

**STATE OF FLORIDA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

<b>DEFENDERS OF CROOKED LAKE, INC.,</b>	)	
<b>AND PHILLIP AND PRISCILLA GERARD,</b>	)	
	)	
<b>Petitioners,</b>	)	
	)	
<b>v.</b>	)	<b>OGC CASE NO. 17-0972</b>
	)	<b>DOAH CASE NO. 17-5328</b>
<b>KRISTA HOWARD AND DEPARTMENT OF</b>	)	
<b>ENVIRONMENTAL PROTECTION,</b>	)	
	)	
<b>Respondents.</b>	)	
	/	

**CONSOLIDATED FINAL ORDER**

An Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH) on July 5, 2018, 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. Neither the Petitioners nor the Defendants filed any exceptions to the ALJ’s RO. This matter is now before the Secretary of the Department for final agency action.<sup>1</sup>

**BACKGROUND**

On July 28, 2017, the Department gave notice of its intent to issue a Consolidated Environmental Resource Permit (ERP) and Lease to Use Sovereign Submerged Lands (BOT Lease) (collectively known as the Consolidated Authorization) (DEP Consolidated Permit No.

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

53-0351424-001-EI), authorizing Krista<sup>2</sup> Howard (Howard) to construct and operate a single family residential dock (Dock) on Crooked Lake, in Babson Park, Polk County, Florida. The Petitioners timely challenged the Department's proposed issuance of the Consolidated Authorization. The matter was referred to DOAH to conduct an administrative hearing pursuant to sections 120.569 and 120.57(1), Florida Statutes.

On January 11, 2018, the Department issued a notice of filing an amended agency action to reflect the correct permitting standard applicable to the ERP portion of the Consolidated Authorization. That Amended Agency Action is the subject of this proceeding.

On January 31, 2018, the Respondents filed a joint motion regarding application of Section 120.569(2)(p), Florida Statutes, as the burden of proof at the final hearing, asserting that pursuant to section 120.569(2)(p), Petitioners bore the ultimate burden of proof with respect to both the ERP portion and the BOT Lease portion of the Consolidated Authorization at issue in this proceeding.

The final hearing was held on February 6 and 7, 2018. Petitioners presented the testimony of Robert Luther, James Tully, Phillip Gerard, Priscilla Gerard, Thomas Williamson, and Steven Howard. Petitioners' Exhibits 4, 5, and 13 were admitted into evidence without objection, and Petitioners' Exhibits 3, 6, and 7 were admitted into evidence over objection. Respondent Howard presented the testimony of Todd Rickman and Steven Howard, and Howard's Exhibits 1 through 9, 13, 14, 16, and 17 were admitted into evidence without objection. Respondent DEP presented the testimony of Brandon Miller; and DEP's Exhibits 1 through 7 were admitted into evidence without objection.

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<sup>2</sup> The application for the project incorrectly identified the applicant as "Kristin" Howard. However, the applicant's name is "Krista" Howard, as reflected by her signature on the application. This error was corrected at the final hearing, and in the case style.

The two-volume Transcript of the final hearing was filed with DOAH on April 6, 2018. The parties timely filed their Proposed Recommended Orders on May 7, 2018, with the ALJ, who then issued her RO on July 5, 2018. No exceptions were filed to the RO.

### **SUMMARY OF THE RECOMMENDED ORDER**

On July 28, 2017, the Department gave notice of its intent to issue a Consolidated Authorization, authorizing the Defendant Howard to construct and operate a single family residential dock (Dock) on Crooked Lake, in Babson Park, Polk County, Florida.

#### **I. The Parties**

Petitioner Defenders is a Florida non-profit corporation that has been in existence since the mid-1980s or earlier. Defenders' primary purpose is to protect and preserve Crooked Lake so that it may remain an Outstanding Florida Water (OFW) for all members of the public to use and enjoy. Defenders has more than 25 members who reside in Polk County, Florida. Its membership consists of approximately 100 family memberships, mostly comprised of persons who live on or near Crooked Lake. (RO ¶ 1).

Petitioners Gerards are riparian landowners on Crooked Lake, whose property is located immediately adjacent to the Respondent Howard's property. The Gerards' home address is 1055 Scenic Highway North, Babson Park, Florida 33827. (RO ¶ 2).

Respondent Howard is the applicant for the Consolidated Authorization for the Dock. Howard's property, which is riparian to Crooked Lake, is located at 1045 Scenic Highway North, Babson Park, Florida 33827. (RO ¶ 3).

Respondent DEP is the Florida administrative agency statutorily charged with, among other things, protecting Florida's water resources. As part of DEP's performance of these duties, it administers and enforces the provisions of chapter 373, part IV, Florida Statutes, and the rules

adopted under that statute. Pursuant to that authority, DEP determines whether to issue or deny applications for ERPs. Pursuant to section 253.002, Florida Statutes, DEP also serves as staff to the Board of Trustees of the Internal Improvement Trust Fund (Board of Trustees) and, in that capacity, reviews and determines whether to issue or deny, applications for approval to use sovereignty submerged lands. (RO ¶4).

## II. DEP Review of the Application

The Dock is proposed to be located on sovereignty submerged lands and in surface waters subject to State of Florida regulatory jurisdiction. Therefore, an environmental resource permit and a sovereignty submerged lands lease are required. (RO ¶ 5).

On or about February 14, 2017, Todd Rickman, Howard's professional contractor who designed the Dock, filed an Application for a Sovereignty Submerged Lands Lease for Existing Structures and Activities (Application) with DEP's Southwest District Office, seeking approval to construct and operate the Dock. On or about March 15, 2017, DEP requested additional information regarding the project. Howard submitted the requested items, and the Application was determined complete on May 30, 2017. Notice of DEP's receipt of the Lease portion of the Application was provided as required by section 253.115, Florida Statutes. The comment period commenced on June 15, 2017, and ended on July 6, 2017. (RO ¶¶ 6-8).

On July 28, 2017, DEP issued the Consolidated Notice of Intent, proposing to issue the Consolidated Authorization to construct and operate the Dock. On January 11, 2018, DEP amended the Consolidated Notice of Intent to accurately reflect the "clearly in the public interest" permitting standard for the ERP portion of the Consolidated Authorization, which applies to projects proposed in OFWs. (RO ¶¶ 9-10).

### III. Background

#### Crooked Lake

The ALJ found that Crooked Lake (also, Lake) is an approximately 4,247-acre freshwater lake in Polk County, Florida, located on the Lake Wales Ridge. It is an irregularly shaped karst lake roughly resembling an inverted "L." Crooked Lake is designated an OFW by Florida Administrative Code Rule 62-302.700(9)(i)9, and classified as a Class III waterbody. Fla. Admin. Code. R. 62-302.400(15). (RO ¶¶ 11-12).

The ALJ found that the elevations and bottom contours in Crooked Lake vary substantially throughout the Lake. Water depths vary substantially from one location to another throughout the Lake. Water levels in Crooked Lake fluctuate frequently and, at times, dramatically, depending on rainfall frequency and amounts. (RO ¶¶ 13-14).

The ALJ found that a graph prepared by Petitioners' witness James Tully, using Southwest Florida Water Management District (SWFWMD) historical water level data for Crooked Lake measured in National Geodetic Vertical Datum of 1929 (NGVD) shows water levels historically fluctuating from as low as approximately 106 feet in or around 1991, to as high as 123 feet NGVD in or around 1951, 1961, and 2004. (RO ¶ 15).

Rickman generated a water level graph using the Polk County Water Atlas (Atlas) website. The ALJ found that this graph, which covers the period of 2008 through mid-2017, shows that the water levels in Crooked Lake, for the most recent ten-year period, fluctuated approximately five feet, with the lowest levels falling slightly below 114 feet NGVD for relatively short periods in 2012 and 2013, and the highest level rising to approximately 119 feet NGVD in mid-2017. The ALJ found that competent, credible evidence shows that although water levels in Crooked Lake may occasionally rise to levels at or around 123 feet NGVD, those

conditions have been associated with extreme weather events such as hurricanes, are atypical, and are relatively short-lived. (RO ¶¶ 16-17).

The ALJ found that the maximum water level in Crooked Lake is subject to control by a weir located south of the Lake. Discharge from the weir occurs at a control elevation of 120 feet NGVD. As such, the water level in parts of Crooked Lake may, at times, temporarily exceed 120 feet NGVD, but will eventually decrease to 120 feet NGVD as the water flows south and is discharged through the weir. To the extent rainfall does not recharge the Lake, water levels may fall below 120 feet NGVD. The ALJ also found that the ordinary high-water line (OHWL), which constitutes the boundary between privately-owned uplands and sovereignty submerged lands, has been established at 120.0 feet NGVD for Crooked Lake. (RO ¶¶ 18-19).

The ALJ found that Crooked Lake is used for recreational activities, such as fishing, swimming, boating, and jet ski use, and there are public and private boat ramps at various points on the lake that provide access to the Lake. There is no marina having a fueling station on the Lake. The ALJ found there was credible evidence that the northeast portion of the Lake, where the Dock is proposed to be located, experiences a substantial amount of boat and jet ski traffic. This portion of the Lake also is used for swimming, water-skiing, wakeboarding, the use of “towables,” such as inner tubes, and for other in-water recreational uses. (RO ¶¶ 20-21).

#### The Proposed Dock

Howard holds fee title by warranty deed to parcel no. 333028-000000-033140 located at 1045 Scenic Highway, Babson Park, Florida. This parcel has approximately 110 linear feet of riparian shoreline on Crooked Lake. Howard proposes to construct and operate the Dock on sovereignty submerged lands adjacent to this riparian upland parcel, which is located on the eastern shore of the northeastern portion of Crooked Lake. (RO ¶¶ 22-23).

The ALJ found that the Dock, as proposed, is a private single-family residential dock that will be used by Howard for water-dependent recreational purposes, such as boating, fishing, swimming, and sunbathing. The ALJ also found that the Dock is not proposed to be constructed or used by, or to otherwise serve, commercial or multifamily residential development. (RO ¶¶ 24- 25).

The ALJ found that the Dock is configured as a “T,” supported by pilings, and consists of a 4-foot-wide by 152-foot-long access walkway, and an approximately 1,983-square-foot terminal platform comprised of a lower-level platform having four vessel slips and a flat platform roof. Stairs lead from the lower level of the terminal platform to the platform roof, which will be elevated eight feet above the lower-level platform and have a railed perimeter. The platform roof will function as a roof for the boat storage area and a sundeck. The ALJ also found that the four slips on the Dock’s lower-level platform will be used for permanent mooring for up to six watercrafts: a 23-foot-long ski boat, a 20-foot-long fishing boat, and four jet skis. The Dock will occupy a total area of approximately 2,591 square feet. The lower platform of the Dock will be constructed at an elevation of 121 feet NGVD, and the roof/upper platform will be constructed eight feet above that, at an elevation of 129 feet NGVD. (RO ¶¶ 26-27).

The ALJ found that the pilings supporting the Dock will be wrapped in an impervious material to prevent leaching of metals and other pollutants into the water. (RO ¶ 28).

The ALJ found that under the Specific Purpose Field Survey (Survey) for the Lease submitted as part of the Application, the Lease will preempt approximately 2,591 square feet, and closely corresponds to the footprint of the Dock. The ALJ also found that the Survey shows “approximate riparian lines” that delineate Howard’s riparian area oriented to the center of the waterbody and to the primary navigation channel in Crooked Lake. (RO ¶¶ 29-30).

The ALJ found that the Dock location, as modified, is proposed to be located 25.1 feet, at its closest point, from the southern riparian line, and 29.4 feet, at its closest point, from the northern riparian line. (RO ¶ 31).

The ALJ found that the walkway of the Dock will commence at an elevation approximately 120 feet NGVD, which corresponds to the OHWL established for Crooked Lake. Moreover, the ALJ found that the walkway will extend waterward approximately 152 feet, where it will intersect with the terminal platform. The terminal platform will extend another 52 feet waterward. In total, the Dock is proposed to extend waterward approximately 204 feet from the OHWL. (RO ¶ 32).

The ALJ found that although the Dock would be one of the longest and largest docks on Crooked Lake, the credible evidence establishes that there are several other docks of similar size and/or length on the Lake. Rickman testified that he obtained approvals for, or was otherwise aware of, several docks over 2,000 square feet on the Lake. Additionally, the evidence showed that eight other docks on the Lake are longer than the proposed Dock. Rickman also testified that most of the larger docks on Crooked Lake have roofs, and that most of these roofs are pitched, rather than flat. (RO ¶ 33).

As noted above, the ALJ found that the water level in Crooked Lake frequently fluctuates. As a result, there are periods during which water depths in parts of the Lake are extremely shallow. The ALJ found that the Dock was designed to extend far enough out into Crooked Lake to reach sufficient water depth to enable Howard to maximize the use of the Dock for boating throughout the year. (RO ¶¶ 34-35).

The ALJ found that the Dock is designed to extend out to the point at which the bottom elevation of the Lake is approximately 109.9 feet NGVD. Based on the Atlas' ten-year water



level graph for Crooked Lake referenced above, Howard's expert projected that at this point, the water depth typically would be sufficient to allow Howard to operate her largest vessel, the 23-foot ski boat, which has a 25-inch draft. The ALJ found that the ski boat will be stored out of the water on a boat lift on the Dock, attached by cables to a sub-roof immediately beneath the platform roof. The ALJ also found that when being lowered into or hoisted from the water, the boat will be placed in a boat cradle consisting of two containment railings approximately 18 inches high on each side, and a "V" shaped aluminum bottom with bunks on which the boat is cradled. (RO ¶¶ 36-37).

The ALJ found that while the boat cradle is approximately 18 to 21 inches in "total height," the cradle does not have to be completely lowered its entire 18- to 21-inch height into the water when used. The ALJ found Steven Howard's testimony credible, that the cradle needs to be lowered into the water only a few inches lower than the ski boat's 25-inch draft to enable the boat to float into or out of the cradle. The ALJ also found Rickman's testimony credible that taking into account the 25-inch draft of the ski boat and the "total height" of the boat cradle, between 40 and 44 inches of water depth would be required when the cradle is used to avoid hitting the Lake bottom. (RO ¶ 38).

The ALJ found Rickman's testimony credible that he designed the Dock to extend out to the 109.9-foot NGVD bottom elevation point, based on the Atlas graph showing the lowest water levels for the previous ten-year period at approximately 114 feet NGVD. At this point, the projected water depth would be slightly more than four feet during periods of the lowest projected water levels for Crooked Lake. The ALJ then found that for the Dock to be able to wharf out to 109.9 feet NGVD bottom elevation, it must extend a total of approximately 204 feet waterward into the Lake. (RO ¶¶ 39-40).

#### IV. Impacts Assessment for Environmental Resource Permit Water Quality Impacts

As noted above, Crooked Lake is a Class III waterbody. Accordingly, the surface water quality standards and criteria applicable to Class III waters in Florida codified in rule 62-302.300, Florida Administrative Code, apply to Crooked Lake. The ALJ found that the Dock, as proposed to be constructed and operated, is not anticipated to adversely affect or degrade water quality in Crooked Lake. The ALJ found that the Consolidated Authorization requires a floating turbidity curtain to be installed around the boundary of the construction area before construction commences, and retained until construction is complete and turbidity levels in the work area have returned to background levels. Furthermore, the ALJ found that the pilings supporting the Dock must be wrapped in an impervious material to prevent leaching of metals and other pollutants into the water. (RO ¶¶ 42-45).

The ALJ also found that the Consolidated Authorization prohibits a variety of activities, including: the installation and use of fueling equipment at the Dock; the discharge of sewage or other waste into the water; liveboards; fish cleaning or the installation of fish cleaning stations unless sufficient measures such as sink screens and waste receptacles are in place; and repair and maintenance activities involving scraping, sanding, painting, stripping, recoating, or other activities that may degrade water quality or release pollutants into the water. (RO ¶ 46).

The ALJ found that while the Consolidated Authorization imposes a specific condition requiring, for all vessels using the Dock, a minimum 12-inch clearance between the deepest draft of the vessel (with motor in the down position) and the top of submerged resources, it does not specifically address circumstances where the use of the boat cradle, rather than the vessel itself, may hit the Lake bottom. The ALJ found that DEP's witness acknowledged that if the boat cradle were to hit the Lake bottom, water quality standards may be violated. (RO ¶¶ 47-48).

Given the information presented at the final hearing regarding the operation of the boat lift and the need for sufficient clearance between the bottom of the boat cradle and the lake bottom, the ALJ recommended that a specific condition be included in the Consolidated Authorization prohibiting contact of the Lake bottom by the boat cradle. (RO ¶ 49). *See* additional condition B in the Conclusion herein below.

Upon consideration of the conditions imposed by the Consolidated Authorization discussed above, including imposing a specific condition that prohibits contact of the boat cradle with the Lake bottom, the ALJ found that the Dock will not adversely affect or degrade the water quality of Crooked Lake. (RO ¶ 50).

#### Water Quantity Impacts

The ALJ found that the proposed Dock is a piling-supported structure that will not impound, store, or impede the flow of surface waters. Accordingly, the ALJ found that the Dock will not cause adverse flooding to on-site or offsite property, will not result in adverse impacts to surface water storage and conveyance capabilities, and will not result in adverse impacts to the maintenance of surface or ground water levels. (RO ¶ 51).

