STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

THOMAS WILSON,	)	
	)	
Petitioner,	)	
	)	
and	)	
	)	
DAVID H. SHERRY, REBECCA R. SHERRY, AND JOHN S. DONOVAN,	)	**OGC CASE NO. 19-1175** **DOAH CASE NO. 19-3356**
	)	
Intervenors,	)	
	)	
v.	)	
	)	
U.S. ARMY CORPS OF ENGINEERS AND FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
	)	
Respondents,	)	
	)	
and	)	
	)	
CITY OF DESTIN AND OKALOOSA COUNTY, FLORIDA,	)	
	)	
Intervenors.	)	
_____/		

FINAL ORDER

An Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH) on February 20, 2020, submitted a Recommended Order (RO) to the Department of Environmental Protection (DEP or Department) in the above-captioned administrative proceeding. A copy of the RO is attached hereto as Exhibit A. Petitioner Thomas Wilson, and Intervenors, David H. Sherry, Rebecca R. Sherry, and John S. Donovan (collectively the Petitioners, or individually, Mr. Wilson, Mr. Sherry, Mrs. Sherry, or Mr. Donovan) timely filed

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joint exceptions on March 6, 2020. DEP and the Intervenor City of Destin (City) each timely filed responses on March 16, 2020, to the Petitioners' and Intervenors' joint exceptions.

This matter is now before the Secretary of the Department for final agency action.

BACKGROUND

On October 28, 2009, DEP issued Permit No. 0288799-001-JC (Permit) to the U.S. Army Corps of Engineers (Corps) to maintenance dredge the East Pass Navigation Channel and the Old Pass Lagoon Channel, and to rehabilitate the eastern and western jetties. On November 14, 2016, DEP issued a Permit Modification to the Corps (Permit Modification No. 0288799-006-JN). The Permit Modification did not change the authorization or requirements for dredging, but allowed dredged material to be placed on "the Gulf front beaches on the eastern and western sides of East Pass."

On November 16, 2018, Mr. Donovan, Mr. Sherry and Mrs. Sherry filed a Petition for Administrative Hearing challenging the Permit Modification issued to the Corps, which was referred to DOAH and assigned DOAH Case No. 19-1915. On June 19, 2019, the ALJ entered an Order Granting Motion in Limine, Relinquishing Jurisdiction, and Closing File, in which the assigned ALJ found the challenge was not timely filed. On July 16, 2019, DEP entered a Final Order in DOAH Case No. 19-1915, dismissing the challenge with prejudice, which was not appealed.

On June 5, 2019, Mr. Wilson filed a Petition for Formal Administrative Hearing challenging the Permit Modification issued to the Corp. The Petition was assigned as DOAH Case No. 19-3356 and is substantively identical to that filed in DOAH Case No. 19-1915. On June 28, 2019, Mr. Donovan, Mr. Sherry and Mrs. Sherry filed a motion to intervene in Case No.

19-3356. On August 20, 2019, the City of Destin moved to intervene in this case (Case No. 19-3356). On September 10, 2019, Okaloosa County, Florida (Okaloosa County) moved to intervene. All parties were granted intervention.

On August 21, 2019, DEP filed a Proposed Change, which amended the Permit Modification from directing the placement of dredged material to "the eastern and western sides of East Pass" to requiring that "[b]each compatible material dredged from the initial maintenance dredge event following issuance of [the Permit Modification], shall be placed to the east of East Pass, which was referred to DOAH and assigned as DOAH Case No. 19-4979. On September 20, 2019, DOAH Case Nos. 19-3356 and 19-4979 were consolidated.

At the commencement of the final hearing, the City's renewed motion to dismiss the petition filed in DOAH Case No. 19-4979 was granted on the record. On January 29, 2020, DOAH Case No. 19-4979 was severed from this case. On December 8, 2019, the ALJ made an oral ruling that whether the East Pass Inlet Management Implementation Plan (IMP) is an unadopted rule was fully resolved by DEP's adoption of the RO in its Final Order for DOAH Case No. 19-1844.[1] The ALJ struck from the Petition the issue of whether the East Pass IMP is an unadopted rule and removed it as an issue for further consideration.

DOAH held the final hearing on November 20 and 21, 2019. At the final hearing, the City presented the testimony of Matthew Trammel, P.E. DEP presented the testimony of Ralph Clark, P.E., and Greg Garis. City Exhibits 10 through 12, 14 through 19, 27, and 38 through 46

[1] Because of the similarity of issues and the overlapping witnesses and evidence in this case (Case No. 19-3356) and those in Case No. 19-1844, the parties stipulated to the admission into evidence of the record from Case No. 19-1844, which includes the hearing transcript and the exhibits in Case No. 19-1844. Throughout this final order, the Department will cite to the transcript in Case No. 19-1844 as "Case No. 19-1844, T. Vol. X, p. X," and to the transcript in Case No. 19-3356 as "Case No. 19-3356, T. Vol. X, p. X."

were received in evidence. DEP Exhibits 1, 20, 27 through 29, 32, 33, and 35 were received in evidence. Three Corps employees - Jennifer Jacobsen, Elizabeth Godsey, and Waylon Register - also testified at the final hearing.

At the final hearing, Petitioners presented the testimony of Scott Douglas, Ph.D., P.E., and Robert Young, Ph.D. Petitioners Mr. Wilson, Mr. Sherry, Mrs. Sherry, and Mr. Donovan also testified as standing witnesses. Petitioners' Exhibits 3, 5, 8, 11, 26, 29, 39 (pages 0009 and 0010), 40 through 43, 45, 46, and 58 were received in evidence. Petitioners' Exhibits 47 and 62 through 64 were proffered, but not received in evidence.

A four-volume transcript of the final hearing was filed with DOAH on January 7, 2020. All parties filed proposed recommended orders (PRO) on January 17, 2020.

SUMMARY OF THE RECOMMENDED ORDER

In the RO, the ALJ recommended that the Department enter a final order to the Corps approving the November 14, 2016, Permit Modification No. 0288799-006-JN, as amended by the Department's Notice of Proposed Changes to Proposed Agency Action for maintenance dredging of East Pass. (RO at p. 41). In doing so, the ALJ found the evidence established that the beaches east of East Pass are adjacent eroding beaches and that the beaches to the west of East Pass are not. (RO ¶¶ 31-35). In accordance with section 161.142, Florida Statutes, the ALJ concluded that the sand from the dredging of East Pass must be placed on the beaches east of East Pass and that the Corps is entitled to the Permit Modification. (RO ¶¶ 77-81).

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 the 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. (2019); *Charlotte Cty. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1082 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So. 2d 61, 62 (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 Cty. School Bd.*, 652 So. 2d 894, 896 (Fla. 2d DCA 1995). If there is competent substantial evidence to support an ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g.*, *Arand Constr. Co. v. Dyer*, 592 So. 2d 276, 280 (Fla. 1st DCA 1991); *Conshor, Inc. v. Roberts*, 498 So. 2d 622, 623 (Fla. 1st DCA 1986).

