including the mitigation plan, the Permit would result in a conservation benefit and would not negatively impact the survival of the least tern.

Accepting and applying the testimony and evidence provided in the hearing, the ALJ further found that the Petitioner failed to prove that the disruption of the least tern nesting area and proposed mitigation would cause him to suffer an injury which would entitle him to a §120.57 Fla. Stat. hearing. The ALJ specifically determined that, Petitioner's interests in environmental integrity, area beauty, beach access, intercoastal waterway access, and fishing are not of a type or nature that an incidental take permit proceeding is designed to protect.

The ALJ concluded, by recommending that the Commission should approve issuance of the Permit issued to the District.

STANDARD OF REVIEW OF DOAH RECOMMENDED ORDER

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. (2014); *Charlotte County v. IMC Phosphates Co.*, 18 So.3d 1089 (Fla. 2d DCA 2009). The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value or weight of the evidence. Rather, "competent substantial evidence" refers to the existence of some evidence (quantity) as to each essential element and as to its admissibility under legal rules of evidence. See e.g., *Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm'n*, 671 So.2d 287, 289 n.3 (Fla. 5th DCA 1996).

A reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. See e.g., *Rogers v. Dep't of Health*, 920 So.2d 27, 30 (Fla. 1st DCA 2005); *Dunham v. Highlands County Sch. Bd.*, 652 So.2d 894 (Fla. 2d. DCA 1995). These evidentiary-related matters are within the province of the ALJ, as the "fact-finder" in these administrative proceedings. See e.g., *Tedder v. Fla. Parole Comm'n*, 842 So.2d 1022, 1025 (Fla. 1st DCA 2003); *Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Also, the ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. See e.g., *Peace River/Manasota Regional Water Supply Authority v. JMC 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). 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 the Final Order. See, e.g., *Walker v. Bd. of Prof. Engineers*, 946 So.2d 604 (Fla. 1st DCA 2006). In addition, an agency has no authority to make independent or supplemental findings of fact. See, e.g., *North Port, Fla. v. Cansol. 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," however, 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. Engineers*, 952 So.2d 1224 (Fla. 1st DCA 2007).

An agency's review of the 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 Env'tl. Protection*, 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 Env'tl. 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 Env'tl. Protection*, 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. Regulation*, 622 So.2d 607, 609 (Fla. 1st DCA 1993); See *Heifetz*, 475 So.2d at 1281; *Fla. Power & Light Co. v. Fla. Siting Bd.*, 693 So.2d 1025 (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.

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 RO (Exhibit A) is adopted and incorporated by reference herein and the findings of fact and conclusions of law set forth in the RO are hereby adopted.
- B. The relief requested in the Petition is denied with prejudice.

C. The subject permit issued to the District for incidental take of the least tern, LSIT-13-00009A as amended April 24, 2014, is approved.

DONE AND ORDERED this 9 day of September 2014, in Tallahassee,
Leon County, Florida.



Eric Sutton
Assistant Executive Director
Florida Fish and Wildlife
Conservation Commission
620 South Meridian Street
Tallahassee, Florida 32399

Filed with the Agency Clerk
This 9th day of September, 2014



Attest: 
Agency Clerk

NOTICE OF APPELLATE RIGHTS

The foregoing constitutes final agency action in this matter. Any party adversely affected has the right to seek judicial review of this Final Order pursuant to section 120.68 Florida Statutes, and rule 9.030(b)(1)(c) and 9.110, Florida Rules of Appellate Procedure. To initiate an appeal, a Notice of Appeal must be filed with the Florida Fish and Wildlife Conservation Commission, Office of the General Counsel, and the appropriate District Court of Appeal within thirty (30) days of the date of that this Final Order is filed with the Agency Clerk. The Notice filed with the District Court of Appeal must be accompanied by the appropriate filing fee required by law.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished this 9th day of September, 2014, to:

Via US mail, William G. Clements, pro se
9079 June Lane
St. Augustine, Florida 32080

Via US mail, James E. Bedsole, Esquire
Law Offices of James E. Bedsole, LLC
7 Old Mission Avenue
St. Augustine, Florida 32084