#### Impacts to Fish, Wildlife, and Listed Species and Habitat

The Application states, in section 5, question 6, that there is no vegetation on Howard's riparian shoreline. However, the ALJ found that the Survey depicts an area of emergent grasses approximately 60 feet wide and extending diagonally approximately 70 feet waterward into the Lake. The Survey depicts this grassed area as straddling the riparian line between Howard's property and the adjacent parcel to the south. The ALJ also found that the Survey shows the Dock is located a significant distance waterward of the grassed area, such that no portion of the Dock will be located on or near this grassed area. (RO ¶¶ 52-53).

The ALJ found that an aerial photograph of Howard's property and the Lake waterward of Howard's property shows a smaller patch of what appears to be *emergent grasses* further offshore. The ALJ found that this grassed area is not shown on the Survey, and it cannot definitively be determined, by examining the Survey and the aerial photograph, whether this grassed area is growing in an area that will be impacted by the Dock. The Applicant's witness Steven Howard acknowledged that this smaller grassed area may be located at or near the jet ski slip on the southeastern side of the Dock. (RO ¶ 54).

The ALJ found that an environmental assessment of this smaller grassed area was not performed or submitted as part of the Application. Thus, any value that this area may have as fish and wildlife habitat was not assessed as part of DEP's determination that the Dock will not adversely impact the value of functions provided to fish, wildlife, and to listed species and their habitat. (RO ¶ 55).

In order to provide reasonable assurance that the Dock will not adversely impact the value of functions provided to fish, wildlife, and to listed species and their habitat, the ALJ recommended including a specific condition in the Consolidated Authorization requiring this smaller grassed area to be completely avoided during construction and operation of the Dock, or, if avoidance is not feasible, that an environmental assessment be performed prior to construction so that the value of this grassed area, if any, to fish, wildlife, and listed species can be evaluated to determine whether minimization and compensatory mitigation should be required. An additional condition to the Consolidated Authorization, slightly modified by DEP, is set forth as additional condition B in the Conclusion herein below. (RO ¶ 56).

The ALJ found that the Consolidated Authorization contains a specific condition requiring a minimum 12-inch clearance between the deepest draft of the vessel (with the motor

in the down position) and the top of submerged resources for all vessels that will use the docking facility. The ALJ found that compliance with this condition will help ensure that the value of functions provided to fish and wildlife and to listed species and their habitat of any such submerged resources is not adversely impacted by vessels using the Dock. The ALJ also found that the specific condition in the Consolidated Authorization that requires handrails to be installed on the Dock to prevent mooring access to portions of the Dock other than the wet slips will help protect submerged resources in shallower areas near the Dock. (RO ¶¶ 57-58).

The ALJ found that fish populations in the immediate area of the Dock site may temporarily be affected during construction of the Dock; however, those impacts are not anticipated to be permanent. Additionally, the ALJ found that the wrapped Dock pilings may provide habitat for fish and a substrate for benthic organisms. (RO ¶ 59).

The ALJ determined that the Consolidated Authorization to construct and operate the Dock will not adversely impact the value of functions provided to fish, wildlife, or to listed species or their habitat, provided the final version of the Consolidated Authorization includes an additional condition that will protect the smaller grassed area identified above. (RO ¶ 60).

#### Impact on Navigation

Petitioners assert that the Dock will create a navigational hazard to boaters, because the Dock extends out approximately 204 feet into the Lake. Steven Howard testified that an inner tube on which his nephew was riding, which was being pulled behind a motor boat, collided with his neighbors 84-foot-long floating dock adjacent to Howard's riparian area. Petitioners argue that if an 84-foot-long dock creates a navigational hazard, a 204-foot-long dock would create an even greater navigational hazard. The ALJ did not find this argument persuasive. (RO ¶¶ 61-62).

The ALJ found that the portion of Crooked Lake on which the Dock will be constructed is approximately a mile and a half to two miles long and one-half to three-quarters of a mile wide. The ALJ found that although this portion of Crooked Lake experiences substantial boat traffic, the evidence shows that the Lake is sufficiently large in this area, even with the proposed Dock, to allow safe navigation. The ALJ noted that two other longer docks in the northeastern portion of Crooked Lake, extend 220 and 244 feet into the Lake from the shoreline. The ALJ found that no evidence was presented showing that either of these docks constitutes a navigational hazard. (RO ¶ 63).

Petitioners also assert that during periods of high water in this portion of Crooked Lake, the Dock will be underwater and thus will present a navigational hazard. In support, they presented photographs taken on October 30, 2017 -- approximately six weeks after Hurricane Irma struck central Florida -- showing ten docks, out of the 109 docks on Crooked Lake, that were partially or completely submerged. When the photographs were taken, the approximate water elevation was 119.2 feet NGVD. The ALJ found that all or a portion of the submerged docks had been constructed at or below the 119.2-foot NGVD elevation. Moreover, the ALJ found that the docks without roofs were mostly or completely invisible under the water; however, the roofs on the roofed docks, remained visible above the water even when their docking platforms were submerged. (RO ¶¶ 64-65).

Although the walkway and lower platform of Howard's Dock will be constructed at an elevation of 121 feet NGVD, the roof will be constructed at an elevation of 129 feet NGVD. Thus, the ALJ found that even during the relatively infrequent periods during which the water level in Crooked Lake may exceed 121 feet NGVD, the platform roof for the Dock will still be visible to vessels navigating in this portion of the Lake. (RO ¶ 66).

Additionally, the Consolidated Authorization contains a specific condition requiring the waterward end of the Dock to be marked with enough reflectors to be visible from the water at night by reflected light. The ALJ found that this condition provides additional assurance that the Dock will not present a navigational hazard. (RO ¶ 67).

For the above reasons, the ALJ found that the Dock will not adversely affect navigation. (RO ¶ 68).

#### Other ERP-Related Issues

The ALJ found that no evidence was presented that the Dock will be located in or proximate to a “work of the District,” as defined in section 373.019(28), Florida Statutes. The only “work of the District” about which evidence was presented was a weir in Crooked Lake located many thousands of feet south of the Dock. The ALJ found that no evidence was presented that the Dock would have any impact on this weir. (RO ¶ 69).

The ALJ found that the Dock was designed by an experienced professional contractor who has designed and installed many docks on Crooked Lake, and, as such, the Dock is anticipated to function as proposed. The ALJ also found that the Dock must be built according to engineering diagrams that are part of the Consolidated Authorization, and that as-built drawings must be submitted when Dock construction is complete, so DEP can confirm the Dock was constructed in accordance with the approved design. (RO ¶ 70).

The ALJ found that the applicant and the professional contractor in charge of construction are financially, legally, and administratively capable of ensuring that the activity will be undertaken in accordance with the terms and conditions of the Consolidated Authorization. The ALJ found that no evidence to the contrary was presented. (RO ¶ 71).

The ALJ found that the Department of State, Division of Historical Resources (DHR), did not provide any comments indicating that historical or archaeological resources are anticipated to be impacted by the project. Additionally, the ALJ found that the Consolidated Authorization contains a general condition requiring subsurface activity associated with construction of the Dock to immediately cease, and DHR be contacted, if any prehistoric or historic artifacts, such as pottery or ceramics, stone tools or implements, dugout canoes, or other physical remains that could be associated with Native American cultures or early colonial or American settlements, are encountered at any time within the project site area. (RO ¶ 72).

Additional Recommended Conditions

Based on the foregoing, the ALJ recommended in sub-paragraphs 73A and 73B that the following additional conditions be included in the Consolidated Authorization, Permit No. 53-0351424-001-EI:

A. A minimum six-inch clearance shall be maintained between the top of all submerged resources and the deepest draft of the cradle of the boat lift while in use. For purposes of this condition, submerged resources consist of the bottom sediment and/or any submerged grasses or other aquatic organisms.

B. Any emergent grasses in the permittee's riparian area shall be avoided during the construction and operation of the Dock. If it is not feasible to avoid these grasses, an environmental assessment of the grassed area shall be performed and submitted to the Department prior to commencing construction, so that the value of this grassed area, if any, to fish, wildlife, and listed species can be evaluated and the extent to which minimization and/or compensatory mitigation is appropriate can be determined. (RO ¶ 73).



Clearly in the Public Interest

The ALJ quoted Rule 62-4.070, Florida Administrative Code, titled “Standards for Issuing or Denying Permits,” as follows:

(1) A permit shall be issued to the applicant upon such conditions as the Department may direct, only if the applicant affirmatively provides the Department with reasonable assurance based on plans, test results, installation of pollution control equipment, or other information, that the construction, expansion, modification, operation, or activity of the installation will not discharge, emit, or cause pollution in contravention of Department standards or rules.

(RO ¶ 74). While located in the findings of fact section of the RO, paragraph 74 of the RO is a conclusion of law. 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).

The Department has substantive jurisdiction over chapter 62-4, and I reject the ALJ’s application of rule 62-4.070, Florida Administrative Code, to this proposed ERP permit regulated under Part IV of Chapter 373, Florida Statutes. Rule 62-4.001, titled “Scope of Part I,” states that “this part shall not apply to activities regulated under Part IV of Chapter 373, F.S.” Because rule 62-4.070, Florida Administrative Code, is located in Part I of chapter 62-4, rule 62-4.070, does not apply to issuance of this ERP permit, which is one component of the Consolidated Authorization for construction and operation of the proposed Dock. Similarly, I reject the ALJ’s citation in paragraph 151 to Fla. Admin. Code R. 62-4.070, as inapplicable to issuance of the proposed Dock. The Department’s interpretation of rule 62-4.070 in this Final Order is more

reasonable than the ALJ's interpretation in RO paragraph 74 and 151. *See* § 120.57(1)(I), Fla. Stat. (2018).

The ALJ found that because the Dock is proposed to be located in an OFW, Howard must provide reasonable assurance that the Dock meets the "clearly in the public interest" standard. The ALJ noted that the "clearly in the public interest" standard does not require the applicant to demonstrate need for the project or a net public benefit from the project. Rather, the ALJ stated that this standard requires the applicant to provide greater assurances, under the circumstances specific to the project, that the project will comply with the applicable permitting requirements. (RO ¶¶ 75-76).

With the inclusion of two additional recommended conditions set forth in sub-paragraphs 73A and 73B, the ALJ concluded that the proposed Dock meets the applicable permitting requirements and the "clearly in the public interest" standard for issuance of the ERP. (RO ¶ 77).

V. Impacts Assessment for Sovereignty Submerged Lands Lease: Water-Dependency of the Proposed Dock

The ALJ noted that a water-dependent activity is one that can only be conducted in, on, over, or adjacent to water areas, because the activity requires direct access to the water body or sovereignty submerged lands for specified activities, including recreation, and where the use of water or sovereignty submerged lands is an integral part of the activity. *See* Fla. Admin. Code R. 18-21.003(71). (RO ¶ 78).

Petitioners argued that the Dock will not constitute a water-dependent activity, because the depth of water in the slips may, at times, be insufficient to allow operation of Howard's vessels while complying with the requirement that a minimum 12-inch clearance be maintained

between the lowest draft of the vessel and submerged resources. The ALJ found this argument unpersuasive. (RO ¶ 79).

The ALJ found that the Dock is being constructed specifically to enable Howard to use her vessels for boating, a recreational activity for which use of the water indisputably is an integral part. Moreover, the ALJ found that the Dock's primary purpose is to moor vessels that will be used for the water-dependent recreational activities of boating and fishing, and other water-dependent recreational uses of the Dock, such as fishing, swimming and sunbathing. The ALJ noted that case law interpreting chapter 18-21, Florida Administrative Code, makes clear that because docks are used for mooring vessels or conducting other in-water recreational uses, they are "water-dependent" activities for purposes of the rules. Thus, even if water depths in the Dock's slips are at times insufficient for vessel mooring or launching, this does not render the Dock not a "water-dependent activity." (RO ¶ 80).

#### Resource Management Requirements

The ALJ found that the applicant proposes to use the preempted area of the Lease to construct and operate a Dock that will be used for boating, fishing, and swimming. The ALJ found that these traditional in-water recreational uses are consistent with the management purposes of sovereignty submerged lands as described in rule 18-21.004(2)(a), Florida Administrative Code. (RO ¶ 81).

With the inclusion of two additional recommended conditions to the draft Consolidated Approval, set forth in sub-paragraphs 73A and 73B of the RO, the ALJ determined that the Dock will not result in adverse impacts to sovereignty submerged lands and associated resources. (RO ¶ 82).

With the inclusion of two additional recommended conditions to the draft Consolidated Approval, set forth in sub-paragraphs 73A and 73B of the RO, the ALJ determined that the Dock is designed to minimize or eliminate impacts to fish and wildlife habitat and submerged resources. (RO ¶ 83).

With the inclusion of two additional recommended conditions to the draft Consolidated Approval, set forth in sub-paragraphs 73A and 73B of the RO, the ALJ determined that the Dock, as designed and constructed, will minimize or eliminate cutting, removal, or destruction of wetland vegetation. (RO ¶ 84).

Additionally, the ALJ found that the proposed Consolidated Approval requires the avoidance of adverse impacts to historic and cultural resources. (RO ¶ 85).

#### Riparian Rights

The ALJ found that, consistent with rule 18-21.004(3)(d), the Dock is proposed to be constructed in Howard's riparian area and will be set back more than 25 feet from the northerly and southerly riparian lines shown on the Survey. (RO ¶ 86).

The ALJ concluded that rule 18-21.004(3)(a), Florida Administrative Code, prohibits activities authorized under chapter 18-21 from being implemented in a manner that would unreasonably infringe on traditional common law riparian rights, as defined in section 253.141, Florida Statutes, of upland owners adjacent to sovereignty submerged lands. The ALJ also concluded that rule 18-21.004(3)(c), Florida Administrative Code, requires all structures and activities to be designed and conducted in a manner that will not unreasonably restrict or infringe upon the riparian rights of adjacent riparian owners. Collectively, the ALJ concluded that these provisions prohibit an activity that will occur on sovereignty submerged lands from unreasonably infringing on or unreasonably restricting the riparian rights of upland riparian owners. (RO ¶ 87).

Riparian rights are rights appurtenant to, and inseparable from, riparian land that borders on navigable waters. § 253.141, Fla. Stat. (2018); *Broward v. Mabry*, 50 So. 830 (Fla. 1909). (RO ¶ 88).

At common law, riparian rights include the rights of navigation, fishing, boating, and commerce. *Hayes v. Bowman*, 91 So. 2d 795 (Fla. 1957). The right of navigation necessarily includes the right to construct and operate a dock to access navigable waters. *Belvedere Dev. Corp. v. Dep't of Transp.*, 476 So. 2d 649 (Fla. 1985); *Shore Vill. Prop. Owners' Ass'n v. Dep't of Env'tl. Prot.*, 824 So. 2d 208, 211 (Fla. 4th DCA 2002). Common law riparian rights also include the right to an unobstructed view. *Lee Cnty v. Kiesel*, 705 So. 2d 1013 (Fla. 2d DCA 1998). (RO ¶ 89).

Many of these common law riparian rights have been statutorily codified in section 253.141, Florida Statutes. Statutory riparian rights include the “rights of ingress, egress, boating, bathing, and fishing and such others as may be or have been defined by law.” § 253.141(1), Fla. Stat. (2018). (RO ¶ 90).

The ALJ found that at issue in this case are the competing riparian rights of next-door neighbors, i.e., Howard’s right to wharf out to navigable waters for purposes of boating and other water-dependent recreational activities, and the Gerards’ right to an unobstructed view. The ALJ concluded that the question is whether Howard’s proposed construction and operation of a dock of sufficient length to enable her to use her boats would unreasonably infringe on or unreasonably restrict the Gerards’ right to an unobstructed view of the Lake. (RO ¶ 91).

The ALJ concluded that by virtue of the riparian rights appurtenant to Howard’s riparian property, she is entitled to wharf out to water deep enough to enable her to navigate. The ALJ found that she owns two boats, one of which pulls a draft of 25 inches, and the other, a draft of

20 inches, which she uses to navigate the Lake. Thus, an essential aspect of Howard's riparian right of navigation is her ability to construct and operate a dock long enough to enable her to reach water depths sufficient to use these boats. However, the ALJ noted that this right is not unfettered. Howard's exercise of her riparian navigation right cannot unreasonably infringe on Gerard's right to an unobstructed view. (RO ¶ 92).

The ALJ concluded that Florida case law holds that the right to an "unobstructed" view does not entail a view free of any infringement or restriction whatsoever by neighboring structures or activities. In *Hayes*, the court defined the right as "a direct, unobstructed view of the [c]hannel and as well a direct, unobstructed means of ingress and egress . . . to the [c]hannel." *Id.* at 801 (emphasis added). The court then prescribed the rule that "in any given case, the riparian rights of an upland owner must be preserved over an area 'as near as practicable' in the direction of the [c]hannel so as to distribute equitably the submerged lands between the upland and the [c]hannel." *Id.* (emphasis added). (RO ¶ 93).