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 Reg'l Water Supply Auth. 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). 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*); Fla. Power & Light Co. v. Fla. Siting Bd.*, 693 So. 2d 1025, 1026-1027 (Fla. 1st DCA 1997).

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, 1012 (Fla. 1st DCA 2001); *L.B. Bryan & Co. v. Sch. Bd. of Broward Cty.*, 746 So. 2d 1194, 1197 (Fla. 1st DCA 1999); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140 1141-142 (Fla. 2d DCA 2001). However, the agency should not label what is essentially an ultimate factual determination as a "conclusion of law" 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, 1225 (Fla. 1st DCA 2007). 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). 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.

RULINGS ON EXCEPTIONS

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. (2019). The agency, however, 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.*

A party that files no exceptions to certain findings of fact "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Envtl. Coal. of Fla., Inc. v. Broward Cty.*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Med. Ctr., Inc. v. State of Fla., Agency for Health Care Admin.*, 847 So. 2d 540, 542 (Fla. 4th DCA 2003). 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, even when exceptions are not filed. *See* § 120.57(1)(l), Fla. Stat. (2019); *Barfield,* 805 So. 2d at 1012; *Fla. Pub. Emp. Council, v. Daniels,* 646 So. 2d 813, 816 (Fla. 1st DCA 1994).

RULINGS ON THE PETITIONERS' EXCEPTIONS

Petitioners' Exception No. 1 regarding Paragraphs 16, 19, 26, 27, 28, 31, 35, 38, 39, 42, 43, 44, 46, 72, 73 and 77 through 81

The Petitioners take exception to certain findings of fact in paragraphs 16, 19, 26, 27, 28, 31, 35, 38, 39, 42, 43, 44 and 46 of the RO, alleging that portions of these paragraphs are not supported by competent substantial evidence. The Petitioners also take exception to certain conclusions of law in paragraphs 72, 73, and 77 through 81.

Paragraph 16 of the RO:

The Petitioners take exception to the ALJ's findings of fact in paragraph 16 that pursuant to a statutory requirement sand must be placed on "adjacent eroding beaches," and that an element of the strategy of the East Pass Inlet Management Implementation Plan is that "'the recent erosion of adjacent beaches observed over a minimum of five years shall define the placement need in terms of location and volume.'" RO ¶ 16. The Petitioners allege that these findings are not supported by competent substantial evidence.

Contrary to the Petitioners' exception, the ALJ's findings in paragraph 16 of the RO are supported by competent substantial evidence in the form of expert testimony from Ralph Clark, P.E., and a joint exhibit. (Case No. 19-1844, T. Vol. 3, pp. 295, 328-29, 371-72) (Case No. 19-3356, T. Vol. II, pp. 223-25; Joint Exhibit 4 (East Pass IMP)). For the abovementioned reasons, the Petitioners' exception to paragraph 16 is rejected.

Paragraph 19 of the RO:

The Petitioners take exception to what they allege is the ALJ's conclusion in paragraph 19 of the RO "that section 161.142(5) is the only provision applicable in this case." RO ¶ 19. Petitioners' Exceptions to the RO at p. 7. The Department concurs with the ALJ's statement in paragraph 19 that "[p]ursuant to section 161.142(5), beach compatible sand dredged from federal navigation channels is to be placed on the adjacent eroding beach." § 161.141(5), Fla. Stat. (2019). More importantly, the Department disagrees with the Petitioners' allegation that the ALJ concluded in paragraph 19 of the RO "that section 161.142(5) is the only provision applicable in this case." Petitioners' Exceptions to the RO at p. 7. The Department concludes the Petitioners have misconstrued the ALJ's reference to section 161.142(5), Florida Statutes, in paragraph 19

of the RO. For the abovementioned reasons, the Petitioners' exception to paragraph 19 is rejected.

Paragraph 26 of the RO:

The Petitioners appear to take exception to the portion of the findings of fact in paragraph 26 of the RO, which finds there is "'a trend of west to east longshore transport resulting in net gain immediately west of [East Pass] and a significant loss of sand along Holiday Isle east of [East Pass].'" RO ¶ 26. Petitioners' Exceptions to the RO at p. 8.

Contrary to the Petitioners' exception to the above cited portion of paragraph 26 of the RO, the Department finds that the ALJ's findings are supported by competent substantive evidence; and thus, must be accepted by the Department. The provisions at issue in paragraph 26 of the RO are supported by competent substantial evidence in the form of expert testimony and exhibits. (Case No. 19-1844, T. Vol. 4, p. 458) (Case No. 19-3356, Joint Exhibit 4 at pp. 14-15 of 21). For the abovementioned reasons, the Petitioners' exception to paragraph 26 is rejected.

Paragraph 27 of the RO:

The Petitioners appear to take exception to that portion of the findings of fact in paragraph 27 of the RO, which references "longshore transport." RO ¶ 27. Petitioners' Exceptions to the RO at p. 8.

Contrary to the Petitioners' exception to the reference to "longshore transport" in paragraph 27 of the RO, the Department finds that the ALJ's findings are supported by competent substantive evidence; and thus, must be accepted by the Department. The provisions at issue in paragraph 27 of the RO are supported by competent substantial evidence in the form of expert testimony by both Ralph Clark, P.E., and Matthew Trammel, P.E., and a joint exhibit. (Case No. 19-1844, T. Vol 3, pp. 318-19; Case No. 19-1844, Vol. 5, pp. 588-89) (Case No.

19-3356, T. Vol. II, pp. 241-42; Joint Exhibit 4). For the abovementioned reasons, the Petitioners' exception to paragraph 27 is rejected.

Paragraph 28 of the RO:

The Petitioners appear to take exception to that portion of the findings of fact in paragraph 28 of the RO, which reference "longshore transport." Petitioners' Exceptions to the RO at p. 8. Paragraph 28 of the RO does not reference the phrase "longshore transport"; however, it does include the phrases "lateral sand transport" and "nodal point." As a result, the Department will rule on this exception.

Contrary to the Petitioners' exception to the reference to "longshore transport" in paragraph 28 of the RO, the Department finds that the ALJ's findings are supported by competent substantive evidence; and thus, must be accepted by the Department. The provisions at issue in paragraph 28 of the RO are supported by competent substantial evidence in the form of expert testimony by both Ralph Clark, P.E., and Matthew Trammel, P.E. (Case No. 19-1844, T. Vol 3, pp. 318-19; Case No. 19-1844, Vol. 5, pp. 588-89). For the abovementioned reasons, the Petitioners' exception to paragraph 28 is rejected.

Paragraph 31 of the RO:

The Petitioners take exception to that portion of the finding of fact in paragraph 31 of the RO, which finds that the beaches east of East Pass "are 'adjacent eroding beaches' as that term is used in section 161.142." RO ¶ 31.