Via US mail, Jacob D. Varn, Esquire
Fowler White Boggs Banker
101 North Monroe Street, Suite 1090
Tallahassee, Florida, 32301

Via email, Brad Gruver,
Listed Species Coordinator
Florida Fish and Wildlife
Conservation Commission
Brad.gruver@myfwc.com

Via Efile, Claudia Llado, Clerk of Division
Division of Administrative Hearings
1230 Apalachee Parkway
Tallahassee, Florida 32399

By: Anthony Pinzino
Anthony Pinzino
Assistant General Counsel
Florida Fish and Wildlife
Conservation Commission

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WILLIAM G. CLEMENTS,

Petitioner,

Case No. 14-0199

vs.

ST. AUGUSTINE PORT, WATERWAY
AND BEACH DISTRICT AND FLORIDA
FISH AND WILDLIFE CONSERVATION
COMMISSION,

Respondents,

and

FRIENDS OF SUMMER HAVEN
RIVER, INC.,

Intervenor.

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on March 18 and April 28, 2014, in Tallahassee, Florida and Jacksonville, Florida, before E. Gary Early, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: William G. Clements, pro se
9079 June Lane
St. Augustine, Florida 32080



For Respondent St. Augustine Port, Waterway and Beach District:

James E. Bedsole, Esquire
Law Offices of James E. Bedsole, LLC
7 Old Mission Avenue
St. Augustine, Florida 32084

For Respondent Florida Fish and Wildlife Conservation Commission:

Ryan Smith Osborne, Esquire
620 South Meridian Street
Tallahassee, Florida 32399

For Intervenor: Jacob D. Varn, Esquire
Fowler White Boggs Banker
101 North Monroe Street, Suite 1090
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

The issue to be determined is whether the applicant, St. Augustine Port, Waterway and Beach District (District), is entitled to issuance of a permit by the Florida Fish and Wildlife Conservation Commission (Commission) for the incidental take of the least tern, subject to mitigation, related to the restoration of the Summer Haven River in St. Augustine, Florida.

PRELIMINARY STATEMENT

On October 18, 2013, the Commission issued a permit, No. LSIT-13-00009 (Permit), to Respondent, St. Augustine Port, Waterway and Beach District. The Permit authorized the incidental take of the least tern, a state-designated threatened species, resulting from habitat modification or degradation that was expected to occur during the restoration of the Summer Haven

River (River). The permit did not authorize the killing of birds or destruction of nests or eggs.

A series of documents requesting a hearing to challenge the Permit, dated December 4, 2013 and December 17, 2013, were filed by Petitioner. The date of their receipt by the Commission is unknown, since none bear any form of date-stamp or acknowledgement. Neither the Commission nor any other party has challenged the timeliness of the petition. The Election of Rights and request for hearing was referred to the Division of Administrative Hearings on January 14, 2014.

The final hearing was commenced in Tallahassee, Florida on March 18, 2014 as scheduled, and partially completed. Due to a misunderstanding on the part of the Commission as to the level of detail that would be necessary for the undersigned to make findings as to the effectiveness of the mitigation plan in performing as asserted, the hearing was recessed, with its completion scheduled by video teleconference at sites in Tallahassee, Florida and Jacksonville, Florida on April 28, 2014.

On April 24, 2014, the Respondents and Intervenor filed, as a joint supplemental exhibit, a Least Tern Nesting Habitat Mitigation Plan prepared by Taylor Engineering, Inc. On April 25, 2014, the Commission filed its amended Listed Species Incidental Take Permit No. LSIT-13-00009A, bearing an effective

date of April 24, 2014, that incorporated the Least Tern Nesting Habitat Mitigation Plan. That final revision forms the basis for this proceeding.

At the hearing, the District, Commission, and Intervenor jointly called as witnesses, Steven Schropp, who was tendered and accepted as an expert in Environmental Permitting in Florida; Ricardo Zambrano, who was tendered and accepted as an expert in the least tern; Alexander Kropp, who was tendered and accepted as an expert in least terns and their nesting behaviors; Adam Kent, who was tendered and accepted as an expert in birds, with specialization in least terns; Linda Ginn, President of the Friends of Summer Haven River, Inc.; and Timothy Keyes, who was tendered and accepted as an expert in least terns and shore birds and their nesting habits. Joint Exhibits 1-3, 5, 6, 9-11, 15-21, and 23, and Commission Exhibits 1 through 5 were received in evidence.