The ALJ concluded that to the extent there is no channel in this portion of the Lake, *Hayes* dictates that riparian rights must be apportioned equitably, so that a riparian owner's right to an unobstructed view can extend only from the owner's property in the direction of the center of the Lake. *Kling v. Dep't of Env'tl. Reg.*, Case No. 77-1224 (Fla. DOAH Oct. 6, 1977; Fla. DER Nov. 18, 1977) at ¶¶ 11-12. (RO ¶ 94).

The ALJ found that no evidence was presented showing that the Dock, which will be located immediately south and east of the Gerards' riparian property and attendant riparian area, will present an obstruction to the Gerards' view of the Lake channel. In addition, the ALJ found that the evidence did not establish that Howard's Dock would obstruct the Gerards' view of the

center of the northeast portion of Crooked Lake, which is located west and slightly south of their property. (RO ¶ 95).

The ALJ concluded that administrative precedent in Florida provides additional support for the determination that the Dock will not unreasonably infringe on the Gerards' right to an unobstructed view. (RO ¶ 96).

In *O'Donnell v. Atlantic Dry Dock Corporation*, Case No. 04-2240 (Fla. DOAH May 23, 2005; Fla. DEP Sept. 6, 2005), riparian owners challenged the proposed approval of expansions of sovereignty submerged lands leases authorizing Atlantic Dry Dock, a neighboring commercial shipyard, to expand its shipyard facilities and install new docking facilities. The administrative law judge noted that although the expanded shipyard would further encroach on the riparian owners' already somewhat-restricted view from their property, it would not substantially and materially obstruct the Petitioners' view to the channel. He commented: "it [their view] may be further obstructed to the west in the direction of the Atlantic Marine yard, but not in the direction of the channel." To that point, he found that although "any lateral encroachment on the Petitioners' line-of-sight to the channel by the large eastern dry dock proposed will be an annoyance, . . . [it] will not rise to the level of a substantial and material interference or obstruction of the Petitioners' view to the channel." *Id.* at ¶ 119. He found that "there is no 'special riparian right' to a view of the sunset, just as there was no right to a particular object of view . . . by the riparian owners complaining in the *Hayes* case." *Id.* at ¶ 120. (RO ¶ 97).

The ALJ also relied upon *Castoro v. Palmer*, Case Nos. 96-0736, 96-5879 (Fla. DOAH Sept. 1, 1998; Fla. DEP Oct. 19, 1998). In *Castoro*, neighboring riparian owners challenged the proposed issuance of an environmental approval and sovereignty submerged lands lease for a 227-foot-long dock having a terminal platform with a boat lift. The owners contended that due

to the dock's length, it would impermissibly obstruct their views of the water. The administrative law judge rejected that contention, distinguishing the circumstances from those in *Lee County v. Kiesel*, 705 So. 2d 1013 (Fla. 2d DCA 1998), in which the construction of a bridge that blocked 80 percent of the riparian owners' view of the channel was held to constitute a "substantial and material" obstruction to the riparian right of view. The ALJ noted that although the dock would have "some impact on the neighbors' views" and their use of the waterbody, it did not unreasonably impact their riparian rights to an unobstructed view or to use of the waterbody. *Id.* at ¶¶ 73-74. (RO ¶ 98).

In *Trump Plaza of the Palm Beaches Condominium v. Palm Beach County*, Case No. 08-4752 (Fla. DOAH Sept. 24, 2009; Fla. DEP Oct. 8, 2009), a condominium association challenged the proposed issuance of a sovereignty submerged lands use approval to fill in a dredged area and create mangrove islands in the Lake Worth Lagoon, alleging, among other things, that the creation of the mangrove islands would unreasonably infringe on their riparian right to an unobstructed view. In rejecting this position and recommending issuance of the submerged lands use approval, the ALJ noted that the area obstructed by the mangrove islands would be negligible compared to the remaining expanse of the view, and further noted that the owners' real concern was directed at the aesthetics of the project-specifically, they did not want to view mangrove islands. The ALJ stated: "[t]he evidence supports a finding that while the project will undoubtedly alter the view of the water from [the riparian owners' property], the impact on view is not so significant as to constitute an unreasonable infringement of their riparian rights." *Id.* at ¶ 86. (RO ¶ 99).

Applying these case law principles, the ALJ concluded that the Dock will not unreasonably infringe on or unreasonably restrict the Gerards' riparian right to an unobstructed



view. The ALJ concluded that the cases make clear that the right to an “unobstructed” view is not an unfettered right to a view of the water completely free of any lateral encroachment, but, instead is the right of a view toward the channel or the center of a lake without unreasonable infringement or restriction. (RO ¶ 100).

Here, although the Dock will laterally encroach on the Gerards’ full panoramic view of the Lake; and, as such, may even constitute an annoyance, the evidence did not show that the Dock will obstruct or otherwise restrict their view to the channel or the center of the Lake. Moreover, to the extent the Gerards have expressed concern about the Dock interfering with their view of the south shore of the Lake, *O'Donnell* makes clear the desire to have a particular object of view, here, the south shore of the Lake, is not a legally protected riparian right. (RO ¶ 101).

The ALJ also found that the Dock will not unreasonably interfere with the Gerards’ riparian rights of ingress, egress, boating, or navigation. As previously noted, the Dock will be located at least 25 feet inside the riparian lines established for Howard’s upland property, and, will not be constructed in a location or operated in a manner that will obstruct, interfere with, or restrict the Gerards’ access to the Lake or to sufficient water depths to enable navigation. (RO ¶ 102).

The ALJ also found that the evidence did not establish that the Dock will restrict or otherwise interfere with the Gerards’ use of their riparian area for ingress and egress, boating, fishing, bathing, or other riparian uses. (RO ¶ 103).

In sum, the ALJ concluded that the Dock will not unreasonably infringe on or restrict the riparian rights of adjacent upland riparian owners. Accordingly, the ALJ determined that the Dock will meet the requirements and standards in rule 18-21.004(3), Florida Administrative Code, regarding riparian rights. (RO ¶ 104).

### Navigational Hazard

For the reasons discussed in paragraphs 63 through 67 of the RO, the ALJ determined that the Dock will not constitute a navigational hazard in violation of rule 18-21.004(7)(g), Florida Administrative Code. (RO ¶ 105).

### Not Contrary to the Public Interest

Rule 18-21.004(1)(a) requires an applicant to demonstrate that an activity proposed to be conducted on sovereignty submerged lands will not be contrary to the public interest. The ALJ concluded that to meet this standard, it is not necessary that the applicant show that the activity is affirmatively in the “public interest,” as that term is defined in rule 18-21.003(51), Florida Administrative Code. Rather, it is sufficient that the applicant show that there are few, if any, “demonstrable environmental, social, and economic costs” of the proposed activity. *Castoro* at 69. (RO ¶¶ 106-107).

With the inclusion of two additional recommended conditions to the draft Consolidated Approval, set forth in sub-paragraphs 73A and 73B of the RO, the ALJ determined that the proposed Dock meets the “not contrary to the public interest” standard required for issuance of the Lease. (RO ¶ 108).

### VI. Demonstration of Entitlement to ERP

The ALJ concluded that Howard met her burden under section 120.569(2)(p), Florida Statutes, to present a prima facie case of entitlement to the ERP by entering into evidence the Application, the Notice of Intent, and supporting information regarding the proposed Dock. The ALJ also concluded that she presented credible, competent, and substantial evidence beyond that required to meet her burden under section 120.569(2)(p), Florida Statutes, to demonstrate prima facie entitlement to the ERP. (RO ¶ 109).

The ALJ concluded that the burden then shifted to Petitioners to demonstrate, by a preponderance of the competent substantial evidence, that the Dock does not comply with section 373.414, Florida Statutes, and applicable ERP rules. For the reasons discussed above, the ALJ determined that Petitioners did not meet their burden of persuasion under section 120.569(2)(p) in this proceeding. Accordingly, the ALJ determined that Howard is entitled to issuance of the ERP for the Dock. (RO ¶ 110).

VII. Demonstration of Entitlement to Lease

As discussed above, the ALJ concluded that Howard bore the burden of proof in this proceeding to demonstrate, by a preponderance of the evidence, that the Dock meets all applicable statutory and rule requirements for issuance of the Lease for the Dock. For the reasons discussed above, the ALJ determined that Howard met this burden, and, therefore, is entitled to issuance of the sovereignty submerged lands lease for the Dock. (RO ¶ 111).

VIII. Petitioners' Standing

Defenders' Standing

As stipulated by the parties and noted above, Defenders is an incorporated non-profit entity created for the primary purpose of protecting and preserving Crooked Lake so that it may remain an OFW for all members of the public to enjoy. Defenders has been in existence since at least the mid-1980s. The ALJ noted that Robert Luther, the president of Defenders, testified that the organization's purpose also includes educating and promoting public awareness to preserve the natural beauty, water quality, ecological value, and quality of life around Crooked Lake. (RO ¶¶ 112-113).

As stipulated by the parties and noted above, Defenders has more than 25 members. Luther testified that Defenders has approximately 100 family members, most of whom live on or

around Crooked Lake. He noted that many of Defenders' members own boats, which they park at a local boat landing on the Lake. Based on this testimony, the ALJ found that these members operate their boats on Crooked Lake. (RO ¶ 114).

After receiving public notice of the project, the Defenders' board of directors voted to oppose issuance of the Consolidated Authorization for the Dock. The ALJ found that the board's decision was based on a determination that "it was clearly within the public interest" to oppose the Dock. (RO ¶ 115). The ALJ concluded that the Defenders had established standing to challenge issuance of the Consolidated Authorization for the Dock. (RO ¶ 143-144).

#### Gerards' Standing

The ALJ found that the Gerards reside at 1055 Scenic Highway, Babson Park, Florida; and that their riparian property is immediately adjacent to, and northwest of, the Howard's property. The ALJ also found that the Gerards own a floating dock located within their riparian area, which consists of two 4-foot-wide by 30-foot-long ramps attached to a 24-foot-long by 8-foot-wide pontoon boat. (RO ¶¶ 116-117).

The ALJ found that Priscilla Gerard enjoys spending time sitting and reading books on the beach in front of her property, and that having that area to sit and read is a significant aspect of her enjoyment of her lakefront property. (RO ¶ 118).

The ALJ found that Ms. Gerard observed that extensive boating activities in the northeast portion of the Lake on weekends is disruptive, and interferes with her use of her beach for relaxing and reading. Ms. Gerard noted that boats operating very close to the shore cause waves to splash up on her beach, interfering with her ability to sit and read close to the shore. However, the ALJ also found that Ms. Gerard did not contend that Howard's use of the Dock for boating would contribute to the disruptive nature of existing boat traffic in the vicinity. (RO ¶ 119).

The ALJ found that Ms. Gerard has viewed the plans for the proposed Dock and is very concerned that due to its size, her view of the south side of the Lake will be completely blocked. The ALJ also found that Ms. Gerard acknowledged, and other competent, credible evidence showed, that there are other docks on the Lake near her riparian property. The evidence shows that existing docks having lengths of 145 feet and 170 feet are located in the vicinity of, and are visible from, the Gerards' property. She testified that an existing dock and tiki hut block her view of the Lake to the north. The ALJ found that Ms. Gerard acknowledged that although Howard's Dock, if constructed as proposed, may somewhat obstruct her view to the left (south) of her property, it would not block her view straight out into the Lake. (RO ¶¶ 120-121).

The ALJ found that Phillip Gerard has boated extensively on Crooked Lake in a variety of vessel types. The ALJ also found that Mr. Gerard has observed a range of boating practices on Crooked Lake, including seeing water skiers and persons being towed behind motorized vessels on inner tubes and other types of "towables." He testified that, based on his personal observations, persons being towed do not have independent control of the speed or direction of the "towable"; thus, depending on the direction in which the towing vessel turns, the towable may be slung to the left or the right. Gerard commented that such lack of control could result in a person riding on a towable colliding with a dock, and he noted that Howard's nephew, who was riding on an inner tube being towed by a boat, was involved in such a collision with his (Mr. Gerard's) own dock. (RO ¶¶ 122-123).

The ALJ found that Mr. Gerard did not testify that the Dock would present a navigational hazard to, or otherwise interfere with, the Gerards' riparian right of ingress and egress. The ALJ also found that neither of the Gerards testified that the Dock would impact their ability to access navigable waters in the Lake. Lastly, the ALJ found that Mr. Gerard acknowledged that if

Howard's Dock were constructed, boats that currently travel very close to the shoreline of his property would be forced to swing further out in the Lake, away from his riparian shoreline, to avoid the Dock. (RO ¶¶ 124-126). Ultimately, the ALJ concluded that the Gerards had established standing to challenge issuance of the Consolidated Authorization for the Dock. (RO ¶ 143-144)

### **STANDARDS OF REVIEW OF DOAH RECOMMENDED ORDERS**

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). 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. Reg. 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. Prot.*, 668 So. 2d 209, 212 (Fla. 1st DCA 1996).

If an ALJ improperly labels a conclusion of law as a finding of fact, the label should be disregarded, and the item treated as though it were actually a conclusion of law. See, e.g., *Battaglia Properties v. Fla. Land and Water Adjudicatory Comm'n*, 629 So. 2d 161, 168 (Fla. 5th DCA 1994). However, neither should the agency label what is essentially an ultimate factual determination as a "conclusion of law" in order to modify or overturn what it may view as an

unfavorable finding of fact. *See, e.g., Stokes v. State, Bd. of Prof'l Eng'rs*, 952 So. 2d 1224 (Fla. 1st DCA 2007).

### CONCLUSION

The case law of Florida holds that parties to formal administrative proceedings must alert reviewing agencies to any perceived defects in DOAH hearing procedures or in the findings of fact of ALJs by filing exceptions to DOAH recommended orders. *See, e.g., Comm'n on Ethics v. Barker*, 677 So. 2d 254, 256 (Fla. 1996); *Henderson v. Dep't of Health, Bd. of Nursing*, 954 So. 2d 77 (Fla. 5th DCA 2007); *Fla. Dep't of Corrections v. Bradley*, 510 So. 2d 1122, 1124 (Fla. 1st DCA 1987). Having filed no exceptions to certain findings of fact, the party “has thereby expressed its agreement with, or at least waived any objection to, those findings of fact.” *Envtl. Coalition of Fla., Inc. v. Broward County*, 586 So. 2d 1212, 1213 (Fla. 1<sup>st</sup> DCA 1991); *see also Colonnade Medical Ctr., Inc. v. State of Fla., Agency for Health Care Admin.*, 847 So. 2d 540, 542 (Fla. 4th DCA 2003). However, even when exceptions are not filed, an agency head reviewing a recommended order is free to modify or reject any erroneous conclusions of law over which the agency has substantive jurisdiction. *See* § 120.57(1)(l), Fla. Stat. (2018); *Barfield v. Dep't of Health*, 805 So. 2d 1008 (Fla. 1st DCA 2001); *Fla. Public Employee Council, 79 v. Daniels*, 646 So. 2d 813, 816 (Fla. 1st DCA 1994).

The authority of this agency to issue permits containing additional permit conditions recommended by the ALJ in DOAH recommended orders is long established. *See, e.g., Hopwood v. Dep't of Env'tl. Regulation*, 402 So. 2d 1296 (Fla. 1st DCA 1981), and cases cited therein at page 1299; *Manasota-88 v. IMC Phosphates Company*, 25 F.A.L.R. 868, 897 (Fla. DEP 2002), *aff'd per curiam* 865 So. 2d 483 (Fla. 1st DCA 2004) (adopting the ALJ's recommendation that IMC submit the final version of its financial responsibility mechanism 30

days before commencing mining operations); *Ginnie Springs v. Watson*, 21 F.A.L.R. 4072, 4085 (Fla. DEP 1999) (adopting six additional permit conditions recommended by the ALJ); *Manasota 88, Inc. v. Agrico Chemical Co.*, 12 F.A.L.R. 1319, 1331 (Fla. DER 1990), *aff'd*, 576 So. 2d 781 (Fla. 2d DCA 1991) (adopting six changes to the phosphate company's mitigation plan recommended by the hearing officer).

The ultimate determination of "reasonable assurance" in relation to the public interest test is a conclusion of law within the substantive jurisdiction of this agency. *See 1800 Atlantic Developers v. Dep't of Env'tl. Regulation*, 552 So. 2d 946 (Fla. 1st DCA 1989), *rev. denied*, 562 So. 2d 345 (Fla. 1990); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140 (Fla. 2d DCA 2001). An agency head reviewing a recommended order is free to reject or modify an ALJ's conclusions of law over which it has substantive jurisdiction even when exceptions are not filed. *See* § 120.57(1)(l), Fla. Stat. (2018); *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); *Fla. Public Employee Council v. Daniels*, 646 So. 2d 813, 816 (Fla. 1st DCA 1994).

While located in the findings of fact section of the RO, paragraph 74 is a conclusion of law. 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).