Contrary to the Petitioners' exception to part of paragraph 31of the RO, the Department finds that the ALJ's findings in this part of paragraph 31 of the RO are supported by competent substantive evidence; and thus, must be accepted by the Department. The provision at issue in paragraph 31 of the RO is supported by competent substantial evidence in the form of expert

testimony. Matthew Trammel presented competent substantial evidence that the beaches east of East Pass are eroding beaches adjacent to East Pass and constitute East Pass' "adjacent eroding beaches." (Case No. 19-1844, T. Vol. 1, pp. 40-42, 115-16) (Case No. 19-3356, T. Vol. II, pp. 177-78, 188-89, 206). Ralph Clark presented similar testimony. (Case No. 19-1844, T. Vol. 3, p. 347) (Case No. 19-3356, T. Vol. II, pp. 227-28). *See also* Case No. 19-3356, Joint Exhibits 5, 6, and 7, City Exhibits 10, 11, 12, 14, and 41-42, and DEP Exhibit 1. For the abovementioned reasons, the Petitioners' exception to paragraph 31 is rejected.

Paragraph 35 of the RO:

The Petitioners take exception to that portion of the findings of fact in paragraph 35 of the RO, which finds that "the beaches to the west of East Pass are stable and accretional, are not subject to erosion caused by East Pass, and are not 'adjacent eroding beaches' as that term is used in section 161.142." RO ¶ 35.

Contrary to the Petitioners' exception to part of paragraph 35 of the RO, the Department finds that the ALJ's findings in paragraph 35 of the RO are supported by competent substantive evidence; and thus, must be accepted by the Department. The provisions at issue in paragraph 35 of the RO are supported by competent substantial evidence in the form of expert testimony. Matthew Trammel, P.E., presented competent substantial evidence that the beaches west of East Pass are stable, if not accreting, and that the beaches west of East Pass are not eroding beaches adjacent to East Pass. (Case No. 19-1844, T. Vol. 1, pp. 40-43, 115-16, 116-18, 119-20) (Case No. 19-3356, T. Vol. II, pp. 178, 186-87, 206). Ralph Clark presented similar testimony. (Case No. 19-1844, T. Vol. 3, p. 347) (Case No. 19-3356, T. Vol. II, pp. 228-30). *See also* Case No. 19-3356, Joint Exhibit 6 at pp. 31-32 of 60, City Exhibits 19, 43, and 44. For the abovementioned reasons, the Petitioners' exception to paragraph 35 is rejected.

Paragraphs 38 and 39 of the RO:

The Petitioners take exception to that portion of the findings of fact in paragraphs 38 and 39 of the RO, which find that "the beaches to the east of East Pass constitute 'adjacent eroding beaches,' and that the beaches to the west of East Pass do not." Petitioners' Exceptions to the RO at p. 7. RO ¶¶ 38, 39.

Contrary to the Petitioners' exception to part of paragraphs 38 and 39 of the RO, the Department finds that the ALJ's findings are supported by competent substantive evidence; and thus, must be accepted by the Department. The provisions at issue in paragraphs 38 and 39 of the RO are supported by competent substantial evidence in the form of expert testimony. Matthew Trammel, P.E., presented competent substantial evidence that the beaches east of East Pass are adjacent eroding beaches. Matthew Trammel also presented competent substantial evidence that the beaches west of East Pass are not adjacent eroding beaches. (Case No. 19-1844, T. Vol. 1, pp. 40-42, 115-16) (Case No. 19-3356, T. Vol. II, pp. 177-78, 188-89, 206; City Exhibits 41-44). Ralph Clark presented similar testimony. (Case No. 19-1844, T. Vol. 3, p. 347) (Case No. 19-3356, T. Vol. II, pp. 227-28). For the abovementioned reasons, the Petitioners' exception to paragraphs 38 and 39 is rejected.

Paragraph 42 of the RO:

The Petitioners take exception to the portion of the findings of fact in paragraph 42 of the RO, which finds that "the Permit Modification is consistent with section 161.142 and will ensure that net long-term erosion or accretion rates on both sides of East Pass remain equal." RO ¶ 42. Petitioners' Exceptions to the RO at p. 7.

Contrary to the Petitioners' exception to part of paragraph 42 of the RO, the Department finds that the ALJ's findings are supported by competent substantive evidence; and thus, must be

accepted by the Department. The provision at issue in paragraph 42 of the RO is supported by competent substantial evidence in the form of expert testimony. Competent substantial evidence was presented that the net long-term erosion or accretion rates on both sides of East Pass remain equal. (Case No. 19-1844, T. Vol. 1, pp. 33-34) (Case No. 19-3356, T. II, pp. 241-42). For the abovementioned reasons, the Petitioners' exception to paragraph 42 is rejected.

Paragraph 43 of the RO:

The Petitioners take exception to that portion of the findings of fact in paragraph 43 of the RO, which finds that the beach disposal areas at "R-17 to R-20.5 [east of East Pass] are critically eroded, a condition influenced, if not caused, by East Pass, and constitute East Pass's 'adjacent eroding beaches.'" Petitioners' Exceptions to the RO at p. 7. RO ¶ 43.

Contrary to the Petitioners' exception to paragraph 43 of the RO, the Department finds that the ALJ's findings in paragraph 43 of the RO are supported by competent substantive evidence; and thus, must be accepted by the Department. Paragraph 43 of the RO is supported by competent substantial evidence in the form of expert testimony from Ralph Clark, P.E., and Matthew Trammel, P.E. Matthew Trammel presented competent substantial evidence that the beaches east of East Pass are eroding beaches adjacent to East Pass and constitute East Pass' "adjacent eroding beaches." (Case No. 19-1844, T. Vol. 1, pp. 40-42, 115-16) (Case No. 19-3356, T. Vol. II, pp. 177-78, 188-89, 206; City Exhibits 41-42). Ralph Clark presented similar testimony. (Case No. 19-1844, T. Vol. 3, p. 347) (Case No. 19-3356, T. Vol. II, pp. 227-28). For the abovementioned reasons, the Petitioners' exception to paragraph 43 is rejected.

Paragraph 44 of the RO:

The Petitioners take exception to that portion of the findings of fact in paragraph 44 of the RO, which finds that "the beach disposal areas at Monuments V-611 to V-622 (west of East

Pass), are stable, if not accreting, and are not East Pass's 'adjacent eroding beaches.'" Petitioners' Exceptions to the RO at p. 7. RO ¶ 44.

Contrary to the Petitioners' exception to paragraph 44 of the RO, the Department finds that the ALJ's findings are supported by competent substantive evidence; and thus, must be accepted by the Department. Paragraph 44 of the RO is supported by competent substantial evidence in the form of expert testimony by Ralph Clark, P.E., and Matthew Trammel, P.E. Matthew Trammel presented competent substantial evidence that the beaches west of East Pass are stable, if not accreting, and are not East Pass' "adjacent eroding beaches." (Case No. 19-1844, T. Vol. 1, pp. 40-43, 115-16, 116-18, 119-20) (Case No. 19-3356, T. Vol. II, pp. 178, 186-87, 206; Joint Exhibit 6 at pp. 31-32 of 60). Ralph Clark presented similar testimony. (Case No. 19-1844, T. Vol. 3, p. 347) (Case No. 19-3356, T. Vol. II, pp. 228-30). For the abovementioned reasons, the Petitioners' exception to paragraph 44 is rejected.