Petitioner testified on his own behalf. Petitioner's Exhibits A, M, N, and O were received in evidence.

A three-volume Transcript was filed, with volumes 1 and 2 filed on April 21, 2014, and volume 3 filed on May 21, 2014. The parties timely filed Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

The Parties

1. Petitioner, William Clements, is the owner of a residence at 9079 June Lane, St. Augustine, Florida.

2. The St. Augustine Port, Waterway and Beach District is a special taxing district created in 1937. Its enabling legislation was re-enacted in Chapter 2000-478, Laws of Florida, by which the District is authorized "[t]o improve all navigable and nonnavigable waters situated within the district, to create and improve for harbor purposes any waterways within the district, . . . to straighten, widen, deepen, and otherwise improve any and all waters, water courses, inlets, bays, lakes, or streams, whether navigable or otherwise, located within the district . . . and to dredge and deepen any natural or artificial waterway within the district." Chapter 2000-478, § 4(c), Laws of Florida.

3. The Florida Fish and Wildlife Conservation Commission is an agency of the state, created pursuant to Article IV, section 9 of the Florida Constitution to "exercise the regulatory and executive powers of the state with respect to wild animal life and fresh water aquatic life."

4. The Friends of Summer Haven River, Inc. (Intervenor), is a 501(c) corporation created in 2011 for the purpose of

preserving and protecting the River as a waterway and wildlife habitat.

Summer Haven River

5. Prior to 2008, the River was a natural waterbody that extended several miles from its current intersection with the Matanzas River at its southern reach, to the Matanzas Inlet at its northern reach. The River was originally part of the natural channel of the Matanzas River until the Matanzas River was dredged and straightened in the 1930s to become part of the improved Intercoastal Waterway. The by-passed channel became known as the Summer Haven River.

6. Prior to 2008, the area to the east of the River consisted of a stable dune system that separated the River from the Atlantic Ocean. U.S. Highway A1A used to run along the dune line until it was moved inland in the 1960s.

7. In 2008, Tropical Storm Fay opened a breach in the dune system, and established a water connection between the Atlantic Ocean and the River. The breach was not immediately repaired. A subsequent series of storms further affected the area, flattening the dunes and depositing the sand into the River, filling the River for a substantial stretch.

8. The action of the storms completely destroyed the preexisting open water and wetland estuarine system, the beach/dune system, and the associated habitat and foraging

grounds used by a number of species of wildlife, including endangered and threatened species.

9. The filled River bed is a low, flat, sandy expanse that extends to the Atlantic shoreline. It is occasionally overwashed and flooded by high tides and storm events.

10. Prior to 2008, persons living to the west of the River, as does Petitioner, would have to walk or drive north on U.S. A1A, go across the Matanzas River bridge, and then cross the island to access the beach. The breach of the dunes and filling of the River created an uninterrupted stretch of sand that allows direct access across the historic River bed to the Atlantic beaches.

Petitioner's Interest in the River

11. Petitioner's residence fronts the Intercoastal Waterway. It is not directly adjacent to the River restoration area, but is near the location that is to be subject to restoration of the River, and the area of least tern habitat to be impacted. Petitioner uses the sandy areas near the least tern nesting area for walking with his dog, but does not venture into the nesting area. Petitioner lives in the area "because the whole environmental system of this area . . . it's good. We like it. We like this beach. We like the birds nesting there."

12. Petitioner testified that "[m]y interest or standing is the environment integrity, the beauty of the area, the access

to the beach, the access to the intercoastal waterway, the fishing, just pick any reason that somebody would live in that area and that's the reason we live there."

The Least Tern

13. The least tern (*Sterna antillarum*) has been designated by the Commission as a state-designated threatened species. The least tern is not a Federally-designated endangered or threatened species.

14. Least terns are seasonally migratory. They winter in the Caribbean, Central America or South America, and return north in the spring to areas in North America, including Florida, to pair, mate, and breed.