As noted above, the Department has substantive jurisdiction over chapter 62-4, and I reject the ALJ's application of rule 62-4.070, Florida Administrative Code, to this proposed ERP permit regulated under Part IV of Chapter 373, Florida Statutes. Rule 62-4.001, titled "Scope of



Part I,” states that “this part shall not apply to activities regulated under Part IV of Chapter 373, F.S.” However, Rule 62-4.070, quoted by the ALJ in paragraph 74 of the RO and cited in paragraph 151 of the RO, is located in Part I of chapter 62-4, Florida Administrative Code. Thus, rule 62-4.070, Florida Administrative Code, does not apply to issuance of the ERP permit, which is one component of the Consolidated Authorization for construction and operation of the proposed Dock. The Department’s interpretation of rule 62-4.070 in this Final Order is more reasonable than the ALJ’s interpretation in RO paragraph 74 and 151. *See* § 120.57(1)(l), Fla. Stat. (2018).

While I accept the ALJ’s recommended additional conditions set forth in paragraph 73 of the RO in principle; I reject, the ALJ’s additional conditions set forth in sub-paragraphs 73A and 73B of the RO, as written. The ALJ’s “additional recommended conditions” in paragraph 73 were mislabeled as findings of fact, when they are conclusions of law over which the Department has substantive jurisdiction. I reject the ALJ’s additional recommended condition in sub-paragraph 73B, because I find it inconsistent, as written, with the caselaw. *Metropolitan Dade County v. Coscan Florida, Inc.*, 609 So. 2d 644, 648 (1992). Accordingly, all references in the RO to sub-paragraphs 73A and 73B are rejected, and substituted with the alternative additional conditions in this Consolidated Final Order set forth below in paragraph B. *See* RO ¶¶ 49, 56, 74A, 74B, 77, 82, 83, 84, 108, 157, 163, Conclusions, and Recommendation. The interpretation in this Final Order is more reasonable than that of paragraphs 73A and 743B in the RO, and the RO text, in paragraphs 49, 56, 74A, 74B, 77, 82, 83, 84, 108, 157, 163, the Conclusions, and the Recommendations, that refers to the ALJ’s recommended additional conditions in sub-paragraphs 73A and 73B. *See* § 120.57(1)(l), Fla. Stat. (2018). The ALJ’s recommended

additional conditions are accordingly modified in this Final Order and set forth in paragraph B below.

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

ORDERED that:

A. The Recommended Order (Exhibit A) is adopted, except as it may have been modified by the rulings in this Final Order, and is incorporated by reference herein;

B. DEP Consolidated Permit No. 53-0351424-001-EI is APPROVED with the following modifications:

(1) A condition shall be added to the permit to require that a minimum six-inch clearance shall be maintained between the top of all submerged resources and the deepest draft of the cradle of the boat life while in use;

(2) A condition shall be added to the permit to prohibit construction of the Dock in any emergent grasses in the permittee's riparian area; and

(3) A condition shall be added to the permit to specify that if it is not possible to avoid construction of the Dock in all emergent grasses, for which mitigation has not been provided, in accordance with the design specifications approved in this permit, then the permittee must stop construction and apply for a modification to the Consolidated Authorization.

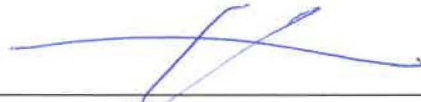
C. The Board of Trustees of the Internal Improvement Trust Fund Lease (Board of Trustees Instrument No. 530353533) to use sovereign submerged lands to construct and operate the Dock identified herein is APPROVED.

**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 16<sup>th</sup> day of August, 2018, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION



NOAH VALENSTEIN  
Secretary

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

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



CLERK

8/16/18  
DATE

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing Final Order has been sent by

electronic mail to:

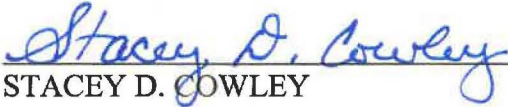
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this 16<sup>th</sup> day of August, 2018.

STATE OF FLORIDA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION

  
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STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEFENDERS OF CROOKED LAKE, INC.,  
AND PHILLIP AND PRISCILLA  
GERARD,

Petitioners,

vs.

Case No. 17-5328

KRISTA HOWARD AND DEPARTMENT OF  
ENVIRONMENTAL PROTECTION,

Respondents.

\_\_\_\_\_ /

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case pursuant to sections 120.569 and 120.57(1), Florida Statutes (2018),<sup>1/</sup> before Cathy M. Sellers, an Administrative Law Judge of the Division of Administrative Hearings ("DOAH"), on February 6 and 7, 2018, in Lakeland, Florida.

APPEARANCES

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Tallahassee, Florida 32399-3000

STATEMENT OF THE ISSUE

The issue is whether Respondent, Krista Howard,<sup>2/</sup> is entitled to issuance of the Consolidated Environmental Resource Permit and Recommended Intent to Grant Sovereignty Submerged Lands Authorization, Permit No. 53-0351424-001-EI, as announced by Respondent, Department of Environmental Protection, in the Consolidated Notice of Intent to Issue Environmental Resource Permit and Lease to Use Sovereignty Submerged Lands issued on July 28, 2017, and subsequently amended on January 11, 2018.<sup>3/</sup>

PRELIMINARY STATEMENT

On July 28, 2017, the Department of Environmental Protection ("DEP") issued a Consolidated Notice of Intent to Issue Environmental Resource Permit and Lease to Use Sovereign Submerged Lands ("Consolidated Notice of Intent"), proposing to issue a Consolidated Environmental Resource Permit and Recommended Intent to Grant Sovereignty Submerged Lands Authorization ("Consolidated Authorization"),<sup>4/</sup> authorizing Krista Howard ("Howard") to construct and operate a single family residential dock (hereafter, "Dock") on Crooked Lake, in Babson Park, Polk County, Florida. Petitioners, Defenders of

Crooked Lake, Inc., and Phillip and Priscilla Gerard (collectively "Petitioners," or, individually, "Defenders" or "Gerards") timely challenged DEP's proposed issuance of the Consolidated Authorization. The matter was referred to DOAH to conduct an administrative hearing pursuant to sections 120.569 and 120.57(1).

On January 11, 2018, DEP issued Respondent Department of Environmental Protection's Notice of Filing Amended Agency Action to reflect the correct permitting standard applicable to the environmental resource permit ("ERP") portion of the Consolidated Authorization for the Dock. That Amended Agency Action is the subject of this proceeding.

On January 31, 2018, Respondents filed the Joint Motion of the Respondents Regarding Application of Section 120.569(2)(p), Florida Statutes[, ] as the Burden of Proof at Final Hearing, asserting that pursuant to section 120.569(2)(p), Petitioners bore the ultimate burden of proof with respect to both the ERP portion and the sovereignty submerged lands lease ("Lease") portion of the Consolidated Authorization at issue in this proceeding.

The final hearing was scheduled for and held on February 6 and 7, 2018. Petitioners presented the testimony of Robert Luther, James Tully, Phillip Gerard, Priscilla Gerard, Thomas Williamson, and Steven Howard. Petitioners' Exhibits 4, 5,

and 13 were admitted into evidence without objection, and Petitioners' Exhibits 3, 6, and 7 were admitted into evidence over objection. Respondent Howard presented the testimony of Todd Rickman and Steven Howard, and Howard's Exhibits 1 through 9, 13, 14, 16, and 17 were admitted into evidence without objection. Respondent DEP presented the testimony of Brandon Miller, and DEP's Exhibits 1 through 7 were admitted into evidence without objection.

The two-volume Transcript of the final hearing was filed with DOAH on April 6, 2018, and, pursuant to request and agreement of the parties at the conclusion of the final hearing, the time for filing proposed recommended orders was extended to 30 days. The parties timely filed their proposed recommended orders on May 7, 2018, and the undersigned duly considered them in preparing this Recommended Order.

#### FINDINGS OF FACT

##### I. The Parties

1. Petitioner Defenders is a Florida non-profit corporation that has been in existence since the mid-1980s or earlier. Defenders' primary purpose is to protect and preserve Crooked Lake so that it may remain an Outstanding Florida Water ("OFW") for all members of the public to use and enjoy. Defenders has more than 25 members who reside in Polk County, Florida. Its membership consists of approximately 100 family



memberships, mostly comprised of persons who live on or near Crooked Lake.

2. Petitioners Gerards are riparian landowners on Crooked Lake, whose property is located immediately adjacent to, and slightly to the northwest of, Respondent Howard's property. The Gerards' home address is 1055 Scenic Highway North, Babson Park, Florida 33827.

3. Respondent Howard is the applicant for the Consolidated Authorization for the Dock. Howard's property, which is riparian to Crooked Lake, is located at 1045 Scenic Highway North, Babson Park, Florida 33827.

4. Respondent DEP is the administrative agency of the State of Florida statutorily charged with, among other things, protecting Florida's water resources. As part of DEP's performance of these duties, it administers and enforces the provisions of chapter 373, part IV, Florida Statutes, and the rules adopted pursuant to that statute. Pursuant to that authority, DEP determines whether to issue or deny applications for ERPs. Pursuant to section 253.002, Florida Statutes, DEP also serves as staff to the Board of Trustees of the Internal Improvement Trust Fund ("Board of Trustees") and, in that capacity, reviews and determines whether to issue or deny, applications for approval to use sovereignty submerged lands.<sup>5/</sup>

## II. DEP Review of the Application

5. The Dock is proposed to be located on sovereignty submerged lands and in surface waters subject to State of Florida regulatory jurisdiction. Therefore, an environmental resource permit and a sovereignty submerged lands lease are required.

6. On or about February 14, 2017, Todd Rickman, Howard's professional contractor who designed the Dock, filed an Application for a Sovereignty Submerged Lands Lease for Existing Structures and Activities<sup>6/</sup> ("Application") with DEP's Southwest District Office, seeking approval to construct and operate the Dock.

7. On or about March 15, 2017, DEP requested additional information regarding the project. Howard submitted the requested items, and the Application was determined complete on May 30, 2017.

8. Notice of DEP's receipt of the Lease portion of the Application was provided as required by section 253.115. The comment period commenced on June 15, 2017, and ended on July 6, 2017.

9. As previously noted, on July 28, 2017, DEP issued the Consolidated Notice of Intent, proposing to issue the Consolidated Authorization to construct and operate the Dock.

10. On January 11, 2018, DEP amended the Consolidated Notice of Intent to accurately reflect the "clearly in the public interest" permitting standard for the ERP portion of the Consolidated Authorization, which is applicable to projects proposed in OFWs.

### III. Background

#### Crooked Lake

11. Crooked Lake (also, "Lake") is an approximately 4,247-acre freshwater lake in Polk County, Florida. It is an irregularly shaped karst lake roughly resembling an inverted "L," with the longer axis running north to south. It is located on the Lake Wales Ridge.

12. Crooked Lake is designated an OFW by Florida Administrative Code Rule 62-302.700(9)(i)<sup>7/</sup> The Lake is classified as a Class III waterbody pursuant to Florida Administrative Code Rule 62-302.400(15).<sup>8/</sup>

13. The elevations and bottom contours in Crooked Lake vary substantially throughout the Lake. Thus, water depths may, and generally do, vary substantially from one location to another throughout the Lake.

14. The water levels in Crooked Lake fluctuate frequently and, at times, dramatically, depending on rainfall frequency and amounts.

15. A graph prepared by Petitioners' Witness James Tully, using Southwest Florida Water Management District ("SWFWMD") historical water level data for Crooked Lake measured in National Geodetic Vertical Datum of 1929 ("NGVD") shows water levels historically fluctuating from as low as approximately 106 feet in or around 1991, to as high as 123 feet NGVD in or around 1951, 1961, and 2004.

16. Rickman generated a water level graph using the Polk County Water Atlas ("Atlas") website. This graph, which covers the period of 2008 through mid-2017, shows that the water levels in Crooked Lake, for this most recent ten-year period, fluctuated approximately five feet, with the lowest levels falling slightly below 114 feet NGVD for relatively short periods in 2012 and 2013, and the highest level rising to approximately 119 feet NGVD in mid-2017.

17. The competent, credible evidence shows that although water levels in Crooked Lake may occasionally rise to levels at or around 123 feet NGVD, those conditions have been associated with extreme weather events such as hurricanes, are atypical, and are relatively short-lived.

18. The maximum water level in Crooked Lake is subject to control by a weir located south of the Lake. Discharge from the weir occurs at a control elevation of 120 feet NGVD. As such, the water level in parts of Crooked Lake may, at times,

temporarily exceed 120 feet NGVD, but will eventually decrease to 120 feet NGVD as the water flows south and is discharged through the weir. To the extent rainfall does not recharge the Lake, water levels may fall below 120 feet NGVD.

19. The ordinary high water line ("OHWL"), which constitutes the boundary between privately-owned uplands and sovereignty submerged lands, has been established at 120.0 feet NGVD for Crooked Lake.

20. Crooked Lake is used for recreational activities such as fishing, swimming, boating, and jet ski use, and there are public and private boat ramps at various points on the lake that provide access to the Lake. There is no marina having a fueling station on the Lake.

21. The credible evidence shows that the northeast portion of the Lake, where the Dock is proposed to be located, experiences a substantial amount of boat and jet ski traffic. This portion of the Lake also is used for swimming, water-skiing, wakeboarding, the use of "towables" such as inner tubes, and for other in-water recreational uses.

#### The Proposed Dock

22. Howard holds fee title by warranty deed to parcel no. 333028-000000-033140 located at 1045 Scenic Highway, Babson Park, Florida.<sup>9/</sup> This parcel has approximately 110 linear feet of riparian shoreline on Crooked Lake.

23. The Dock is proposed to be constructed and operated on sovereignty submerged lands adjacent to this riparian upland parcel, which is located on the eastern shore of the northeastern portion of Crooked Lake.

24. The Dock, as proposed, is a private single-family residential dock that will be used by Howard for water-dependent recreational purposes, such as specifically, boating, fishing, swimming, and sunbathing.

25. The Dock is not proposed to be constructed or used by, or to otherwise serve, commercial or multifamily residential development.

26. The Dock is configured as a "T," supported by pilings and consisting of a 4-foot-wide by 152-foot-long access walkway, and an approximately 1,983-square-foot terminal platform comprised of a lower-level platform having four vessel slips and a flat platform roof. Two sets of stairs lead from the lower level of the terminal platform to the platform roof, which will be elevated eight feet above the lower-level platform and will have a railed perimeter. The platform roof will function as a roof for the boat storage area below and a sundeck.

27. The four slips on the Dock's lower-level platform will be used for permanent mooring for up to six watercraft: a 23-foot-long ski boat,<sup>10/</sup> a 20-foot-long fishing boat, and four jet skis. As proposed, the Dock will occupy a total area of

approximately 2,591 square feet. The lower platform of the Dock is proposed to be constructed at an elevation of 121 feet NGVD. The roof/upper platform will be constructed eight feet above that, at an elevation of 129 feet NGVD.

28. The pilings supporting the Dock will be wrapped in an impervious material to prevent leaching of metals and other pollutants into the water.

29. Pursuant to the Specific Purpose Field Survey ("Survey") for the Lease submitted as part of the Application, the Lease will preempt approximately 2,591 square feet, and closely corresponds to the footprint of the Dock. The submerged lands surrounding the Dock that are not occupied by the footprint of the Dock, including the area between terminal platform and the shoreline, are not included in the preempted area of the Lease.<sup>11/</sup>

30. The Survey shows "approximate riparian lines" which delineate Howard's riparian area oriented to the center of the waterbody and to the primary navigation channel in the northeast portion of Crooked Lake.

31. As shown on the version of the Survey initially filed as part of the Application, the Dock was proposed to be located approximately 4.7 feet, at its closest point, from the southern riparian line. However, in response to DEP's request for additional information, the Survey was modified in April 2017,

to shift the Dock northward within Howard's riparian area. The Dock is now proposed to be located 25.1 feet, at its closest point, from the southern riparian line, and 29.4 feet, at its closest point, from the northern riparian line.

32. The walkway of the Dock will commence at an approximate elevation of 120 feet NGVD, which corresponds to the OHWL established for Crooked Lake. As previously noted above, the walkway will extend waterward approximately 152 feet, where it will intersect with the terminal platform. The terminal platform will extend another 52 feet waterward. In total, the Dock is proposed to extend waterward approximately 204 feet from the OHWL.

33. Although the Dock would be one of the longest and largest docks on Crooked Lake, the credible evidence establishes that there are several other docks of similar size and/or length on the Lake. Rickman testified that he obtained approvals for, or was otherwise aware of, several docks over 2,000 square feet on the Lake. Additionally, the evidence showed that eight other docks on the Lake are longer than the proposed Dock.<sup>12/</sup> Rickman testified that most of the larger docks on Crooked Lake have roofs, and that most of these roofs are pitched, rather than flat.<sup>13/</sup>

34. As noted above, the water level in Crooked Lake frequently and, at times, extensively fluctuates. As a result,



there are periods during which water depths in parts of the Lake are extremely shallow.

35. Rickman testified that the Dock was designed to extend far enough out into Crooked Lake to reach sufficient water depth to enable Howard to maximize the use of the Dock for boating throughout the year.

36. The Dock is designed to extend out to the point at which the bottom elevation of the Lake is approximately 109.9 feet NGVD. Based on the Atlas' ten-year water level graph for Crooked Lake referenced above, Rickman projected that at this point, the water depth typically would be sufficient to allow Howard to operate her largest vessel, the 23-foot ski boat.