Paragraph 46 of the RO:

The Petitioners take exception to the ALJ's ultimate finding of fact in paragraph 46 of the RO, which finds:

> 46. The greater weight of the competent substantial evidence establishes that the Corps met the standards for the Permit Modification as proposed for issuance by DEP on November 14, 2016, and August 21, 2019, including section 161.142 and rules 62B-41.003 and 62B-41.005. Evidence to the contrary was not persuasive. Thus, the Permit Modification should be issued.

Petitioners' Exceptions to the RO at p. 7. RO ¶ 46.

The Department concludes that paragraph 46 of the RO contains mixed issues of law and fact. Findings of fact include "ultimate facts," sometimes termed mixed issues of law and fact, necessary to determine the issues in a case. *Costin v. Fla. A & M Univ. Bd. of Trs.*, 972 So. 2d 1084, 1086-1087 (Fla. 5th DCA 2008). An agency reviewing a recommended order may not

reject or modify the findings of fact of the 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. (2019); *Charlotte Cty.*, 18 So. 3d at 1082; *Wills,* 955 So. 2d at 62.

Moreover, the ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting the decision. *See, e.g.*, *Peace River/Manasota Reg'l Water Supply Auth.*, 18 So. 3d at 1088; *Collier Med. Ctr.*, 462 So. 2d at 85; *Fla. Chapter of Sierra Club,* 436 So. 2d at 389. As the ALJ found, the greater weight of the competent substantial evidence establishes that the Corps met the criteria for issuance of the Permit Modification, and "[e]vidence to the contrary was not persuasive." RO ¶ 46.

Contrary to the Petitioners' exception to paragraph 46 of the RO, the Department finds that the ALJ's ultimate finding of fact is supported by competent substantive evidence; and thus, must be accepted by the Department. Paragraph 46 of the RO is supported by competent substantial evidence in the form of expert testimony and exhibits cited throughout this RO in response to each of the Petitioners' exceptions to numerous paragraphs of the RO. The Department's response to each of the Petitioners' exceptions are incorporated into this response to the Petitioners' exception to paragraph 46 of the RO.

For the abovementioned reasons, the Petitioners' exception to paragraph 46 is rejected.

Paragraph 72 of the RO:

The Petitioners take exception to the conclusions of law in paragraph 72 of the RO, asserting that the ALJ has misinterpreted section 161.142, Florida Statutes, and chapter 62B-41, Florida Administrative Code. Paragraph 72 of the RO does not mention in any manner chapter

62B-41, Florida Administrative Code, or any other Department rule; thus, the Department shall not rule on the ALJ's alleged interpretation or application of 62B-41, Florida Administrative Code in paragraph 72. The Department, which is the agency authorized to implement section 161.141, Florida Statutes, concurs with the ALJ's interpretation of section 161.142, Florida Statutes, as articulated in paragraph 72 of the RO. [2]

For the abovementioned reasons, the Petitioners' exception to paragraph 72 is rejected.

Paragraph 73 of the RO:

The Petitioners take exception to the conclusions of law in paragraph 73 of the RO, which reads:

> 73. The more specific and *unequivocal* legislative requirement that disposal of beach quality sand from maintenance dredging of navigation inlets be onto adjacent eroding beaches, as established in section 161.142(5), controls over more general provisions of section 161.142. *See*, *e.g. Nolden. v. Summit Fin. Corp.*, 244 So. 3d 322. 327 (Fla. 4th DCA 2018); *G.E.L. Corp. v. Dep't of Envtl. Prot.*, 875 So. 2d 1257, 1261 (Fla. 5th DCA 2004); *Barnett Banks, Inc., v. Dep't of Rev.*, 738 So. 2d 502, 505 (Fla. 1st DCA 1999).

RO ¶ 73(emphasis added). The Petitioners disagree with the ALJ's interpretation of the doctrines of statutory interpretation. Petitioners' Exceptions at pp. 4-5.

The Department concurs with the ALJ's interpretation of section 161.142, Florida Statutes. The ALJ concludes that Section 161.142, Florida Statutes, is unambiguous. Moreover, the Department concludes that the ALJ's analysis in paragraph 73 regarding the doctrines of statutory construction merely lends support to the plain and "unequivocal" language of the statute.

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[2] Similarly, the Department concurred with the ALJ's interpretation of section 161.142, Florida Statutes, as articulated in paragraph 85 of the RO in DOAH Case No. 19-1844, the record of which is incorporated by reference into this case, DOAH Case No. 19-3356, by stipulation of the parties.

For the abovementioned reasons, the Petitioners' exception to paragraph 73 is rejected.

Paragraphs 77 through 81 of the RO:

The Petitioners take exception to the conclusions of law in paragraphs 77 through 81 of the RO, asserting that the conclusions of law in paragraphs 77 through 81 of the RO are inconsistent with their interpretation of section 161.142, Florida Statutes.

The Department concludes that paragraphs 77 through 81 contain mixed issues of law and fact. Findings of fact include "ultimate facts," sometimes termed mixed issues of law and fact, necessary to determine the issues in a case. *Costin*, 972 So. 2d at 1086-1087. An agency reviewing a recommended order may not reject or modify the findings of fact of the 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. (2019); *Charlotte Cty.*, 18 So. 3d at 1082; *Wills,* 955 So. 2d at 62.

The Petitioners take exception to the ALJ's finding in paragraph 77 of the RO that "the Beaches of East Pass are adjacent eroding beaches." RO ¶ 77. The Petitioners also take exception to the ALJ's finding in paragraph 78 of the RO that "the beaches west of East Pass are not adjacent eroding beaches." RO ¶ 78. Contrary to the Petitioners' exceptions to paragraphs 77 and 78 of the RO, the Department finds that the ALJ's findings in these two paragraphs are supported by competent substantive evidence; and thus, must be accepted by the Department. The findings in paragraph 77 and 78 of the RO are supported by competent substantial evidence in the form of expert testimony by Ralph Clark, P.E., and Matthew Trammel, P.E. (Case No. 19-1844, T. Vol. 1, pp. 40-42, 115-16) (Case No. 19-3356, T. Vol. II, pp. 177-78, 188-89, 206; City Exhibits 41-44). Ralph Clark presented similar testimony. (Case No. 19-1844, T. Vol. 3, p. 347) (Case No. 19-3356, T. Vol. II, pp. 227-28).

The Petitioners also take exception to the conclusions of law in paragraphs 79 through 81 of the RO, asserting that the ALJ has misinterpreted section 161.142, Florida Statutes, and chapter 62B-41, Florida Administrative Code.

The Petitioner contends that the ALJ could not, as a matter of law, conclude that the Project application meets the statutory and rule criteria for issuance of the Permit Modification without the factual findings in paragraphs 16, 19, 26, 27, 28, 31, 35, 38, 39, 42, 43, 44 and 46 of the RO. However, the Department herein above has rejected each of the Petitioner's exceptions to the findings in paragraphs 16, 19, 26, 27, 28, 31, 35, 38, 39, 42, 43, 44 and 46 of the RO, finding each paragraph was supported by competent substantial evidence. As a result, the Petitioner has no basis to allege that the Permit Modification does not meet the statutory requirements in section 161.141, Florida Statutes, and rule criteria in rule 62B-41, Florida Administrative Code. For the abovementioned reasons, the Petitioners' exceptions to paragraphs 79-81 are rejected.