15. Least terns like open, sandy, well-drained areas surrounded by water. They prefer areas with enough scattered vegetation to provide cover for the chicks from the sun and from predators, but not so much vegetation as to allow predators to encroach undetected. The terns will try to nest on the highest area of a beach, though away from trees or structures that could provide predator perches.

16. Least terns are opportunistic nesters. If there is a suitable and appropriate nesting site, least terns will not hesitate to use it. However, if conditions change, the terns will move. In Florida, due to loss of undisturbed areas of suitable material, about half of least terns now nest on pea

gravel rooftops, though those types of rooftops are in decline. Those areas are dry, and free of predators, people, and dogs, which have made many natural areas unsuitable for nesting.

17. Least terns are also predictable nesters. As long as a nesting site remains suitable for nesting, the terns will return in subsequent years. Conditions affecting their return include the overgrowth of vegetative cover, predators, and human traffic.

18. Least terns prefer to nest in colonies. They build their nests on the ground. The eggs and chicks, though camouflaged, are an easy mark if discovered by predators. Terrestrial predators include raccoons, snakes, rats, and coyotes. Avian predators include gulls, crows, and herons, though there is little evidence of avian predation at sites in St. John's County.

19. Nests can be destroyed in areas that are affected by over-wash from storms or high tides. If such conditions occur early in the season, the terns may re-nest. However, areas of inundation create a nesting problem.

20. Least tern eggs hatch 22 days after they are laid. The chicks fledge approximately 25 days later, and are able to migrate south several weeks thereafter.

Least Tern Management Plan

21. On March 31, 2011, the Commission issued a Least Tern Biological Status Report. The Commission recognized the decline in population of the least tern due to "low reproductive success, decrease in available nesting sites, increased predation, and vulnerability to stochastic events." The report noted that "[r]ecreational disturbance has an overwhelming influence on the nesting success of least terns," and that "[p]redation of eggs and chicks . . . can be severe for some colonies."

22. On November 1, 2013, the Commission published the final draft of "A Species Action Plan for Four Imperiled Beach-Nesting Birds," which is applicable to the least tern.

23. The plan recognizes that spoil islands are a suitable and effective location for nesting.

24. The plan notes that the Commission's rules lack specific guidelines for incidental take but provides that incidental take permits should be issued "if there will be a scientific or conservation benefit and only upon the applicant's demonstration that the permitted activity will not have a negative impact on the survival potential of the species."

The Summer Haven River Nesting Site

25. After the River was filled with sand, which created a wide, sandy, open area with little vegetation, it began to be used as a nesting area by the opportunistic least terns.

26. The Commission first identified the River site as a least tern nesting area in 2010. In 2010, the site was used by about 100 pairs of nesting terns. Since the area had been newly identified, there was no count of surviving chicks or flight-capable juveniles.

27. In 2011, the use of the River site was at its peak. The site was used by over 100 nesting pairs, producing 36 flight-capable juveniles.

28. In 2012, there were again approximately 100 nests, but the number of flight-capable juveniles declined into single digits.

29. By 2013, the number of nesting pairs of least terns declined to 36. The chick count was in single digits. Although there was one count in 2013 of 20 flight-capable juveniles, it is believed that they were from other nearby nesting areas. The River site was also subject to over-wash in 2013 which may have adversely affected the viability of eggs and chicks.

30. The area of the River site posted as the least tern nesting area varies year-to-year, and is generally about 10 acres in size. The terns use only about five acres of that

site. They prefer the north end, which is higher and drier, over the south end, which is lower and has been repeatedly washed out.

31. Since its first use by least terns in 2010, the River site has been discovered by predators as evidenced by the increasing number of raccoon tracks in the area. In addition, people have been reported in the colony, and dogs have been observed running through the colony and chasing after the birds.

Restoration of Summer Haven River

32. The underlying consolidated Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands issued by the Department of Environmental Protection (DEP), for which the incidental take permit was necessary, calls for the River to be restored to its pre-2008 condition. The total project area is approximately 32 acres in size. The River cannot be restored to its original width and depth without removing the least tern nesting area. The consolidated DEP permit has not been challenged, and is not a subject of this proceeding.