37. The ski boat has a 25-inch draft.<sup>14/</sup> The boat will be stored out of the water on a boat lift on the Dock, attached by cables to a sub-roof immediately beneath the platform roof. When being lowered into or hoisted from the water, the boat will be placed in a boat cradle consisting of two containment railings approximately 18 inches high each on either side, and a "V" shaped aluminum bottom with bunks on which the boat is cradled. The aluminum bottom of the cradle was estimated to be two to three inches thick.

38. Although the boat cradle is approximately 18 to 21 inches in "total height,"<sup>15/</sup> the cradle does not have to be

completely lowered its entire 18- to 21-inch height into the water when used. Steven Howard explained, credibly, that the cradle needs to be lowered into the water only a few inches lower than the ski boat's 25-inch draft to enable the boat to float into or out of the cradle. To that point, Rickman testified that taking into account the 25-inch draft of the ski boat and the "total height" of the boat cradle, between 40 and 44 inches of water depth would be required when the cradle is used in order to avoid coming into contact with the Lake bottom.

39. Based on the Atlas graph showing the lowest water levels for the previous ten-year period at approximately 114 feet NGVD, Rickman designed the Dock to extend out to the 109.9-foot NGVD bottom elevation point. At this point, the projected water depth would be slightly more than four feet during periods of the lowest projected water levels for Crooked Lake.

40. For the Dock to be able to wharf out to 109.9 feet NGVD bottom elevation, it must extend a total of approximately 204 feet waterward into the Lake.

41. The credible evidence establishes that while Howard's ski boat is one of the largest, it is not the largest boat operated on Crooked Lake.

IV. Impacts Assessment for Environmental Resource Permit  
Water Quality Impacts

42. As noted above, Crooked Lake is a Class III waterbody. Accordingly, the surface water quality standards and criteria applicable to Class III waters in Florida codified in rule 62-302.300 apply to Crooked Lake.

43. The Dock, as proposed to be constructed and operated, is not anticipated to adversely affect or degrade water quality in Crooked Lake.

44. Specifically, as required by the Consolidated Authorization, a floating turbidity curtain will be installed around the boundary of the construction area before construction commences, and it must be left in place until construction is complete and turbidity levels in the work area have returned to background levels.

45. Additionally, as noted, the pilings supporting the Dock must be wrapped in an impervious material to prevent leaching of metals and other pollutants into the water over the life of the structure.

46. The Consolidated Authorization also prohibits the installation and use of fueling equipment at the Dock; prohibits the discharge of sewage or other waste into the water; prohibits liveboards; prohibits fish cleaning or the installation of fish cleaning stations unless sufficient measures such as sink

screens and waste receptacles are in place; and prohibits repair and maintenance activities involving scraping, sanding, painting, stripping, recoating, and other activities that may degrade water quality or release pollutants into the water.

47. Although the Consolidated Authorization imposes a specific condition requiring, for all vessels using the Dock, a minimum 12-inch clearance between the deepest draft of the vessel (with motor in the down position) and the top of submerged resources, it does not specifically address circumstances where the use of the boat cradle, rather than the vessel itself, may come into contact with the Lake bottom.

48. DEP's witness acknowledged that if the boat cradle were to come into contact with the Lake bottom, water quality standards may be violated.

49. Given the information presented at the final hearing regarding the operation of the boat lift and the need for sufficient clearance between the bottom of the boat cradle and the lake bottom, the undersigned recommends that a specific condition be included in the Consolidated Authorization prohibiting contact of the Lake bottom by the boat cradle. This recommended condition is set forth in paragraph 73.A., below.

50. Upon consideration of the conditions imposed by the Consolidated Authorization discussed above, including imposing a specific condition that prohibits contact of the boat cradle

with the Lake bottom, the undersigned finds that the Dock will not adversely affect or degrade the water quality of Crooked Lake.

#### Water Quantity Impacts

51. The Dock, as proposed, is a piling-supported structure that will not impound, store, or impede the flow of surface waters. As such, the Dock will not cause adverse flooding to on-site or offsite property, will not result in adverse impacts to surface water storage and conveyance capabilities, and will not result in adverse impacts to the maintenance of surface or ground water levels.

#### Impacts to Fish, Wildlife, and Listed Species and Habitat

52. The Application states, in section 5, question 6, that there is no vegetation on Howard's riparian shoreline.

53. However, the Survey depicts an area of emergent grasses approximately 60 feet wide and extending diagonally approximately 70 feet waterward into the Lake. The Survey depicts this grassed area as straddling the riparian line between Howard's property and the adjacent parcel to the south. The Survey shows the Dock as being located a significant distance waterward of the grassed area, such that no portion of the Dock will be located on or near this grassed area.

54. Additionally, an aerial photograph of Howard's property and the Lake waterward of Howard's property shows a

smaller patch of what appears to be emergent grasses further offshore. This grassed area is not shown on the Survey, and it cannot definitively be determined, by examining the Survey and the aerial photograph, whether this grassed area is growing in an area that will be impacted by the Dock. Steven Howard acknowledged that this smaller grassed area may be located at or near the jet ski slip on the southeastern side of the Dock.

55. An environmental assessment of this smaller grassed area was not performed or submitted as part of the Application. Thus, any value that this area may have as fish and wildlife habitat was not assessed as part of DEP's determination that the Dock will not adversely impact the value of functions provided to fish, wildlife, and to listed species and their habitat.

56. In order to provide reasonable assurance that the Dock will not adversely impact the value of functions provided to fish, wildlife, and to listed species and their habitat, the undersigned recommends including a specific condition in the Consolidated Authorization requiring this smaller grassed area to be completely avoided during construction and operation of the Dock, or, if avoidance is not feasible, that an environmental assessment be performed prior to construction so that the value of this grassed area, if any, to fish, wildlife, and listed species can be evaluated to determine whether minimization and compensatory mitigation should be required.

This recommended condition is set forth in paragraph 73.B., below.

57. As previously noted, the Consolidated Authorization contains a specific condition requiring a minimum 12-inch clearance between the deepest draft of the vessel (with the motor in the down position) and the top of submerged resources for all vessels that will use the docking facility. Compliance with this condition will help ensure that the value of functions provided to fish and wildlife and to listed species and their habitat of any such submerged resources is not adversely impacted by vessels using the Dock.

58. The Consolidated Authorization also contains a specific condition requiring handrails to be installed on the Dock to prevent mooring access to portions of the Dock other than the wet slips. This will help protect submerged resources in shallower areas in the vicinity of the Dock.

59. Fish populations in the immediate area of the Dock site may temporarily be affected during construction of the Dock; however, those impacts are not anticipated to be permanent. Additionally, as previously discussed, the Dock pilings must be wrapped with an impervious material to prevent leaching of pollutants into the water, and once installed, the pilings may provide habitat for fish and a substrate for benthic organisms.

60. Provided that the conditions set forth in the draft Consolidated Authorization, as well as the recommendation regarding the smaller grassed area, are included in the final version of the Consolidated Authorization, it is determined that the construction and operation of the Dock will not adversely impact the value of functions provided to fish, wildlife, or to listed species or their habitat.<sup>16/</sup>

Impact on Navigation

61. Petitioners assert that the Dock will constitute a hazard to navigation in the northeast portion of Crooked Lake. Specifically, they assert that because the Dock will extend out approximately 204 feet into the Lake, it necessarily will create a navigational hazard to boaters in the vicinity. As support, Petitioners presented evidence consisting of Steven Howard's testimony that an inner tube on which his nephew was riding, that was being pulled behind a motor boat, collided with the Gerards' 84-foot-long floating dock adjacent to Howard's riparian area. Petitioners argue that if an 84-foot-long dock creates a navigational hazard, a 204-foot-long dock would create an even greater navigational hazard.

62. The undersigned does not find this argument persuasive.

63. The portion of Crooked Lake on which the Dock is proposed to be located is approximately a mile and a half to two



miles long and one-half to three-quarters of a mile wide. Although this portion of Crooked Lake experiences substantial boat traffic, the evidence shows that the Lake is sufficiently large in this area, even with the Dock in place, to allow safe navigation. To this point, it is noted that there are two other longer docks in the northeastern portion of Crooked Lake, extending 220 and 244 feet into the Lake from the shoreline. There was no evidence presented showing that either of these docks constitutes a navigational hazard.<sup>17/</sup>

64. Petitioners also assert that during periods of high water in this portion of Crooked Lake, the Dock will be underwater and thus will present a navigational hazard. In support, they presented photographs taken on October 30, 2017—approximately six weeks after Hurricane Irma struck central Florida—showing ten docks, out of the 109 docks on Crooked Lake, that were partially or completely submerged.<sup>18/</sup> When the photographs were taken, the approximate water elevation was 119.2 feet NGVD.

65. All or a portion of the submerged docks had been constructed at or below the 119.2-foot NGVD elevation. The docks without roofs were mostly or completely invisible under the water. However, for the roofed docks, the roofs remained visible above the water even when their docking platforms were submerged.

66. Here, although the walkway and lower platform of Howard's Dock is proposed to be constructed at an elevation of 121 feet NGVD, the roof will be constructed at an elevation of 129 feet NGVD. Thus, even during the relatively infrequent periods<sup>19/</sup> during which the water level in Crooked Lake may exceed 121 feet NGVD, the platform roof will still be visible to vessels navigating in this portion of the Lake.

67. Additionally, the Consolidated Authorization contains a specific condition requiring the waterward end of the Dock to be marked with a sufficient number of reflectors to be visible from the water at night by reflected light. This condition provides additional assurance that the Dock will not present a navigational hazard.

68. For these reasons, it is determined that the Dock will not adversely affect navigation.

#### Other ERP-Related Issues

69. The evidence did not show that the Dock is proposed to be located in or proximate to a "work of the District," as defined in section 373.019(28). The only "work of the District" about which evidence was presented is the weir located south of Crooked Lake. This structure is many thousands of feet south of the Dock. There was no evidence presented showing that the Dock would have any impact on this weir.

70. The Dock, as proposed, was designed by an experienced professional contractor who has designed and installed many docks on Crooked Lake, and, as such, is anticipated to function as proposed. The Dock must be built according to engineering diagrams to the Consolidated Authorization, and as-built drawings must be submitted when Dock construction is complete so that DEP can confirm that the Dock is constructed in accordance with the approved design.

71. The evidence establishes that Howard, as the applicant, and Rickman, as the professional contractor in charge of construction, are financially, legally, and administratively capable of ensuring that the activity will be undertaken in accordance with the terms and conditions of the Consolidated Authorization. No evidence to the contrary was presented.

72. The Dock will be located in the waters of Crooked Lake and will be affixed to the submerged bottom. The Department of State, Division of Historical Resources ("DHR"), did not provide any comments indicating that historical or archaeological resources are anticipated to be impacted by the project. Additionally, the Consolidated Authorization contains a general condition requiring subsurface activity associated with construction of the Dock to immediately cease, and DHR to be contacted, if any prehistoric or historic artifacts, such as pottery or ceramics, stone tools or implements, dugout canoes,

or other physical remains that could be associated with Native American cultures or early colonial or American settlements are encountered at any time within the project site area.

Additional Recommended Conditions

73. Based on the foregoing, the undersigned recommends that the following specific conditions be included in the Consolidated Authorization, Permit No. 53-0351424-001-EI:

A. A minimum six-inch clearance shall be maintained between the top of all submerged resources and the deepest draft of the cradle of the boat lift while in use. For purposes of this condition, submerged resources consist of the bottom sediment and/or any submerged grasses or other aquatic organisms.

B. Any emergent grasses in the permittee's riparian area shall be avoided during the construction and operation of the Dock. If it is not feasible to avoid these grasses, an environmental assessment of the grassed area shall be performed and submitted to the Department prior to commencing construction, so that the value of this grassed area, if any, to fish, wildlife, and listed species can be evaluated and the extent to which minimization and/or compensatory mitigation is appropriate can be determined.

Clearly in the Public Interest

74. Florida Administrative Code Rule 62-4.070, Standards for Issuing or Denying Permits, states in pertinent part:

(1) A permit shall be issued to the applicant upon such conditions as the Department may direct, only if the applicant affirmatively provides the Department with reasonable assurance based on plans, test results, installation of pollution control equipment, or other information, that the construction, expansion, modification, operation, or activity of the installation will not discharge, emit, or cause pollution in contravention of Department standards or rules.

75. In addition to the foregoing permitting requirements, because the Dock is proposed to be located in an OFW, Howard also must provide reasonable assurance that the Dock meets the "clearly in the public interest" standard.

76. The "clearly in the public interest" standard does not require the applicant to demonstrate need for the project or a net public benefit from the project. Rather, this standard requires the applicant to provide greater assurances, under the circumstances specific to the project, that the project will comply with the applicable permitting requirements.<sup>20/</sup>

77. For the reasons discussed above, and with the inclusion of the additional recommended conditions in paragraphs 73.A. and 73.B., it is determined that the proposed Dock meets

the applicable permitting requirements and the "clearly in the public interest" standard for issuance of the ERP.

V. Impacts Assessment for Sovereignty Submerged Lands Lease Water-Dependency of the Proposed Dock

78. A water-dependent activity is one which can only be conducted in, on, over, or adjacent to water areas because the activity requires direct access to the water body or sovereignty submerged lands for specified activities, including recreation, and where the use of water or sovereignty submerged lands is an integral part of the activity. See Fla. Admin. Code R. 18-21.003(71).

79. Petitioners argue that the Dock will not constitute a water-dependent activity because the depth of water in the slips may, at times, be insufficient to allow operation of Howard's vessels while complying with the requirement that a minimum 12-inch clearance be maintained between the lowest draft of the vessel and submerged resources. The undersigned finds this argument unpersuasive.

80. The Dock is being constructed specifically for the purpose of enabling Howard to use her vessels for boating—a recreational activity for which use of the water indisputably is an integral part. The Dock's primary purpose is to moor vessels that will be used for the water-dependent recreational activities of boating and fishing, and other water-dependent

recreational uses of the Dock include fishing, swimming and sunbathing. Case law interpreting the Florida Administrative Code Chapter 18-21 makes clear that because docks are used for mooring vessels or conducting other in-water recreational uses, they are "water-dependent" activities for purposes of the rules.<sup>21/</sup> Thus, even if water depths in the Dock's slips are at times insufficient for vessel mooring or launching,<sup>22/</sup> this does not render the Dock not a "water-dependent activity."

#### Resource Management Requirements

81. The preempted area of the Lease is proposed to be used for a Dock that will be used for boating, fishing, and swimming. These traditional in-water recreational uses are consistent with the management purposes of sovereignty submerged lands as described in rule 18-21.004(2)(a).

82. With the inclusion of the conditions currently proposed in the draft Consolidated Approval, as well as the recommended conditions in paragraphs 73.A. and 73.B., the undersigned determines that the Dock will not result in adverse impacts to sovereignty submerged lands and associated resources.

83. With the inclusion of the conditions currently proposed in the draft Consolidated Approval, as well as the recommended conditions in paragraphs 73.A. and 73.B., the undersigned determines that the Dock is designed to minimize or

eliminate impacts to fish and wildlife habitat and submerged resources.

84. With the inclusion of the currently proposed conditions in the draft Consolidated Authorization, as well as the recommended conditions set forth in paragraphs 73.A. and 73.B., it is determined that the Dock, as designed and constructed, will minimize or eliminate cutting, removal, or destruction of wetland vegetation.

85. Additionally, as discussed above, the proposed Consolidated Approval requires the avoidance of adverse impacts to historic and cultural resources.

#### Riparian Rights

86. Consistent with rule 18-21.004(3)(d), the Dock is proposed to be constructed in Howard's riparian area and will be set back more than 25 feet from the northerly and southerly riparian lines shown on the Survey.

87. Rule 18-21.004(3)(a) prohibits activities authorized under chapter 18-21 from being implemented in a manner that would unreasonably infringe on traditional common law riparian rights, as defined in section 253.141, of upland owners adjacent to sovereignty submerged lands. Similarly, rule 18-21.004(3)(c) requires all structures and activities to be designed and conducted in a manner that will not unreasonably restrict or infringe upon the riparian rights of adjacent riparian owners.



Collectively, these provisions prohibit an activity that will occur on sovereignty submerged lands from unreasonably infringing on or unreasonably restricting the riparian rights of upland riparian owners.

88. Riparian rights are rights appurtenant to, and inseparable from, riparian land that borders on navigable waters. § 253.141, Fla. Stat.; Broward v. Mabry, 50 So. 830 (Fla. 1909).

89. At common law, riparian rights include the rights of navigation, fishing, boating, and commerce. Hayes v. Bowman, 91 So. 2d 795 (Fla. 1957). The right of navigation necessarily includes the right to construct and operate a dock to access navigable waters. Belvedere Dev. Corp. v. Dep't of Transp., 476 So. 2d 649 (Fla. 1985); Shore Vill. Prop. Owners' Ass'n v. Dep't of Env'tl. Prot., 824 So. 2d 208, 211 (Fla. 4th DCA 2002). Common law riparian rights also include the right to an obstructed view. Lee Cnty v. Kiesel, 705 So. 2d 1013 (Fla. 2d DCA 1998).