Based on the foregoing reasons, the Petitioners' Exception No. 1 is denied.

Petitioners' Exception No. 2 regarding Pages 3, 6, and 11 of the RO, and Paragraphs 10, 22, 23-46, 43-44, 59 and 76-81 of the RO

The Petitioners take exception to the findings of fact in paragraphs 3, 6, 11, 22, 23 through 46, and 43 through 44 of the RO; and moreover, take exception to the conclusions of law in paragraphs 59 and 76 through 81 of the RO.

Specifically, the Petitioners contend the ALJ erroneously concluded "that the issue to be determined in this case is limited solely to determining entitlement to place sand as part of the next dredging event to the east of East Pass." *See* Petitioner's Exception 2 at page 9. However, it is clear that the ALJ understood that the Permit Modification under litigation authorized more

than one dredging event. In fact, the ALJ stated as such in paragraph 22 of the RO, which reads as follows:

> 22. The Permit Modification provides that, for the first maintenance dredging event following issuance of the Permit Modification, dredged material is to be placed at fill sites east of East Pass, the condition that Petitioners' find objectionable. The Permit Modification then provides that "[f]or all subsequent maintenance dredging events conducted under this permit, disposal locations shall be supported by physical monitoring data of the beaches east and west of East Pass in order to identify the adjacent eroding beaches that will receive the maintenance dredged material, providing consistency with section 161.142, Florida Statutes." Thus, the placement of dredged material to the east of East Pass authorized by the Permit Modification applies to the next dredging event, and not necessarily to subsequent periodic dredging events authorized by the Permit Modification.

RO ¶ 22. *See also* Case No. 19-3356, DEP Exhibit 29. It is also clear that the Petitioners have no dispute with the sand being placed on the western side of East Pass as required under the 2009 Permit. In fact, this is the crux of their challenge. They contend the sand should be required to go only to the west (as provided in the 2009 Permit) and should not be authorized to ever go to the east (as allowed in the Permit Modification in the event it is the adjacent eroding beach). *See* Petitioner's Petition for Formal Administrative Hearing at ¶¶ 15, 17 (stating "[u]nless sand dredged from East Pass continues to go west … Petitioner will be harmed as described herein" and "[t]he contested agency action is the Department's decision to authorize the Corps, under the Modification, to deposit sand dredged from East Pass within the swash zone on the eastern side of East Pass"). In fact, in Case No. 19-1844, the Petitioners testified that their objective in bringing this litigation is to get 100 percent of the sand dredged from East Pass "to go to the west at all times." (Case No. 19-1844, T. Vol. 5, p. 566). Accordingly, the Department concludes that the ALJ has properly characterized that the main disputed issue is whether sand can be placed on the beaches to the east of East Pass.

Page 3 of the RO's Statement of the Issues:

The Petitioners take exception to a phrase in the ALJ's Statement of the Issues on page 3 of the RO. RO at p. 3. As described above, the ALJ correctly, characterized the disputed issue in this case. Moreover, the Petitioners' exception to the ALJ's Statement of the Issues is improper and must be denied, because parties may only file an exception to findings of fact and conclusions of law. Fla. Admin. Code R. 28-106.217 (2019). For the abovementioned reasons, the Petitioners' exception to a phrase in the ALJ's Statement of the Issues is rejected.

Pages 6, 9 and 11 of the RO's Preliminary Statement:

The Petitioners take exception to several statements in the ALJ's Preliminary Statement on pages 6, 9 and 11 of the RO. RO at pp. 6, 9, 11. As described above, the ALJ correctly, characterized the disputed issue in this case. Moreover, the Petitioners' exception to the ALJ's Preliminary Statement is improper and must be denied, because parties may only file an exception to findings of fact and conclusions of law. Fla. Admin. Code R. 28-106.217 (2019). For the abovementioned reasons, the Petitioners' exception to several statements in the ALJ's Preliminary Statement is rejected.

Paragraph 10 of the RO:

The Petitioners take exception to a statement in paragraph 10 of the RO's findings of fact, which reads, in its entirety, that "[t]he issue in dispute in this case, as it was in 19-1844, is the determination of whether beaches adjacent to the East Pass inlet are eroding, stable, or accreting, for purposes of meeting the statutory objective of section 161.142." RO ¶ 10.

The Petitioners object that paragraph 10 of the RO "suggests that the issues in this case and in Division Case No. 19-1844 are the same." Petitioners' Exceptions to the RO at p. 10. The

Department rejects the Petitioners' reading of paragraph 10 of the RO that the ALJ "suggested" that the issues in DOAH Case Nos. 19-1844 and 19-3356 are the same.

First, the Department concludes that paragraph 10 of the RO contains mixed issues of law and fact. *Costin*, 972 So. 2d at 1086-1087. An agency reviewing a recommended order may not reject or modify the findings of fact of the 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. (2019); *Charlotte Cty.*, 18 So. 3d at 1082; *Wills,* 955 So. 2d at 62.

This final order is replete with citations to the record for both DOAH Case No. 19-1844 and the case at issue, DOAH Case No. 3356, which provide competent substantial evidence that certain beaches adjacent to the East Pass Inlet, proposed for dredging, are eroding, and other beaches are stable or accreting. The Department's rulings on the Petitioners' numerous objections to paragraphs in their Exceptions No. 1, 2 and 3 are incorporated herein in response to this exception.

Second, the Petitioners' have waived any exception to the ALJ's "suggestion" in paragraph 10 of the RO, because the parties, including the Petitioners, stipulated to the admission into evidence of the record, including the hearing transcript, from DOAH Case No. 19-1844, because of the similarity of issues and overlapping witnesses and evidence in both cases. RO at p. 12 (Preliminary Statement).

For the abovementioned reasons, the Petitioners' exception to paragraph 10 is rejected.

Paragraph 22 of the RO:

The Petitioners take exception to a portion of paragraph 22 of the RO's findings of fact. However, the Petitioners statements on pages 10-11 of their exceptions appear internally

inconsistent. The Department is not obligated to consider an exception that does not clearly identify the disputed portion of the recommended order or identify the legal basis for the exception. *See* § 120.57(1)(k), Fla. Stat. (2019).

Nevertheless, the Department will attempt to interpret the Petitioners' objection to paragraph 22 RO. It appears that the Petitioners object to any finding by the ALJ "as it relates to future dredge events authorized by the Permit Modification. [R.O. ¶ 22 ('[T]he placement of dredged material to the east of East Pass authorized by the Permit Modification applies to the *next* dredge event, and not necessarily to subsequent dredging events authorized by the Permit Modification.' (emphasis added))]." Petitioners' Exceptions to the RO at pp. 10-11.