33. The sand removed from the pre-2008 River channel will be used to recreate the dune system along the shore, which will consist of a protective berm, an intermediate "back berm" at an elevation of 8 feet NAVD (North American Vertical Datum or, roughly, height above "sea level"), and a line of dunes with a crest of 12 feet NAVD.

34. The restoration of the River is expected to have a beneficial effect on wetland and open water habitat, beach and dune habitat, and other fish and wildlife species that previously used the River.

35. The restoration of the River will be performed outside of the nesting season so that the least terns, and their nests, eggs, and chicks will not be physically affected or killed. However, the removal of the nesting habitat constitutes "harm and harassment," thus necessitating an incidental take permit for an otherwise lawful activity.

Intervenor's Interest in the Permit

36. Intervenor has approximately 300 active members interested in the restoration of the River, a substantial number of which reside in the vicinity of the River. Prior to the storms of 2008, the members enjoyed a variety of recreational activities on the River, including boating, kayaking, bird watching and enjoying the scenic nature of the River and its associated habitats. Intervenor is paying various permit-related costs, including the cost of obtaining a release of an easement on the mitigation spoil island, the cost of a Phase I environmental study on the spoil island, and the cost of publishing newspaper notice of proposed agency action.

Mitigation

37. To offset the effect of the River restoration on the least tern, the District has proposed mitigation in the form of two recreated or enhanced nesting sites.

Back Berm

38. One of the new nesting sites will be on the "back berm" of the recreated dune system. The back berm will provide three acres of least tern habitat near the shore, and in the same general location as the area affected by the River restoration activities.

39. The back berm will be an open, sandy area at an elevation of eight feet, which should minimize incidents of over-wash and provide a greater degree of security for the nesting area. The back berm will not have any devices for protection from predators, and as such will exist much as the existing area does now. The back berm will exist as a natural nesting area similar to others along the coast.

40. The back berm will provide a suitable and effective area for least tern nesting.

Spoil Island

41. The other new nesting site will be located on the northern end of a diked spoil island created during the dredging of the Intracoastal Waterway. The spoil island will provide 6.4

acres of least tern habitat within about one mile of the River restoration site.

42. The spoil island, having been dredged from adjacent waters, has a sandy, somewhat shelly substrate that is consistent and compatible with the area.

43. The spoil island is removed from direct tidal and storm-driven influences, and surrounded by a dike. As such, it is unlikely to be subject to the over-washes that have affected the River site.

44. The spoil island is uninhabited, and inaccessible except by boat. Thus, the spoil island is unlikely to suffer impacts from the presence of humans and their pets.

45. Least terns fly for miles around their breeding sites foraging for food. Thus, the one mile distance from the spoil island to the River nesting site, and distance from the spoil island to the waters of the Atlantic Ocean will pose no impediment to their ability to locate the spoil island as a potential nesting area, or to thereafter forage and feed.

46. The mitigation proposal calls for the spoil island to be shaped and contoured with a gentle slope from the highest area on the north to the lowest area on the south. The dike will not be touched so as to preserve its integrity and prevent erosion.

47. Excess vegetation and trees extending more than five feet above the top of the dike are to be removed as part of the initial habitat creation, and again prior to the second and third nesting seasons.

48. In order to prevent predators from invading the property, a 2,000-foot solar powered electrical fence is to be installed 30 feet from the inside edge of the dike around the full perimeter of the spoil island mitigation site. Although the evidence was somewhat contradictory as to the height of the fence, the greater weight of the evidence demonstrates that the fence is to be 42 inches in height. Before the nesting season, the fence will be activated, and bait caps will be placed along the perimeter in locations that will cause predators attracted by the bait to be shocked by the fence. In that way, they will be reluctant to come near the perimeter when birds show up to inhabit the interior. Thus, the likelihood that a predator would jump the fence or dig under the fence is minimized.

49. The fence is a commercially available fence that has proven to be effective in dry, sandy soils to prevent the incursion of raccoons, foxes and coyotes.

50. Petitioner has argued that the fence will likely not be effective in keeping out snakes, which he believes to inhabit the spoil island. Given that the southern part of the island, outside of the mitigation area, is protected gopher tortoise

habitat, and that snakes often live in gopher tortoise burrows, his belief is not unwarranted. However, snakes are not a primary predator, and are not known to decimate colonies as can mammalian predators.