90. Many of these common law riparian rights have been statutorily codified in section 253.141. Statutory riparian rights include the "rights of ingress, egress, boating, bathing, and fishing and such others as may be or have been defined by law." § 253.141(1), Fla. Stat.

91. At issue in this case are the competing riparian rights of next-door neighbors—i.e., Howard's right to wharf out to navigable waters for purposes of boating and other water-dependent recreational activities, and the Gerards' right to an unobstructed view. The question is whether Howard's proposed construction and operation of a dock of sufficient length to enable her to use her boats would unreasonably infringe on or unreasonably restrict the Gerards' right to an unobstructed view of the Lake.

92. By virtue of the riparian rights appurtenant to Howard's riparian property, she is entitled to wharf out to water deep enough to enable her to navigate. She owns two boats, one of which pulls a draft of 25 inches, and the other, a draft of 20 inches, which she uses to navigate the Lake. Thus, an essential aspect of Howard's riparian right of navigation is her ability to construct and operate a dock long enough to enable her to reach water depths sufficient to use these boats. However, as noted above, this right is not unfettered. Howard's exercise of her riparian navigation right cannot unreasonably infringe on Gerard's right to an unobstructed view.

93. Florida case law holds that the right to an "unobstructed" view does not entail a view free of any infringement or restriction whatsoever by neighboring structures or activities. In Hayes, the court defined the right as

"a direct, unobstructed view of the [c]hannel and as well a direct, unobstructed means of ingress and egress . . . to the [c]hannel." Id. at 801 (emphasis added). The court then prescribed the rule that "in any given case, the riparian rights of an upland owner must be preserved over an area 'as near as practicable' in the direction of the [c]hannel so as to distribute equitably the submerged lands between the upland and the [c]hannel." Id. (emphasis added).

94. To the extent there is no channel in this portion of the Lake, Hayes dictates that riparian rights must be apportioned equitably, so that a riparian owner's right to an unobstructed view can extend only from the owner's property in the direction of the center of the Lake. Kling v. Dep't of Env'tl. Reg., Case No. 77-1224 (Fla. DOAH Oct. 6, 1977; Fla. DER Nov. 18, 1977) at ¶¶ 11-12 (emphasis added).

95. Here, no evidence was presented showing that the Dock—which will be located immediately south and east of the Gerards' riparian property and attendant riparian area—will present an obstruction to the Gerards' view of the Lake channel. Additionally, the evidence did not establish that Howard's Dock would obstruct the Gerards' view of the center of the northeast portion of Crooked Lake, which is located west and slightly south of their property.<sup>23/</sup>

96. Administrative precedent in Florida provides additional support for the determination that the Dock will not unreasonably infringe on the Gerards' right to an unobstructed view.

97. In O'Donnell v. Atlantic Dry Dock Corporation, Case No. 04-2240 (Fla. DOAH May 23, 2005; Fla. DEP Sept. 6, 2005), riparian owners challenged the proposed approval of expansions of sovereignty submerged lands leases authorizing Atlantic Dry Dock, a neighboring commercial shipyard, to expand its shipyard facilities and install new docking facilities. The administrative law judge noted that although the expanded shipyard would further encroach on the riparian owners' already somewhat-restricted view from their property, it would not substantially and materially obstruct the Petitioners' view to the channel. He commented: "it [their view] may be further obstructed to the west in the direction of the Atlantic Marine yard, but not in the direction of the channel." To that point, he found that although "any lateral encroachment on the Petitioners' line-of-sight to the channel by the large eastern dry dock proposed will be an annoyance, . . . [it] will not rise to the level of a substantial and material interference or obstruction of the Petitioners' view to the channel." Id. at ¶ 119. He found that "there is no 'special riparian right' to a view of the sunset, just as there was no right to a particular

object of view . . . by the riparian owners complaining in the Hayes case." Id. at ¶ 120.

98. Castoro v. Palmer, Case Nos. 96-0736, 96-5879 (Fla. DOAH Sept. 1, 1998; Fla. DEP Oct. 19, 1998), also is instructive. In Castoro, neighboring riparian owners challenged the proposed issuance of an environmental approval and sovereignty submerged lands lease for a 227-foot-long dock having a terminal platform with boat lift. The owners contended that due to the dock's length, it would impermissibly obstruct their views of the water. The administrative law judge rejected that contention, distinguishing the circumstances from those in Lee County v. Kiesel, 705 So. 2d 1013 (Fla. 2d DCA 1998), in which the construction of a bridge that blocked 80 percent of the riparian owners' view of the channel was held to constitute a "substantial and material" obstruction to the riparian right of view. The ALJ noted that although the dock would have "some impact on the neighbors' views" and their use of the waterbody, it did not unreasonably impact their riparian rights to an unobstructed view or to use of the waterbody. Id. at ¶¶ 73-74.

99. In Trump Plaza of the Palm Beaches Condominium v. Palm Beach County, Case No. 08-4752 (Fla. DOAH Sept. 24, 2009; Fla. DEP Oct. 8, 2009), a condominium association challenged the proposed issuance of a sovereignty submerged lands use approval to fill in a dredged area and create mangrove islands in the

Lake Worth Lagoon, alleging, among other things, that the creation of the mangrove islands would unreasonably infringe on their riparian right to an unobstructed view. In rejecting this position and recommending issuance of the submerged lands use approval, the ALJ noted that the area obstructed by the mangrove islands would be negligible compared to the remaining expanse of the view, and further noted that the owners' real concern was directed at the aesthetics of the project—specifically, they did not want to view mangrove islands. The ALJ stated: "[t]he evidence supports a finding that while the project will undoubtedly alter the view of the water from [the riparian owners' property], the impact on view is not so significant as to constitute an unreasonable infringement of their riparian rights." Id. at ¶ 86.

100. Applying these case law principles, it is determined that the Dock will not unreasonably infringe on or unreasonably restrict the Gerards' riparian right to an unobstructed view. To that point, the cases make clear that the right to an "unobstructed" view is not an unfettered right to a view of the water completely free of any lateral encroachment, but, instead is the right of a view toward the channel or the center of a lake without unreasonable infringement or restriction.

101. Here, although the Dock will laterally encroach on the Gerards' full panoramic view of the Lake—and, as such, may

even constitute an annoyance, the evidence did not show that the Dock will obstruct or otherwise restrict their view to the channel or the center of the Lake. Moreover, to the extent the Gerards have expressed concern about the Dock interfering with their view of the south shore of the Lake, O'Donnell makes clear the desire to have a particular object of view—here, the south shore of the Lake—is not a legally protected riparian right.

102. It is also found that the Dock will not unreasonably interfere with the Gerards' riparian rights of ingress, egress, boating, or navigation. As previously noted, the Dock will be located at least 25 feet inside the riparian lines established for Howard's upland property, and, it will not be constructed in a location or operated in a manner that will obstruct, interfere with, or restrict the Gerards' access to the Lake or to sufficient water depths to enable navigation.<sup>24/</sup>

103. The evidence also did not establish that the Dock will restrict or otherwise interfere with the Gerards' use of their riparian area for ingress and egress, boating, fishing, bathing, or other riparian uses.

104. In sum, it is concluded that the Dock will not unreasonably infringe on or restrict the riparian rights of adjacent upland riparian owners. Accordingly, it is determined that the Dock will meet the requirements and standards in rule 18-21.004(3) regarding riparian rights.

### Navigational Hazard

105. For the reasons discussed in paragraphs 63 through 67, it is determined that the Dock will not constitute a navigational hazard in violation of rule 18-21.004(7)(g).

### Not Contrary to the Public Interest

106. Rule 18-21.004(1)(a) requires an applicant to demonstrate that an activity proposed to be conducted on sovereignty submerged lands will not be contrary to the public interest.

107. To meet this standard, it is not necessary that the applicant show that the activity is affirmatively in the "public interest," as that term is defined in rule 18-21.003(51). Rather, it is sufficient that the applicant show that there are few, if any, "demonstrable environmental, social, and economic costs" of the proposed activity. Castoro, at ¶ 69.

108. For the reasons discussed above, and with the inclusion of the additional recommended conditions in paragraphs 73.A. and 73.B., it is determined that the proposed Dock meets the "not contrary to the public interest" standard required for issuance of the Lease.

### VI. Demonstration of Entitlement to ERP

109. Howard met her burden under section 120.569(2)(p) to present a prima facie case of entitlement to the ERP by entering into evidence the Application, the Notice of Intent, and



supporting information regarding the proposed Dock. She also presented credible, competent, and substantial evidence beyond that required to meet her burden under section 120.569(2)(p) to demonstrate prima facie entitlement to the ERP.

110. The burden then shifted to Petitioners to demonstrate, by a preponderance of the competent substantial evidence, that the Dock does not comply with section 373.414 and applicable ERP rules. For the reasons discussed above, it is determined that Petitioners did not meet their burden of persuasion under section 120.569(2)(p) in this proceeding. Accordingly, for the reasons addressed above, it is determined that Howard is entitled to issuance of the ERP for the Dock.

#### VII. Demonstration of Entitlement to Lease

111. As previously discussed, Howard bore the burden of proof in this proceeding to demonstrate, by a preponderance of the evidence, that the Dock meets all applicable statutory and rule requirements for issuance of the Lease for the Dock. For the reasons discussed above, it is determined that Howard met this burden, and, therefore, is entitled to issuance of the sovereignty submerged lands lease for the Dock.

#### VIII. Petitioners' Standing

##### Defenders' Standing

112. As stipulated by the parties and noted above, Defenders is an incorporated non-profit entity created for the

primary purpose of protecting and preserving Crooked Lake so that it may remain an OFW for all members of the public to enjoy. Defenders has been in existence since at least the mid-1980s.

113. Robert Luther, the president of Defenders, testified that the organization's purpose also entails providing education and promoting public awareness in order to preserve the natural beauty, water quality, ecological value, and quality of life around Crooked Lake.

114. As stipulated by the parties and noted above, Defenders has more than 25 members. Luther testified that Defenders has approximately 100 family members, most of whom live on or around Crooked Lake. He noted that many of Defenders' members own boats, which they park at a local boat landing on the Lake. Based on this testimony, it is inferred that these members operate their boats on Crooked Lake.

115. After receiving the public notice of the project, Defenders' board of directors voted to oppose issuance of the Consolidated Authorization for the Dock. Luther testified that the board's decision was based on the determination that "it was clearly within the public interest" to oppose the Dock.

### Gerards' Standing

116. The Gerards reside at 1055 Scenic Highway, Babson Park, Florida. Their riparian property is immediately adjacent to, and northwest of, Howard's property.

117. The Gerards own a floating dock that is located within their riparian area.<sup>25/</sup> The dock consists of two 4-foot-wide by 30-foot-long ramps attached to a 24-foot-long by 8-foot-wide pontoon boat.

118. Priscilla Gerard testified that she enjoys spending time sitting and reading books on the beach in front of her property, and that having that area to sit and read is a significant aspect of her enjoyment of her lakefront property.

119. Ms. Gerard observed that extensive boating activities in the northeast portion of the Lake on weekends is disruptive, and interferes with her use of her beach for relaxing and reading. She particularly noted that boats operating very close to the shore cause waves to splash up on her beach, interfering with her ability to sit and read close to the shore. She did not contend that Howard's use of the Dock for boating would contribute to the disruptive nature of existing boat traffic in the vicinity.

120. Ms. Gerard has viewed the plans for the proposed Dock and is very concerned that due to its size, her view of the south side of the Lake will be completely blocked.

121. She acknowledged, and other competent, credible evidence showed, that there are other docks on the Lake in the vicinity of her riparian property. The evidence shows that existing docks having lengths of 145 feet and 170 feet are located in the vicinity of, and are visible from, the Gerards' property. She testified that an existing dock and tiki hut block her view of the Lake to the north. She acknowledged that although Howard's Dock, if constructed as proposed, may somewhat obstruct her view to the left (south) of her property, it would not block her view straight out into the Lake.

122. Phillip Gerard testified that he has boated extensively on Crooked Lake in a variety of vessel types.

123. He further testified that he has observed a range of boating practices on Crooked Lake, including seeing water skiers and persons being towed behind motorized vessels on inner tubes and other types of "towables." He testified that, based on his personal observations, persons being towed do not have independent control of the speed or direction of the "towable"; thus, depending on the direction in which the towing vessel turns, the towable may be slung to the left or the right. Gerard commented that such lack of control could result in a person riding on a towable colliding with a dock, and he noted that Howard's nephew, who was riding on an inner tube being

towed by a boat, was involved in such a collection with his (Mr. Gerard's) own dock.

124. Mr. Gerard did not testify that the Dock would present a navigational hazard to, or otherwise interfere with, the Gerards' riparian right of ingress and egress.

125. Neither of the Gerards testified that the Dock would impact their ability to access navigable waters in the Lake.

126. Mr. Gerard acknowledged that if Howard's Dock were constructed, boats that currently travel very close to the shoreline of his property would be forced to swing further out in the Lake, away from his riparian shoreline, in order to avoid the Dock.

#### CONCLUSIONS OF LAW

127. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

#### I. Petitioners' Standing

128. As persons asserting party status to challenge the proposed agency action in this proceeding, Petitioners have the burden to demonstrate their standing to initiate and maintain this proceeding. Palm Beach Cnty. Env'tl. Coal. v. Dep't of Env'tl. Prot., 14 So. 3d 1076, 1078 (Fla. 4th DCA 2009); Agrico Chem. Co. v. Dep't of Env'tl. Reg., 406 So. 2d 478, 482 (Fla. 1st DCA 1981).

129. In Agrico, the court established a two-prong test for standing in administrative proceedings under section 120.57, stating:

[w]e 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 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.

130. Since Agrico, courts have clarified that standing to initiate an administrative proceeding is not dependent on proving that the proposed agency action would violate the law applicable to the proceeding. In other words, it is not necessary that the person prevail on the merits in an administrative challenge under section 120.57(1) to have standing as a party to initiate and maintain that challenge. As one court explained:

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."

Palm Beach Cnty. Env'tl. Coal., 14 So. 3d at 1078 (citing Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co., 18 So. 3d 1079, 1084 (Fla. 2d DCA 2009)). See St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist., 54 So. 3d 1051 (Fla. 5th DCA 2011); see also Reily Enters., LLC v. Dep't of Env'tl. Prot., 990 So. 2d 1248 (Fla. 4th DCA 2008).

131. Thus, to have standing, it is sufficient for a party challenging proposed issuance of a permit or other agency approval to show that his or her substantial interests "could reasonably be affected by the [proposed] activit[y]." Peace River/Manasota Reg'l Water Supply Auth., 14 So. 3d at 1084 (emphasis added). This, in turn, depends on the challenger offering evidence to prove that he or she could be injured. Id.; see Angelo's Aggregate Materials, Ltd. v. Dep't of Env't'l. Prot., Case Nos. 09-1543, 09-1544, 09-1545, 09-1546 (Fla. DOAH June 28, 2013; Fla. DEP Sept. 16, 2013).

#### Gerards' Standing

132. Based on the foregoing, it is concluded that the Gerards, as persons whose substantial interests will be affected by the Dock, have standing to initiate and maintain their challenge to the proposed Dock.

133. The Gerards own riparian property on Crooked Lake immediately adjacent to Howard's property. Petitioners presented evidence that the use of the Dock could cause adverse

impacts to water quality and submerged aquatic resources proximate to the Gerards' property. If Petitioners were correct, those impacts could reasonably and foreseeably impact the Gerards' use and enjoyment of the waters of Crooked Lake and those proximate aquatic resources. These interests are protected by section 373.414 and DEP rules that implement this statute.

134. Additionally, the Gerards asserted that the Dock would negatively impact their riparian rights—particularly to the right to an "unobstructed" view of the Lake—which, if true, constituted a reasonably foreseeable injury that is statutorily cognizable in this proceeding.

135. As discussed at length above, Petitioners did not prevail on the merits of their challenges. However, the Gerards' presented evidence that the proposed Dock could reasonably and foreseeably injure their interests protected by the statutes and rules applicable to this proceeding. Accordingly, the Gerards have demonstrated that, as parties whose substantial interests will be affected by the proposed Dock, they have standing to challenge the issuance of the Consolidated Authorization for the Dock.

#### Defenders' Standing

136. For Defenders to have standing to challenge the Consolidated Authorization on behalf of its members, it must



show that it meets the associational standing test established in Florida Home Builders Association v. Department of Labor and Employment Security, 412 So. 2d 351 (Fla. 1982). See also Friends of the Everglades, Inc. v. Bd. of Tr. of Int. Imp. Trust Fund, 595 So. 2d 186 (Fla. 1st DCA 1992) (applying associational standing test to 120.57 proceedings). To satisfy this test, Defenders must establish that: (1) a substantial number of its members' substantial interests are affected in these proceedings; (2) the interests Defenders seeks to protect in these proceedings are within its general scope of interest and activity; and (3) the relief Defenders requests is appropriate for it to receive on behalf of its members.