The Department concludes that the ALJ's statement cited above in paragraph 22 of the RO is citing to the terms of the Permit Modification. The conditions of the Permit Modification authorize the specific placement of dredged material for the *next* dredging event, but not necessarily subsequent dredging events. The Permit Modification requires each new dredging event to be analyzed to determine which shoreline constitutes the "adjacent eroding beach" for placement of the dredged material. (Case No. 19-3356, DEP Exhibit 29).

For the abovementioned reasons, the Petitioners' exception to paragraph 22 is rejected.

Paragraphs 23 through 46 of the RO:

The Petitioners take exception to the findings of fact in paragraphs 23 through 46 of the RO, asserting that they fail to address all requirements relating to placement of dredge spoil from *future* dredge events under the Permit Modification. Petitioners' Exceptions to the RO at pp. 11-12.

The Petitioners' appear to object to the ALJ's failure to reference placement of dredge spoils from future dredge events under the Permit. The conditions of the Permit Modification

authorize the *specific* placement of dredged material for the *next* dredging event, but not subsequent dredging events. The Permit Modification requires each new dredging event to be analyzed to determine which shoreline constitutes the "adjacent eroding beach" for placement of the dredged material. *See* RO ¶ 22 and Case No. 19-3356, DEP Exhibit 29.

The Petitioners appear to be requesting the Department to supplement the ALJ's findings of fact in paragraphs 23 through 46 of the RO. However, an agency has no authority to make independent or supplemental findings of fact. *See, e.g.*, *North Port, Fla.*, 645 So. 2d at 487*; Fla. Power & Light Co.*, 693 So. 2d at 1026-1027. For the abovementioned reasons, the Petitioners' exception to paragraphs 23 through 46 is rejected.

Paragraphs 43 and 44 of the RO:

The Petitioners take exception to the ultimate findings of fact in paragraphs 43 and 44 of the RO. However, the Petitioners statements on pages 10-11 of their exceptions are unclear. The Department is not obligated to consider an exception that does not clearly identify the disputed portion of the recommended order or identify the legal basis for the exception. *See* § 120.57(1)(k), Fla. Stat. (2019).

Nevertheless, the Department will attempt to interpret the Petitioners' objection to paragraphs 43 and 44 of the RO. The "ultimate finding of fact" in paragraph 43 can be summarized to state that the greater weight of the competent substantial evidence establishes that the shoreline east of East Pass is critically eroded and constitutes East Pass' "adjacent eroding beaches." RO ¶ 43. The "ultimate finding of fact" in paragraph 44 can be summarized to state that the greater weight of the competent substantial evidence establishes that the shoreline west of East Pass are stable, if not accreting, and are not East Pass' "adjacent eroding beaches."

The Petitioners contend that

> [W]hile the Division's conclusions in R.O. paragraphs 43 and 44 regarding the status of the beaches east and west of East Pass as "adjacent eroding beaches" might arguably apply to the immediate dredge event for which the Permit Modification requires placement to the east, those conclusions have no relevance to the placement of dredge spoils from future dredge events under the Permit.

Petitioners' Exceptions to the RO at p. 11.

The Petitioners' appear to object to the ALJ's failure to reference placement of dredge spoils from future dredge events under the Permit. The conditions of the Permit Modification authorize the *specific* placement of dredged material for the *next* dredging event, but not subsequent dredging events. The Permit Modification requires each new dredging event to be analyzed to determine which shoreline constitutes the "adjacent eroding beach" for placement of the dredged material. *See* RO ¶ 22 and Case No. 19-3356, DEP Exhibit 29.

The Petitioners appear to be requesting the Department to supplement the ALJ's findings of fact in paragraphs 43 and 44 of the RO. However, an agency has no authority to make independent or supplemental findings of fact. *See, e.g.*, *North Port, Fla.*, 645 So. 2d at 487*; Fla. Power & Light Co.*, 693 So. 2d at 1026-1027.

For the abovementioned reasons, the Petitioners' exceptions to paragraphs 43 and 44 are rejected.

Paragraph 59 of the RO:

The Petitioners take exception to a phrase in conclusion of law paragraph 59 of the RO, which states that "the immediate case involves a single maintenance dredging event, and not all maintenance dredging authorized over the term of the Permit Modification." RO ¶ 59. Paragraph 59 is directed to the Petitioners' standing. The ALJ added the phrase above to emphasize their questionable standing to challenge the Permit Modification, especially as it relates to the

speculative and remote nature of any potential injury to the Petitioners. The Petitioners conclude that the ALJ intended to imply that the Permit Modification under litigation only involves "a single maintenance dredging event, and not all maintenance dredging authorized under the terms of the Permit Modification." As described above, the Department rejects this conclusion.

The ALJ understood that the Permit Modification under litigation authorized more than one dredging event. In fact, the ALJ stated as such in paragraph 22 of the RO, which reads as follows:

> 22. The Permit Modification provides that, for the first maintenance dredging event following issuance of the Permit Modification, dredged material is to be placed at fill sites east of East Pass, the condition that Petitioners' find objectionable. The Permit Modification then provides that "[f]or all subsequent maintenance dredging events conducted under this permit, disposal locations shall be supported by physical monitoring data of the beaches east and west of East Pass in order to identify the adjacent eroding beaches that will receive the maintenance dredged material, providing consistency with section 161.142, Florida Statutes." Thus, the placement of dredged material to the east of East Pass authorized by the Permit Modification applies to the next dredging event, and not necessarily to subsequent periodic dredging events authorized by the Permit Modification.

RO ¶ 22. *See also* Case No. 19-3356, DEP Exhibit 29.

For the abovementioned reasons, the Petitioners' exception to paragraph 59 is rejected.

Paragraphs 76 through 81 of the RO:

The Petitioners take exception to the conclusions of law in paragraphs 76 through 81 of the RO, asserting that they fail to address all requirements relating to placement of dredge spoil from *future* dredge events under the Permit Modification. Petitioners' Exceptions to the RO at p. 12.

The Petitioners' appear to object to the ALJ's failure to reference placement of dredge spoils from future dredge events under the Permit. The conditions of the Permit Modification authorize the *specific* placement of dredged material for the *next* dredging event, but not

subsequent dredging events. The Permit Modification requires each new dredging event to be analyzed to determine which shoreline constitutes the "adjacent eroding beach" for placement of the dredged material. *See* RO ¶ 22 and Case No. 19-3356, DEP Exhibit 29.

The Petitioners appear to be requesting the Department to supplement the ALJ's underlying findings of fact that support paragraphs 76 through 81 of the RO. However, an agency has no authority to make independent or supplemental findings of fact. *See, e.g.*, *North Port, Fla.*, 645 So. 2d at 487*; Fla. Power & Light Co.*, 693 So. 2d at 1026-1027. For the abovementioned reasons, the Petitioners' exception to paragraphs 76 through 81 is rejected.

Based on the foregoing reasons, the Petitioners' Exception No. 2 is denied.