51. The protection provided to birds in a natural environment cannot be absolute. Mitigation sufficient to offset the loss of habitat allowed by an incidental take permit does not require the creation of a bubble, but requires reasonable and scientifically supported means of ensuring the viability of the site for nesting and habitat. The electric fence as proposed provides such a means.

52. The District is to install social attractors, including a solar powered bird call broadcast system and life size decoys. The bird call system is designed to operate at a volume that will be effective to attract least terns as they fly up and down the coast. The decoys will be placed in paired and single configurations located within the mitigation site.

53. The Commission has used broadcast bird calls and decoys to attract a similar species of tern to an island in the Dry Tortugas that had been made suitable for nesting as a result of the destruction of vegetation during the hurricanes of 2005. The effort was a success, and the terns were attracted and have returned each year, even after the bird calls were discontinued.

54. The evidence supports a finding that the broadcast bird calls and decoys will be effective to draw the attention of the least terns and attract them to the spoil island.

55. During the nesting season, an observer is to be dispatched to the spoil island twice weekly to inspect the fence, make sure it is functioning properly, and check for any signs of human, natural, animal, or weather-related interference. The observer will make minor repairs and adjustments to the fence as necessary.

56. The observer will also inspect the decoys and make sure they are in place and in good shape, and make adjustments or replacements if necessary, and ensure that the bird call system is functioning, and perform maintenance if needed. The evidence is sufficient to demonstrate that the twice-weekly inspections will be effective to insure the integrity of the social attractors.

57. The observer will be able to determine if the fence causes entanglement of other species of animals, including gopher tortoises. In the event entanglement, though unlikely, is discovered, the system may be modified to prevent such occurrences.

58. The evidence in this case suggests that avian predators are not a significant cause of predation of least tern colonies in St. John's County. However, if the twice-weekly

inspections during breeding season reveal that avian predation has become a problem, the District has agreed to implement such controls as are needed, in consultation with the Commission, and to obtain necessary permits for such controls.

59. Petitioner argues that it would be a better gauge of success and effectiveness to construct and install the back berm and spoil island mitigation, and allow for a period of years to elapse before allowing the River restoration and incidental least tern habitat disruption to proceed. However, the likelihood is that the least terns would not be attracted to the spoil island site as long as the River site, as poor as it has become, is present and undisturbed. In addition, the back berm site is to be constructed from material recovered during the River restoration. Thus, the proposal to construct the mitigation in advance of the impact is impractical and, given the preponderance of the evidence in this proceeding, unnecessary.

60. The suggestion that the mitigation proposed offers no absolute guarantee of success overlooks the fact that the current River site has no controls, is subject to regular overwash, and appears to be increasingly affected by predators and humans.

61. The evidence in this case is persuasive that the mitigation proposed will provide better nesting habitat than

that available at the River site, resulting in a greater chance of breeding success for least terns in the area and a likely increase in the local population. The mitigation will completely offset the "take" of least terns occasioned by the River restoration such that there will be no net injury, harm, or loss of least terns. The activities authorized by the Permit will not affect human safety.

62. It is possible that the least terns displaced from the River site may find places to nest other than those created pursuant to the incidental take permit. The predators in the spoil island area may be particularly clever and able to circumvent the fence. However, the greater weight of the reasoned, scientific evidence in this case is persuasive that there is a substantial likelihood the mitigation proposed will benefit the conservation and management of least terns, and will have a positive impact on the survival potential of the least tern.

CONCLUSIONS OF LAW

Jurisdiction

63. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2013).

Standing

64. The person asserting party status has the burden of demonstrating the requisite standing to initiate and maintain this proceeding. Palm Beach Cnty. Emtl. Coal. v. Fla. Dep't of Emtl. Prot., 14 So. 3d 1076, 1078 (Fla. 4th DCA 2009); Agrico Chem. Co. v. Dep't of Emtl. Reg., 406 So. 2d 478, 482 (Fla. 2nd DCA 1981).