137. The evidence establishes that a substantial number of Defenders' members reside on property that borders Crooked Lake, and that many of these members own boats, which they park and store at a public boat landing near the Lake. Thus, it is reasonable to infer that a substantial number of Defenders' members use Crooked Lake for boating and other recreational purposes, such as fishing, swimming, and water skiing.

138. Defenders presented evidence in support of their allegation that the Dock would present a navigational hazard for persons boating on the Lake. They also alleged, and presented evidence, that use of the boat cradle on the Dock could result in water quality violations and damages to submerged resources.

Section 373.414 and the rules implementing that statute make alleged injuries to navigation, recreational values, and water quality cognizable in this proceeding.

139. Based on the evidence presented at the hearing, it is concluded that Defenders showed that a substantial number of its members' substantial interests could reasonably and foreseeably be affected by the Dock. Accordingly, Defenders meets the "substantial interests affected" prong of the associational standing test.

140. Defenders was organized for the primary purpose of protecting and preserving Crooked Lake so that it may remain an OFW for all members of the public to enjoy. Other stated purposes of Defenders include providing education and promoting public awareness for the purpose of preserving the natural beauty, water quality, and ecological value of, and quality of life around, Crooked Lake.

141. Robert Luther testified that Defenders' board of directors decided to challenge the Dock based on their conclusion that it is "clearly in the public interest" to do so. A stated purpose of Defenders is to protect and preserve Crooked Lake "for all members of the public to enjoy." Based on this evidence, it is concluded that Defenders meets the "organizational purpose" prong of the associational standing test.

142. Defenders initiated this proceeding specifically to prevent issuance of the Consolidated Authorization for the Dock. This is an appropriate remedy for Defenders to seek on behalf of its members. Accordingly, Defenders has shown that it meets the "appropriate remedy" prong of the associational standing test.

143. In sum, Defenders established that it meets the requirements of the associational standing test, and, thus, has standing, pursuant to sections 120.569 and 120.57(1), to represent the interests of its members in this proceeding.

144. Defenders also presented evidence that establishes its standing under section 403.412(6), Florida Statutes, to initiate and participate in this proceeding.<sup>26/</sup>

## II. Burden and Standard of Proof

145. This is a de novo proceeding intended to formulate final agency action, not review action taken earlier and preliminarily. See Young v. Dep't of Cmty. Aff., 625 So. 2d 831, 833 (Fla. 1st DCA 1991); Capeletti v. Dep't of Transp., 362 So. 2d 346 (Fla. 1st DCA 1978).

146. Section 120.569(2) (p) provides, in pertinent part:

For any proceeding arising under chapter 373, chapter 378, or chapter 403, if a nonapplicant petitions as a third party to challenge an agency's issuance of a license, permit, or conceptual approval, the order of presentation in the proceeding is for the permit applicant to present a prima facie case demonstrating entitlement to the license, permit, or conceptual approval,

followed by the agency. This demonstration may be made by entering into evidence the application and relevant material submitted to the agency in support of the application, and the agency's staff report or notice of intent to approve the permit, license, or conceptual approval. Subsequent to the presentation of the applicant's prima facie case and any direct evidence submitted by the agency, the petitioner initiating the action challenging the issuance of the license, permit, or conceptual approval has the burden of ultimate persuasion and has the burden of going forward to prove the case in opposition to the license, permit, or conceptual approval through the presentation of competent and substantial evidence. The permit applicant and agency may on rebuttal present any evidence relevant to demonstrating that the application meets the conditions for issuance.

§ 120.569(2) (p), Fla. Stat. (emphasis added).

147. The ERP at issue is governed by chapter 373. Pursuant to section 120.569(2) (p), Howard had the initial burden of going forward to demonstrate her case of prima facie entitlement to the ERP. As discussed above, Howard satisfied this burden by entering into evidence the application, the Consolidated Notice of Intent, and other evidence at the final hearing showing her entitlement to the ERP. The ultimate burden of proof then shifted to Petitioners to prove, by a preponderance of the evidence, that the Dock does not meet the requirements of section 373.414 and implementing rules such that

the ERP portion of the Consolidated Authorization should be denied.<sup>27/</sup>

148. The Lease for the Dock is governed by chapter 253, which is not among the statutes listed in section 120.569(2) (p) to which the shifted burden of proof applies. Accordingly, as the applicant, Howard bears the ultimate burden of proof, by a preponderance of the evidence, to show entitlement to issuance of the Lease. See Fla. Dep't of Transp. V. J.W.C. Co., 396 So. 2d 778, 790 (Fla. 1st DCA 1981) (applicant for agency approval bears ultimate burden of persuasion).

III. Statutory and Rule Requirements Applicable to ERP and Lease

Environmental Resource Permit

149. To be entitled to issuance of the ERP portion of the Consolidated Authorization, the applicant must provide reasonable assurance that the Dock will meet the requirements of chapter 373, Part IV; the applicable provisions of Florida Administrative Code Chapter 62-330; and the applicable provisions of the Environmental Resource Permit Applicant's Handbook, Volume I (General and Environmental) ("Handbook").

150. The "reasonable assurance" standard requires the applicant to demonstrate to DEP the "substantial likelihood" that the project will be successfully implemented and will not discharge, emit, or cause pollution in contravention of DEP

rules. Reasonable assurance does not require absolute guarantees that the project will not violate applicable requirements under any and all circumstances. See Save Anna Maria, Inc. v. Dep't of Transp., 700 So. 2d 113, 117 (Fla. 2d DCA 1997); see also Metropolitan Dade Cnty. v. Coscan Fla., Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992); McCormick v. City of Jacksonville, Case No. 88-2283 (Fla. DOAH Oct. 16, 1989; Fla. DER Jan. 22, 1990). Additionally, the reasonable assurance standard does not require the applicant to eliminate all contrary possibilities, no matter how remote, or to address impacts that are theoretical or not reasonably likely to occur. See Crystal Springs Recreational Preserve, Inc. v. SW Fla. Water Mgmt. Dist., Case No. 99-1415 (Fla. DOAH Jan. 27, 2000; SWFWMD Feb. 29, 2000); Alafia River Basins Stewardship Council, Inc. v. SW Fla. Water Mgmt. Dist., Case Nos. 98-4925, 98-4926, 98-4930, 98-4931 (Fla. DOAH July 2, 1999; SWFWMD Aug. 2, 1999).

151. Further, because the Dock is proposed to be constructed and operated in an OFW, Howard is required to provide reasonable assurance that the Dock meets the "clearly in the public interest" standard. § 373.414(1), Fla. Stat.; Fla. Admin. Code R. 62-4.070.

152. As previously noted, providing reasonable assurance that a proposed activity is clearly in the public interest does not require a demonstration of need for or net public benefit

from the activity, but, instead, requires greater assurances—particularly with respect to the potential harm to environmental resources that may be caused by the proposed activity—than for waters not designated as OFWs. See 1800 Atlantic Developers v. Dep't of Env'tl. Reg., 552 So. 2d 946, 957 (Fla. 1st DCA 1989). Whether the assurances provided by the applicant are reasonable for purposes of meeting the "clearly in the public interest" standard depends on the circumstances involved. See Angelo's Aggregate Materials, Ltd. v. Dep't of Env'tl. Prot., Case No. 09-1543 (Fla. DOAH June 28, 2013; Fla. DEP Sept. 16, 2013).

153. Section 373.414(1), in pertinent part, states:

(1) As part of an applicant's demonstration that an activity regulated under this part will not be harmful to the water resources or will not be inconsistent with the overall objectives of the district, the governing board or the department shall require the applicant to provide reasonable assurance that state water quality standards applicable to waters as defined in s. 403.031(13) will not be violated and reasonable assurance that such activity in, on, or over surface waters or wetlands, as delineated in s. 373.421(1), is not contrary to the public interest. However, if such an activity significantly degrades or is within an Outstanding Florida Water, as provided by department rule, the applicant must provide reasonable assurance that the proposed activity will be clearly in the public interest.

(a) In determining whether an activity, which is in, on, or over surface waters or wetlands, as delineated in s. 373.421(1), and is regulated under this part, is not

contrary to the public interest or is clearly in the public interest, the governing board or the department shall consider and balance the following criteria:

1. Whether the activity will adversely affect the public health, safety, or welfare or the property of others;
2. Whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;
3. Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;
4. Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;
5. Whether the activity will be of a temporary or permanent nature;
6. Whether the activity will adversely affect or will enhance significant historical and archaeological resources under the provisions of s. 267.061; and
7. The current condition and relative value of functions being performed by areas affected by the proposed activity.

154. DEP has adopted rules to implement this statute.

Rule 62-330.301(1), titled "Conditions for Issuance of Individual and Conceptual Approval Permits," states, in pertinent part:

- (1) To obtain an individual or conceptual approval permit, an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, removal,



or abandonment of the projects regulated under this chapter:

(a) Will not cause adverse water quantity impacts to receiving waters and adjacent lands;

(b) Will not cause adverse flooding to on-site or off-site property;

(c) Will not cause adverse impacts to existing surface water storage and conveyance capabilities;

(d) Will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters;

(e) Will not adversely affect the quality of receiving waters such that the state water quality standards set forth in chapters 62-4, 62-302, 62-520, and 62-550, F.A.C., including the antidegradation provisions of paragraphs 62-4.242(1)(a) and (b), F.A.C., subsections 62-4.242(2) and (3), F.A.C., and rule 62-302.300, F.A.C., and any special standards for Outstanding Florida Waters and Outstanding National Resource Waters set forth in subsections 62-4.242(2) and (3), F.A.C., will be violated;

(f) Will not cause adverse secondary impacts to the water resources. In addition to the criteria in this subsection and in subsection 62-330.301(2), F.A.C., in accordance with section 373.4132, F.S., an applicant proposing the construction, alteration, operation, maintenance, abandonment, or removal of a dry storage facility for 10 or more vessels that is functionally associated with a boat launching area must also provide reasonable assurance that the facility, taking into consideration any secondary impacts, will meet the provisions of paragraph 62-

330.302(1)(a), F.A.C., including the potential adverse impacts to manatees;

(g) Will not adversely impact the maintenance of surface or ground water levels or surface water flows established pursuant to section 373.042, F.S.;

(h) Will not cause adverse impacts to a Work of the District established pursuant to section 373.086, F.S.;

(i) Will be capable, based on generally accepted engineering and scientific principles, of performing and functioning as proposed;

(j) Will be conducted by a person with the financial, legal and administrative capability of ensuring that the activity will be undertaken in accordance with the terms and conditions of the permit, if issued[.]

155. Additionally, rule 62-330.302, titled "Additional Conditions for Issuance of Individual and Conceptual Approval Permits," states, in pertinent part:

(1) In addition to the conditions in rule 62-330.301, F.A.C., to obtain an individual or conceptual approval permit under this chapter, an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, repair, removal, and abandonment of a project:

(a) Located in, on, or over wetlands or other surface waters will not be contrary to the public interest, or if such activities significantly degrade or are within an Outstanding Florida Water, are clearly in the public interest, as determined by balancing the following criteria as set

forth in sections 10.2.3 through 10.2.3.7 of Volume I:

1. Whether the activities will adversely affect the public health, safety, or welfare or the property of others;
2. Whether the activities will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;
3. Whether the activities will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;
4. Whether the activities will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;
5. Whether the activities will be of a temporary or permanent nature;
6. Whether the activities will adversely affect or will enhance significant historical and archaeological resources under the provisions of section 267.061, F.S.; and
7. The current condition and relative value of functions being performed by areas affected by the proposed activities.

(b) Will not cause unacceptable cumulative impacts upon wetlands and other surface waters as set forth in sections 10.2.8 through 10.2.8.2 of Volume I.

156. Section 10.2. of the Handbook, titled Environmental Criteria, is incorporated into the foregoing rules, and provides guidance regarding meeting the requirements of those rules. The Handbook provides in pertinent part:

### **10.2.1 Elimination or Reduction of Impacts**

Protection of wetlands and other surface waters is preferred to destruction and mitigation due to the temporal loss of ecological value and uncertainty regarding the ability to recreate certain functions associated with these features. The following factors are considered in determining whether an application will be approved by the Agency: the degree of impact to wetland and other surface water functions caused by a proposed activity; whether the impact to these functions can be mitigated; and the practicability of design modifications for the site that could eliminate or reduce impacts to these functions, including alignment alternatives for a proposed linear system. . . . To receive Agency approval, an activity cannot cause a net adverse impact on wetland functions and other surface water functions that is not offset by mitigation.

\* \* \*

### **10.2.2 Fish, Wildlife, Listed Species and their Habitats**

Pursuant to section 10.1.1(a), above, an applicant must provide reasonable assurances that a regulated activity will not impact the values of wetland and other surface water functions so as to cause adverse impacts to:

- (a) The abundance and diversity of fish, wildlife, [and] listed species[.]
- (b) The habitat of fish, wildlife, and listed species.

In evaluating whether an applicant has provided reasonable assurances under these provisions, de minimis effects shall not be considered adverse for the purposes of this section.

As part of the assessment of the impacts of regulated activities upon fish and wildlife, the Agency will provide a copy of all notices of applications for individual (including conceptual approval) permits that propose regulated activities in, on, or over wetlands or other surface waters to the Florida Fish and Wildlife Conservation Commission (FWC) for review and comment, in accordance with Section 20.331(10), F.S. In addition, Agency staff may solicit comments from the FWC regarding other applications to assist in the assessment of potential impacts to fish and wildlife and their habitats, particularly with regard to listed species.

\* \* \*

### **10.2.3 Public Interest Test**

In determining whether a regulated activity located in, on, or over wetlands or other surface waters is not contrary to the public interest, or if such an activity significantly degrades or is within an Outstanding Florida Water, that the regulated activity is clearly in the public interest, the Agency shall consider and balance, and an applicant must address, the following criteria:

(a) Whether the regulated activity will adversely affect the public health, safety, or welfare or the property of others (subparagraph 62-330.302(1)(a)1[.], F.A.C.);

(b) Whether the regulated activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats (subparagraph 62-330.302(1)(a)2[.], F.A.C.);

(c) Whether the regulated activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling (subparagraph 62-330.302(1)(a)3[.], F.A.C.);

(d) Whether the regulated activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity (subparagraph 62-330.302(1)(a)4[.], F.A.C.);

(e) Whether the regulated activity will be of a temporary or permanent nature (subparagraph 62-330.302(1)(a)5[.], F.A.C.);

(f) Whether the regulated activity will adversely affect or will enhance significant historical and archaeological resources under the provisions of Section 267.061, F.S. (subparagraph 62-330.302(1)(a)6[.], F.A.C.); and

(g) The current condition and relative value of functions being performed by areas affected by the proposed regulated activity (subparagraph 62-330.302(1)(a)7[.], F.A.C.).

#### **10.2.3.1 Public Health, Safety, or Welfare or the Property of Others**

In reviewing and balancing the criterion regarding public health, safety, welfare and the property of others in section 10.2.3(a), above, the Agency will evaluate whether the regulated activity located in, on, or over wetlands or other surface waters will cause:

(a) An environmental hazard to public health or safety or improvement to public health or safety with respect to environmental issues. . . . For example, the installation of navigational aids may improve public safety and may reduce impacts to public resources;

\* \* \*

(c) Flooding or alleviate existing flooding on the property of others.

(d) Environmental impacts to the property of others. . . . The Agency will not consider impacts to property values.

#### **10.2.3.2 Fish and Wildlife and their Habitats**

The Agency's public interest review of that portion of a proposed activity in, on, or over wetlands and other surface waters for impacts to "the conservation of fish and wildlife, including endangered or threatened species, or their habitats" is encompassed within the required review of the entire activity under section 10.2.2, above. An applicant must always provide the reasonable assurances required under section 10.2.2, above.

#### **10.2.3.3 Navigation, Water Flow, Erosion and Shoaling**

In reviewing and balancing the criterion on navigation, erosion and shoaling in section 10.2.3(c), above, the Agency will evaluate whether the regulated activity located in, on or over wetlands or other surface waters will:

(a) Significantly impede navigability or enhance navigability. The Agency will consider the current navigational uses of the surface waters and will not speculate on uses that may occur in the future. . . . Applicants proposing to construct docks, piers and other works that extend into surface waters must address the continued navigability of these waters. An encroachment into a marked or customarily used navigation channel is an example of a significant impediment to navigability.

(b) Cause or alleviate harmful erosion or shoaling. Applicants proposing activities such as channel relocation, artificial reefs, construction of jetties, breakwaters, groins, bulkheads and beach nourishment must

address existing and expected erosion or shoaling in the proposed design. Compliance with erosion control best management practices referenced in Part IV of this Volume, will be an important consideration in addressing this criterion. Each permit will have a general condition that requires applicants to utilize appropriate erosion control practices and to correct any adverse erosion or shoaling resulting from the regulated activities.

(c) Significantly impact or enhance water flow. Applicants must address significant obstructions to sheet flow by assessing the need for structures that minimize the obstruction such as culverts or spreader swales in fill areas. Compliance with the water quantity criteria found in section 10.2.2.4, above, shall be an important consideration in addressing this criterion.