Petitioners' Exception No. 3 regarding Paragraphs 23, 24, 30, 31, 32, 33 and 43

The Petitioners take exception to the findings of fact in paragraphs 23, 24, 30, 31, 32, 33 and 43 of the RO. Regarding paragraphs 23, 24, 30, 31 and 43 of the RO, the Petitioners take exception to the ALJ's reference in these paragraphs to whether a shoreline is designated as "critically eroded." The Petitioners allege that whether a shoreline is critically eroded is irrelevant to where and what quantity of sand dredged from East Pass should be placed and whether the Permit Modification complies with section 161.142, Florida Statutes, or Chapter 62B-41, Florida Administrative Code. Their exception to these paragraphs must be rejected, because the Petitioners did not contend, expressly or by implication, that these findings are not supported by competent substantial evidence.

Moreover, the ALJ's findings of fact at issue in paragraphs 23, 24, 30, 31 and 43 of the RO are supported by competent substantial evidence in the form of expert testimony and hearing exhibits. Regarding paragraphs 23, 30, 31 and 43, competent substantial evidence was presented that the eastern areas of influence of East Past, which include the beaches east of East Pass, are

critically eroded. (Case No. 19-1844, T. Vol. 1, pp. 41-42, 60-64, 91-92, 115-16, 121-26; Case No. 19-1844, T. Vol. 2, pp. 255-57; Case No. 19-1844, T. Vol. 3, pp. 296-302, 307) (Case No. 19-3356, T. Vol. II, pp. 222-230, 234-36, 241; Joint Exhibits 3, 6, and 7, City Exhibits 10, 11, 12, 14, and 41, DEP Exhibit 1). Regarding paragraph 24, competent substantial evidence was presented that the "shoreline landward of the western fill site has not been designated as critically eroded by the Department." (Case No. 19-1844, T. Vol. 1, p. 42).

The Petitioners also take exception to the statement in paragraph 32 that the beach on Santa Rosa Island to the west of East Pass recovered "naturally" following impacts from hurricanes in 2004-2005, alleging this portion of paragraph 32 is not supported by competent substantial evidence. RO ¶ 32.

Contrary to the Petitioners' exception, the ALJ's above cited finding in paragraph 32 of the RO is supported by competent substantial evidence in the form of expert testimony from Matthew Trammell, P.E., and photographic evidence he presented. (Case No. 19-1844, T. Vol. 1, pp. 39-40) (Case No. 19-3356, T. Vol. II, pp. 203-206; City Exhibits 45 and 46).

The Petitioners also take exception to the statement in paragraph 33 of the RO that "the Santa Rosa Island shoreline is not deemed by DEP to be 'critically eroded,'" alleging this statement is not supported by competent substantial evidence. RO ¶ 33.

Contrary to the Petitioners' exception, the ALJ's above cited finding in paragraph 33 of the RO is supported by competent substantial evidence in the form of expert testimony from Matthew Trammell, P.E., who testified that the beaches within the western area of influence are not currently designated as critically eroded. (Case No. 19-1844, T. Vol. 1, p. 42).

The Petitioners disagree with the ALJ's findings and seek to have the Department reweigh the evidence. However, the Department is not authorized to reweigh evidence presented

at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Constr. Co.,* 592 So. 2d at 280; *Conshor, Inc.,* 498 So. 2d at 623. For the abovementioned reasons, the Petitioners' exception to paragraphs 23, 24, 30, 31, 32, 33 and 43 of the RO is rejected.

Based on the foregoing reasons, the Petitioners' Exception No. 3 is denied.

Petitioners' Exception No. 4 regarding Paragraphs 26 and 27

The Petitioners take exception to the findings of fact in paragraphs 26 and 27 of the RO, alleging that these paragraphs are based on similar conclusions in the RO for Case No. 19-1844, which the Petitioners allege were based on statements from the Physical Monitoring Plan in the City's separate permit from Case No. 19-1844.

The Petitioners disagree with the ALJ's findings in paragraphs 26 and 27 of the RO and seek to have the Department reweigh the evidence. However, the Department is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307.

Contrary to the Petitioners' exception, the ALJ's findings in paragraphs 26 and 27 of the RO are supported by competent substantial evidence. Because of the similarity of issues and the overlapping witnesses and evidence in this case and Case No. 19-1844, the parties in this case stipulated to the admission into evidence of the record from Case No. 19-1844, including but not limited to the hearing transcript from Case No. 19-1844. The ALJs findings are supported by more than the Physical Monitoring Plan in the City's separate permit from Case No. 19-1844.

The ALJ's findings in paragraphs 26 and 27 are supported by competent substantial evidence in the form of expert testimony and exhibits from both Case No. 19-1844 and Case No. 19-3356. (Case No. 19-1844, T. Vol. 1, pp. 50, 93; Case No 19-1844, T. Vol. 3, pp. 288-89, 318-19; Case No. 19-1844, T. Vol. 5, pp. 569-70, 572-73, 576, 581, 588-89) (Case No. 19-3356 Joint Exhibit 4 (East Pass IMP)).

Based on the foregoing reasons, the Petitioners' Exception No. 4 is denied.

Petitioners' Exception No. 5 regarding Paragraphs 4 and 41

The Petitioners take exception to certain findings in paragraphs 4 and 41 of the RO related to the Petitioners' injuries, alleging the statements were not supported by competent substantial evidence. Specifically, they object to the ALJ's finding that the Petitioners' objective is "to have any sand dredged from East Past to be placed on the western disposal areas at all times." RO ¶ 4.

Contrary to the Petitioners' exception, the ALJ's above cited finding in paragraph 4 of the RO is supported by competent substantial evidence. Because of the similarity of issues and the overlapping witnesses and evidence in this case and Case No. 19-1844, the parties in this case stipulated to the admission into evidence of the record from Case No. 19-1844, including but not limited to the hearing transcript from Case No. 19-1844. In Case No. 19-1844, the Petitioners testified that their objective in bringing this litigation is to get 100 percent of the sand dredged from the pass "to go to the west at all times." (Case No. 19-1844, T. Vol. 5, p. 566).

The Petitioners also take exception to the ALJ's statement in paragraph 41 of the RO that "placement of the dredged material on the eastern beach placement areas would, to some degree, accomplish the goals of allowing sand transport to the western beaches, as was the relief sought in the Petition." RO ¶. The ALJ's statement was based on Google Earth engine images

"depict[ing] sand moving across the ebb shoal to the western side of the inlet and attaching at various distances from the west jetty." RO ¶ 41.

The Petitioners disagree with the ALJ's above cited finding in paragraph 41 of the RO and seek to have the Department reweigh the evidence. However, the Department is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307.

Contrary to the Petitioners' exception, the ALJ's above cited finding in paragraph 41 of the RO is supported by competent substantial evidence in the form of expert testimony from Ralph Clark, P.E. (Case No. 19-3356, T. Vol. IV, p. 386).

Based on the foregoing reasons, the Petitioners' Exception No. 5 is denied.

Petitioners' Exception No. 6 regarding Page 11 of the RO's Preliminary Statement

The Petitioners take exception to a phrase in the ALJ's Preliminary Statement of the RO. RO at p. 11. However, Petitioners' exception to the ALJ's preliminary statement is improper and must be denied, because parties may only file an exception to findings of fact and conclusions of law. Fla. Admin. Code R. 28-106.217 (2019).