St. Augustine Port, Waterway and Beach District

65. Section 120.569(1) provides, in pertinent part that, "[t]he provisions of this section apply in all proceedings in which the substantial interests of a party are determined by an agency." The District is a "[s]pecifically named person[] whose substantial interests are being determined in the proceeding" and is thus a party as defined in section 120.52(13)(a). See Maverick Media Group v. Dep't of Transp., 791 So. 2d 491 (Fla. 1st DCA 2001).

Petitioner

66. Respondents and Intervenor argue that the interests asserted by the Petitioner fail to meet the two-pronged test for standing in formal administrative proceedings established in the seminal case of Agrico Chemical Corp. v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981). In that case, the Court held that:

We believe that before one can be considered to have a substantial interest in the outcome of the proceeding, he must show 1) that he will suffer an injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury.

Id. at 482.

67. Agrico was not intended as a barrier to the participation in proceedings under chapter 120 by persons who are affected by the potential and foreseeable results of agency action. Rather, "[t]he intent of Agrico was to preclude parties from intervening in a proceeding where those parties' substantial interests are totally unrelated to the issues that are to be resolved in the administrative proceedings." Mid-Chattahoochee River Users v. Fla. Dep't of Env'tl. Prot., 948 So. 2d 794, 797 (Fla. 1st DCA 2006) (citing Gregory v. Indian River Cnty., 610 So. 2d 547, 554 (Fla. 1st DCA 1992)).

68. The standing requirement established by Agrico requires proof that the petitioner has a substantial interest and that the interest reasonably could be affected by the proposed agency action. Whether the effect would constitute a violation of applicable law is a separate question.

Standing is "a forward-looking concept" and "cannot 'disappear' based on the ultimate outcome of the proceeding." . . . When

standing is challenged during an administrative hearing, the petitioner must offer proof of the elements of standing, and it is sufficient that the petitioner demonstrate by such proof that his substantial interests "could reasonably be affected by . . . [the] proposed activities." (emphasis in original.)

Palm Beach Cnty. Env'tl. Coal. v. Fla. Dep't of Env'tl. Prot., 14 So. 3d at 1078 (Fla. 4th DCA 2009) (citing Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co., 18 So. 3d 1079, 1083 (Fla. 2nd DCA 2009) and Hamilton Cnty. Bd. of Cnty. Comm'rs v. State, Dep't of Env'tl. Reg., 587 So. 2d 1378 (Fla. 1st DCA 1991)).

69. Having accepted and applied the testimony and evidence adduced in this proceeding, Petitioner has failed to prove that the disruption of the least tern nesting area and the mitigation proposed to offset that disruption will cause him to suffer an injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing.

70. Petitioner's interest in "the environment integrity, the beauty of the area, the access to the beach, the access to the intercoastal waterway, [and] the fishing" is not of a type or nature which the incidental take permit proceeding is designed to protect.

71. The preponderance of the evidence in this proceeding demonstrates that Petitioner's interest in the outcome is

related to the activities that are the subject of the consolidated Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands issued by the DEP. The incidental take permit does not authorize the restoration activities that are proposed but, as the name implies, is incidental thereto. Whether the least terns are able to nest on the River site, under the testimony offered by Petitioner, will have little or no effect on the general quality of the environment, his access to the beach and the Intercoastal Waterway, or other interests expressed. Thus, Petitioner failed to produce the quantum of evidence necessary to demonstrate that he will suffer an injury in fact which is of sufficient immediacy to entitle him to a hearing.

Intervenor

72. The preponderance of the evidence in this proceeding demonstrates that Intervenor is serving as a partner with the District in obtaining and implementing the Permit, and is responsible, in whole or in part, for payment of Permit related costs. Thus, Intervenor demonstrated that it will suffer an injury in fact which is of sufficient immediacy to entitle it to party status in this proceeding.

Burden of Proof

73. As the party seeking issuance of the subject permit, the District bears the burden of demonstrating, by a

preponderance of the evidence, entitlement to the requested variance. Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778, 788 (Fla. 1st DCA 1981); § 120.57(1)(j), Fla. Stat.