#### **10.2.3.4 Fisheries, Recreation, Marine Productivity**

In reviewing and balancing the criterion regarding fishing or recreational values and marine productivity in section 10.2.3(d), above, the Agency will evaluate whether the regulated activity in, on, or over wetlands or other surface waters will cause:

(a) Adverse effects to sport or commercial fisheries or marine productivity. Examples of activities that may adversely affect fisheries or marine productivity are the elimination or degradation of fish nursery habitat, change in ambient water temperature, change in normal salinity regime, reduction in detrital export, change in nutrient levels, or other adverse effects on populations of native aquatic organisms.

(b) Adverse effects or improvements to existing recreational uses of a wetland or other surface water. Wetlands and other surface waters may provide recreational uses



such as boating, fishing, swimming, waterskiing, hunting, and birdwatching.

#### **10.2.3.5 Temporary or Permanent Nature**

When evaluating the other criteria in section 10.2.3, above, the Agency will consider the frequency and duration of the impacts caused by the proposed activity. Temporary impacts will be considered less harmful than permanent impacts of the same nature and extent.

#### **10.2.3.6 Historical and Archaeological Resources**

In reviewing and balancing the criterion regarding historical and archaeological resources in section 10.2.3(f), above, the Agency will evaluate whether the regulated activity located in, on, or over wetlands or other surface waters will impact significant historical or archaeological resources.

#### **10.2.3.7 Current Condition and Relative Value of Functions**

When evaluating other criteria in section 10.2.3, above, the Agency will consider the current condition and relative value of the functions performed by wetlands and other surface waters affected by the proposed regulated activity. Wetlands and other surface waters that have had their hydrology, water quality or vegetative composition permanently impacted due to past legal alterations or occurrences such as infestation with exotic species, usually provide lower habitat value to fish and wildlife. However, if the wetland or other surface water is currently degraded, but is still providing some beneficial functions, consideration will be given to whether the regulated activity will further reduce or eliminate those functions. The Agency will also evaluate the predicted ability of the

wetlands or other surface waters to maintain their current functions as part of the proposed activity once it is developed. Where previous impacts to a wetland or other surface water are temporary in nature, consideration will be given to the inherent functions of these areas relative to seasonal hydrologic changes, and expected vegetative regeneration and projected habitat functions if the use of the subject property were to remain unchanged.

157. Based on the foregoing Findings of Fact, and provided that the additional recommended conditions in paragraphs 73.A. and 73.B. are included in the Consolidated Authorization, the Dock will be clearly in the public interest, as determined through considering and balancing the factors in section 373.414(1)(a), as implemented in the applicable rules and Handbook provisions.

158. Accordingly, it is concluded that Howard is entitled to issuance of the ERP for the Dock.

#### Sovereignty Submerged Lands Lease

159. Title to sovereignty submerged lands is vested in the Board of Trustees pursuant to section 253.001. To manage the state's sovereignty submerged lands, the Board of Trustees has adopted chapter 18-21.

160. Rule 18-21.003 defines the following terms pertinent to this proceeding:

(20) "Dock" means a fixed or floating structure, including access walkways,

terminal platforms, catwalks, mooring pilings, lifts, davits and other associated water-dependent structures, used for mooring and accessing vessels.

\* \* \*

(32) "Lease" means an interest in sovereignty lands designated by a contract creating a landlord-tenant relationship between the board as landlord and the applicant as tenant whereby the board grants and transfers to the applicant the exclusive use, possession, and control of certain specified sovereignty lands for a determinate number of years, with conditions attached, at a definite fixed rental.

\* \* \*

(45) "Preempted area" means the area of sovereignty submerged lands from which any traditional public uses have been or will be excluded by an activity, such as the area occupied by docks, piers, and other structures; the area between a dock and the shoreline where access is not allowed, between docks, or areas where mooring routinely occurs that are no longer reasonably accessible to the general public; permanent mooring areas not associated with docks; and swimming areas enclosed by nets, buoys, or similar marking systems. When the Board requires an activity to be moved waterward to avoid adverse resource impacts, the portion of the nearshore area that is avoided by the proposed activity shall not be included in the preempted area.

\* \* \*

(48) "Private residential single-family dock or pier" means a dock or pier used for private recreational or leisure purposes that is located on a single-family riparian parcel or that is shared by two adjacent

single-family riparian owners if located on their common riparian rights line.

\* \* \*

(51) "Public interest" means demonstrable environmental, social, and economic benefits which would accrue to the public at large as a result of a proposed action, and which would clearly exceed all demonstrable environmental, social, and economic costs of the proposed action. In determining the public interest in a request for use, sale, lease, or transfer of interest in sovereignty lands . . . the board shall consider the ultimate project and purpose to be served by said use, sale, lease, or transfer of lands[.]

\* \* \*

(58) "Riparian rights" means those rights incident to lands bordering upon navigable waters, as recognized by the courts and common law.

\* \* \*

(61) "Sovereignty submerged lands" means those lands including but not limited to, tidal lands, islands, sand bars, shallow banks, and lands waterward of the ordinary or mean high water line, beneath navigable fresh water or beneath tidally-influenced waters, to which the State of Florida acquired title on March 3, 1845, by virtue of statehood, and which have not been heretofore conveyed or alienated. For the purposes of this chapter sovereignty submerged lands shall include all submerged lands title to which is held by the Board.

\* \* \*

(71) "Water dependent activity" means an activity which can only be conducted on, in, over, or adjacent to water areas because the

activity requires direct access to the water body or sovereign submerged lands for transportation, recreation, energy production or transmission, or source of water, and where the use of the water or sovereign submerged lands is an integral part of the activity.

161. Rule 18-21.004, which establishes the management policies, standards, and criteria regarding requests for activities on sovereignty submerged lands, states, in pertinent part:

(1) General Proprietary.

(a) For approval, all activities on sovereignty lands must be not contrary to the public interest, except for sales which must be in the public interest.

(b) All leases, easements, deeds or other forms of approval for sovereignty land activities shall contain such terms, conditions, or restrictions as deemed necessary to protect and manage sovereignty lands.

\* \* \*

(2) Resource Management.

(a) All sovereignty lands shall be considered single use lands and shall be managed primarily for the maintenance of essentially natural conditions, propagation of fish and wildlife, and traditional recreational uses such as fishing, boating, and swimming.

(b) All leases, easements, deeds or other forms of approval for sovereignty land activities shall contain such terms, conditions, or restrictions as deemed

necessary to protect and manage sovereignty lands.

\* \* \*

(d) Activities shall be designed to minimize or eliminate any cutting, removal, or destruction of wetland vegetation (as listed in Chapter 62-340, F.A.C.) on sovereignty lands.

\* \* \*

(i) Activities on sovereignty lands shall be designed to minimize or eliminate adverse impacts on fish and wildlife habitat, and other natural or cultural resources. Special attention and consideration shall be given to endangered and threatened species habitat.

\* \* \*

(3) Riparian Rights.

(a) None of the provisions of this rule shall be implemented in a manner that would unreasonably infringe upon the traditional, common law riparian rights, as defined in Section 253.141, F.S., of upland property owners adjacent to sovereignty submerged lands.

(b) Satisfactory evidence of sufficient upland interest is required for activities on sovereignty submerged lands riparian to uplands[.]

(c) All structures and other activities must be designed and conducted in a manner that will not unreasonably restrict or infringe upon the riparian rights of adjacent upland riparian owners.

(d) Except as provided herein, all structures, including mooring pilings,

breakwaters, jetties and groins, and activities must be set back a minimum of 25 feet inside the applicant's riparian rights lines.

162. Section 253.141(1) states, in pertinent part:

Riparian rights are those incident to land bordering upon navigable waters. They are rights of ingress, egress, boating, bathing, and fishing and such others as may be or have been defined by law. Such rights are not of a proprietary nature. They are rights inuring to the owner of the riparian land but are not owned by him or her. They are appurtenant to and are inseparable from the riparian land. . . . Conveyance of title to or lease of the riparian land entitles the grantee to the riparian rights running therewith whether or not mentioned in the deed or lease of the upland.

163. Based on the foregoing Findings of Fact, and provided that the additional recommended condition in paragraph 73.B. is included in the Consolidated Authorization, it is concluded that the Dock will meet all applicable requirements of chapter 253 and chapter 18-21, including the requirement that it not be contrary to public interest.

164. Accordingly, it is concluded that Howard is entitled to issuance of the sovereignty submerged lands lease for the Dock.

#### Conclusion

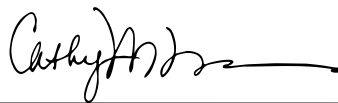
165. Based on the foregoing, it is concluded that, with the inclusion of the all of the conditions currently included in the draft Consolidated Authorization and the inclusion of the

recommended conditions set forth in paragraphs 73.A. and 73.B., the Dock will meet all applicable statutory and rule requirements for issuance of the ERP and the Lease.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Environmental Protection enter a final order approving the issuance of Consolidated Environmental Resource Permit and Recommended Intent to Grant Sovereignty Submerged Lands Authorization, Permit No. 53-0351424-001-EI, on the terms and conditions set forth in the Consolidated Notice of Intent and attached draft of Permit No. 53-0351424-001-EI, as modified to include the Additional Recommended Conditions set forth in paragraphs 73.A. and 73B.

DONE AND ENTERED this 5th day of July, 2018, in Tallahassee, Leon County, Florida.



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CATHY M. SELLERS  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 5th day of July, 2018.

ENDNOTES

<sup>1/</sup> All Florida Statutes references are to the 2018 version unless otherwise stated. All references to Florida Administrative Code rules are to the version in effect at the time of issuance of this Recommended Order. See Lavernia v. Dep't of Prof'l Reg., 616 So. 2d 53 (Fla. 1st DCA 1993) (law in effect at the time the agency takes final action on a licensure application applies). As a practical matter, in this case, the statutory and rule provisions pertinent to this case did not substantively change between the date the application was filed and the date of issuance of this Recommended Order.

<sup>2/</sup> The application for the project incorrectly identified the applicant as "Kristin" Howard. However, the applicant's name is "Krista" Howard, as reflected by her signature on the application. This error was corrected at the final hearing. Accordingly, the case style has been revised to reflect this correction.

<sup>3/</sup> In the Consolidated Notice of Intent issued on January 11, 2018, the last sentence in section III.B. was amended to reflect DEP's determination that the project proposed to be authorized by the Consolidated Authorization was "clearly in the public interest."

<sup>4/</sup> Pursuant to section 373.427, Florida Statutes, DEP has adopted procedural rules regarding the concurrent application submittal and review of applications for projects that require both an environmental resource permit and approval to use sovereignty submerged lands. Florida Administrative Code Rule 62-330.075(2) states in pertinent part: "[n]o application under this section shall be approved until all requirements of applicable provisions of Part IV of Chapter 373, F.S., and proprietary authorization under chapter 253[, F.S.] . . . and rules adopted thereunder for both the individual . . . permit and proprietary authorization are met."

<sup>5/</sup> Sovereignty submerged lands are the lands underlying navigable waters in the state of Florida. These lands belong to the people of Florida, and title to these lands is held in trust

by the Board of Trustees for the benefit of the people of Florida. Art. X, § 11, Fla. Const.

<sup>6/</sup> Rickman completed, and submitted to DEP, a form titled "Application for a Sovereignty Submerged Lands Lease." The first page of the application form Rickman completed and submitted to DEP was not included in the application form tendered by the parties and accepted into evidence at the final hearing. However, that application form was adopted by DEP as a rule and the undersigned takes official recognition of the form pursuant to section 90.202(9), Florida Statutes. On the first page of the form, below the title, is the parenthetical: "(For existing structures and activities that need to be brought under lease)." The instructions at the top of page 1 of the form state in pertinent part: "This form is intended to be used for existing structures and activities only." The proposed Dock is not an existing structure, so this form is not applicable to the Dock. However, that mistake does not constitute a fatal flaw, provided the statutory and rule requirements for issuance of the ERP and the Lease are met.

<sup>7/</sup> OFWs are waters designated by the State of Florida as worthy of special protection because of their natural attributes. § 403.061(27), Fla. Stat.

<sup>8/</sup> Class III waterbodies are designated for recreation, propagation and maintenance of a healthy, well-balanced population of fish and wildlife, and for fish consumption. Fla. Admin. Code R. 62-302.400(1), (15).

<sup>9/</sup> Howard's property is assigned parcel no. 033140 by the Polk County Property Appraiser.

<sup>10/</sup> There is conflicting evidence as to whether the ski boat is 23 or 25 feet long. This matter is noted only for accuracy purposes. The draft of the ski boat, rather than its length, is a relevant issue and is discussed later herein.

<sup>11/</sup> The submerged lands surrounding the Dock's footprint are not included in the preempted area of the Lease. Therefore, Howard does not have the right to exclude the general public from entering into and using these areas for fishing, swimming, boating, and other activities.

<sup>12/</sup> The docks on the Lake that are longer than the proposed Dock range from 205 feet to 280 feet in length. Among those is a 244-foot-long dock on the southern shore of the northeast portion of Crooked Lake—the same portion of the Lake in which

Howard's Dock is proposed to be located. Also of note is a 220-foot-long dock located on the southern shore of the northeast portion of the Lake, near the point where a peninsula juts into the Lake from the south, narrowing the width of the Lake in that area. There was no evidence presented showing that either of these docks presented a navigational hazard.

<sup>13/</sup> A pitched roof generally creates more of a visual intrusion than a flat roof. Howard ultimately decided on a flat roof for the Dock to reduce the Dock's visual profile.

<sup>14/</sup> The ski boat's draft is deepest at the front (bow). The boat's inboard motor is located at the back of the boat (stern), where the draft is less than 25 inches.

<sup>15/</sup> The "total height" is comprised of the 18-inch side railings and the two- to three-inch cradle bottom thickness.

<sup>16/</sup> Of note is that the Florida Fish and Wildlife Conservation Commission received a copy of the Application and did not submit any comments to DEP expressing concerns regarding potential impact of the Dock to fish or wildlife or to listed species or their habitat.

<sup>17/</sup> A riparian owner's right to access navigable waters is subject to the superior right of the public to be able to safely navigate. See *Ferry Pass Inspectors' & Shippers' Ass'n v. White River Inspectors' & Shippers' Ass'n*, 48 So. 643 (Fla. 1909). However, that some boaters may choose not to engage in safe boating practices is not sufficient justification to deny a riparian owner his or her right to wharf out to navigable portions of a waterbody when doing so does not create a navigational hazard.

<sup>18/</sup> These photographs were taken by Robert Luther and James Tully, both of whom testified on behalf of Petitioners at the final hearing.

<sup>19/</sup> The undersigned notes that even following an extreme weather event—a hurricane—the water levels in the Lake were not such that the walkway and terminal platform of the Dock would have been submerged.

<sup>20/</sup> See paragraph 152, below.

<sup>21/</sup> See, e.g., Sutton v. Hubbard and Dep't of Env'tl. Prot., Case Nos. 93-1499, 93-6057 (Fla. DOAH May 31, 1995; Fla. DEP July 1, 1995).

<sup>22/</sup> Additionally, the undersigned does not find tenable Petitioners' underlying premise that the Dock may not be able to "serve its purpose for a boat with a 2-foot draft 44 percent of the time." As previously discussed, Rickman presented a graph of water level information for Crooked Lake covering the ten-year period preceding the filing of the Application. This graph shows that the water level in the Lake fell below 114 feet NGVD only twice, for what appear to be relatively short-lived periods, and that for most of that ten-year period, the water level was 115 feet NGVD or higher. As discussed above, the persuasive evidence establishes that a water level of 114 feet NGVD or higher provides sufficient depth for Howard's deepest draft vessel to use the Dock in compliance with the Consolidated Authorization.

<sup>23/</sup> This determination was made using information in the record consisting of scaled maps and photographs of Crooked Lake and aerial photographs depicting Howard's and the Gerards' delineated parcels.

<sup>24/</sup> The Survey shows the Gerards' dock as being at least 77.5 feet away from Howard's dock.

<sup>25/</sup> The Survey depicts the Gerards' floating dock as being set back less than 25 feet from the northern riparian line for Howard's riparian area.

<sup>26/</sup> Section 403.412(6) states:

Any Florida corporation not for profit which has at least 25 current members residing within the county where the activity is proposed, and which was formed for the purpose of the protection of the environment, fish and wildlife resources, and protection of air and water quality, may initiate a hearing pursuant to s. 120.569 or s. 120.57, provided that the Florida corporation not for profit was formed at least 1 year prior to the date of the filing of the application for a permit, license, or authorization that is the subject of the notice of proposed agency action.

The evidence shows that Defenders has at least 25 members residing near or around Crooked Lake; that it was formed for the purpose of protecting the environment, including water quality, in and around Crooked Lake; and that it was in existence more than one year before the Application was filed. See Conservation Alliance of St. Lucie, Inc. v. Fort Pierce Util. Auth., Case No. 09-1599 (Fla. DOAH 2013; Fla DEP July 8, 2013) (provided evidence in the record establishes standing under section 403.412(6), it is not necessary to plead standing on that basis).

<sup>27/</sup> As discussed herein, Petitioners failed to carry their burden to show that the Dock did not meet the applicable requirements and standards for issuance of the ERP.

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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.