Based on the foregoing reasons, the Petitioners' Exception No. 6 is denied.

RULINGS ON CITY'S EXCEPTIONS

City's Exception No. 1 regarding Paragraphs 48 through 59 and Recommendation Paragraph

The City takes exception to paragraphs 48 through 59 and the Recommendation paragraph of the RO, which includes every paragraph directed to the Petitioners' standing to challenge issuance of the proposed Permit Modification. The City alleges that the ALJ should

have made a precise ruling in the RO that the Petitioners' lacked standing and that their petition should be dismissed because of a lack of standing.

In paragraph 59 of the RO, the ALJ identified facts that questioned whether the Petitioners demonstrated at the DOAH hearing that they had standing to challenge the proposed Permit Modification. Specifically, the ALJ found:

> Despite their allegations that they were "substantially affected," Petitioners, who reside miles away from the area of influence of East Pass, completely failed to prove that they will suffer any injury to their property, or any injury to their ability to enjoy the beaches between their homes and East Pass, or that they were otherwise adversely affected by the issuance of the Permit Modification. The evidence was not persuasive that perceptible quantities of sand deposited on the western disposal site would migrate from the area of influence, or make its way to their property, or would adversely affect the already accretional nature of the shoreline adjacent to their properties. Furthermore, even accepting that sand would eventually make it to their properties, the evidence was convincing that the journey would be lengthy, hardly an immediate or adverse effect, particularly since the immediate case involves a single maintenance dredging event, and not all maintenance dredging authorized over the term of the Permit Modification. Thus, despite their allegations, Petitioners wholly failed to prove at the hearing that the Permit Modification as issued would – or could – result in actual or immediate threatened adverse effects to their property or their ability to use and enjoy the beaches west of East Pass.

RO ¶ 59. Accordingly, the Petitioners' standing to participate in this case should technically be denied at this stage of these proceedings under the Agrico rationale. *See Agrico Chem. Co. v. Dep't of Envtl. Regulation*, 406 So. 2d 478, 481-82 (Fla. 2d DCA 1981).

Nevertheless, the DOAH record reflects that the ALJ afforded the Petitioners all the rights provided by the Administrative Procedures Act to a party claiming his substantial interests would be affected by the DEP action being challenged in this case. During the DOAH hearing, the Petitioners presented arguments, testimony, and documentary evidence in support of the merits of their claims. The Petitioners filed a Proposed Recommended Order and Exceptions to the RO; and, these Exceptions have been addressed on their merits in this Final Order.

Consequently, since the Petitioners' claims were litigated on their merits in the DOAH hearing and are addressed in this Final Order, the issue of their standing is essentially moot at this administrative stage of these proceedings. *See Hamilton Cty. Bd. of Cty. Comm'rs v. Dep't of Envtl. Regulation*, 587 So. 2d 1378, 1383 (Fla. 1st DCA 1991) (concluding that the issue of Hamilton County's standing to challenge a DER permitting action was moot on appellate review because the "issues were fully litigated in the proceedings below."); *Suncoast Waterkeeper, Inc., v. Long Bar Point, LLLP and Dep't of Envtl. Prot.,* DOAH Case Nos. 17-0795 and 17-0796 (Fla. DOAH March 6, 2018; DEP April 27, 2018) (concluding that the issue of Suncoast Waterkeeper's standing was moot, because its substantive claims had been litigated on their merits at the DOAH final hearing); *Okaloosa Cty. v. Dep't of Envtl. Regulation*, ER F.A.L.R. 1992: 032, p. 6 (Fla. DER 1992) (concluding that, from a practical standpoint, the issue of Okaloosa County's standing was moot, because the County's substantive claims had been litigated on their merits at the DOAH final hearing). [3]

Based on the foregoing reasons, the City's Exception No. 1 is denied.

City's Exception No. 2 regarding Paragraphs 48 through 59 and Recommendation Paragraph

The City takes exception to paragraphs 48 through 59 and the Recommendation paragraph of the RO, which includes every paragraph directed to the Petitioners' standing to challenge issuance of the proposed Permit Modification. The City alleges that the ALJ should

[3] In paragraph 58 of the RO, the ALJ concluded he was willing to accept the Petitioners' "tenuous" standing "based on what is perceived to be a broad grant of standing as established in *Palm Beach County Environmental Coalition* and further discussed in *Bluefield Ranch Mitigation Bank Trust*," and "on the policy that it is best to have cases heard on their merits when possible." RO ¶ 58.

have made a precise ruling in the RO that the Petitioners' lacked standing and that their petition should be dismissed because of a lack of standing.

In particular, the City alleges that the ALJ's interpretation of the law of standing in paragraph 57 of the RO "may have been misapplied in Conclusions of Law ¶¶ 48-49." City's Exceptions at p. 3. Paragraph 57 of the RO reads, as follows:

> 57. Petitioners have alleged that the proposed placement of dredged material in the swash zone to the east of East Pass could result in adverse erosional impacts. For purposes of standing, the allegations must be accepted as true. *S. Broward Hosp. Dist. v. Ag. for Health Care Admin.*, 141 So. 3d at 681. The allegations are sufficient to meet the standard of an "injury in fact which is of sufficient immediacy to entitle them to a section 120.57 hearing."

RO ¶ 57.

The Petitioners' standing to participate in this case should technically be denied at this stage of these proceedings under the Agrico rationale. *See Agrico Chem. Co.,* 406 So. 2d *at* 481-82. As explained above in response to the City's Exception No. 1, the issue of the Petitioners' standing is essentially moot at this administrative stage of these proceedings, because their claims were litigated on the merits in the DOAH hearing. *See Hamilton Cty. Bd. of Cty. Comm'rs*, 587 So. 2d at 1383 (concluding that the issue of Hamilton County's standing to challenge a DER permitting action was moot on appellate review because the "issues were fully litigated in the proceedings below."); *Suncoast Waterkeeper, Inc.,* DOAH Case Nos. 17-0795 and 17-0796 (concluding that the issue of Suncoast Waterkeeper's standing was moot, because its substantive claims had been litigated on their merits at the DOAH final hearing); *Okaloosa Cty.*, ER F.A.L.R. 1992: 032, p. 6 (concluding that, from a practical standpoint, the issue of Okaloosa County's standing was moot, because the County's substantive claims had been litigated on their merits at the DOAH final hearing).

Based on the foregoing reasons, the City's Exception No. 2 is denied.

CONCLUSION

Having considered the applicable law in light of the rulings on the above Exceptions, and being otherwise duly advised, it is

ORDERED that:

A. The Recommended Order (Exhibit A) is adopted, and is incorporated by reference herein; and

B. The proposed Permit Modification No. 0288799-006-JN, as amended by DEP's August 21, 2019, Notice of Proposed Changes to Proposed Agency Action, to the U.S. Army Corps of Engineers is APPROVED, subject to the general and specific conditions set forth therein.

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 Rule 9.110, 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 6th day of April, 2020, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

NOAH VALENSTEIN
Secretary

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

Lea Crandall
CLERK

04/06/2020
DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order has been sent by electronic mail this 6th day of April, 2020 to:

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