74. This is a de novo proceeding, intended to formulate final agency action and not to review action taken earlier and preliminarily. Young v. Dep't of Cmty. Aff., 625 So. 2d 831, 833 (Fla. 1993); Hamilton Cnty. Bd. of Cnty. Comm'rs v. Dep't of Env'tl. Reg., 587 So. 2d 1378, 1387 (Fla. 1st DCA 1991); McDonald v. Dep't of Banking & Fin., 346 So. 2d 569, 584 (Fla. 1st DCA 1977). Therefore, the final April 24, 2014 Listed Species Incidental Take Permit No. LSIT-13-00009A is properly at issue.

Standards

75. Article IV, section 9 of the Florida Constitution provides, in pertinent part, that "[t]here shall be a fish and wildlife conservation commission, [which] shall exercise the regulatory and executive powers of the state with respect to wild animal life and fresh water aquatic life."

76. Section 379.1025, Florida Statutes (2013), provides that:

The Fish and Wildlife Conservation Commission may exercise the powers, duties, and authority granted by s. 9, Art. IV of the Constitution of Florida, and as otherwise authorized by the Legislature by the adoption of rules, regulations, and orders in accordance with chapter 120.

77. In furtherance of its constitutional and statutory authority, the Commission has promulgated Florida Administrative Code Chapter 68A-27 relating to endangered and threatened species, and the circumstances under which they may be subject to a "take."

78. Rule 68A-27.001 provides, in pertinent part, that:

When used in this rule chapter, the terms and phrases listed below have the meaning provided:

* * *

(4) Take - to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in such conduct. The term "harm" in the definition of take means an act which actually kills or injures fish or wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering. The term "harass" in the definition of take means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering.

(5) Incidental take - any taking otherwise prohibited, if such taking is incidental to, and not the purpose of the carrying out of an otherwise lawful activity.

79. Rule 68A-27.003(2) provides that the least tern is a state-designated threatened species, and that no person may

"take" the least tern or their nests or eggs "except as authorized by Commission rule or by permit from the Commission."

80. Rule 68A-27.007(2) (b) provides that:

(2) The permit requirements for the taking of a State-designated Threatened species are as follows:

* * *

(b) Incidental take: The Commission may issue permits authorizing incidental take of State-designated Threatened species upon a conclusion that the following permitting standards have been met: . . . for all other State-designated Threatened species, the permit may be issued when there is a scientific or conservation benefit and only upon a showing by the applicant that the permitted activity will not have a negative impact on the survival potential of the species. Factors which shall be considered in determining whether a permit may be granted are:

1. The objectives of a federal recovery plan or a state management plan for the species sought to be taken;
2. The foreseeable long range impact over time if take of the species is authorized;
3. The impacts to other fish and wildlife species if take is authorized;
4. The extent of injury, harm or loss of the species;
5. Whether the incidental take could reasonably be avoided, minimized or mitigated by the permit applicant;
6. Human safety; and

7. Other factors relevant to the conservation and management of the species.

81. The evidence in this case demonstrates that, applying the factors set forth in rule 68A-27.007(2)(b), the incidental take permit proposed will result in a conservation benefit to the least tern, and will have no negative impact on the survival potential of the species.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law set forth herein it is RECOMMENDED that the Florida Fish and Wildlife Conservation Commission enter a final order approving the issuance of Listed Species Incidental Take Permit No. LSIT-13-00009A to the St. Augustine Port, Waterway and Beach District.

DONE AND ENTERED this 26th day of June, 2014, in Tallahassee, Leon County, Florida.



E. GARY EARLY
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of June, 2014.

COPIES FURNISHED:

Ryan Smith Osborne, Esquire
Florida Fish and Wildlife Conservation Commission
620 South Meridian Street
Tallahassee, Florida 32399

Jacob David Varn, Esquire
Fowler White Boggs Banker
101 North Monroe Street
Tallahassee, Florida 32301

William George Clements
9079 June Lane
St. Augustine, Florida 32080

James E. Bedsole, Esquire
Law Offices of James E. Bedsole, LLC
7 Old Mission Avenue
St. Augustine, Florida 32084

Eugene N. Wiley II, Executive Director
Florida Fish and Wildlife Conservation Commission
Farris Bryant Building
620 South Meridian Street
Tallahassee, Florida 32399

Harold G. Vielhauer, General Counsel
Florida Fish and Wildlife Conservation Commission
Farris Bryant Building
620 South Meridian Street
Tallahassee, Florida 32399

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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

