STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

MARINEMAX, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	**OGC CASE NO. 18-0204**
	)	**DOAH CASE NO. 18-2664**
LARRY LYNN AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
	)	
Respondents.	)	
_____/		

FINAL ORDER

An Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH) on March 28, 2019, 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. The Petitioner MarineMax, Inc. (MarineMax or Petitioner) timely filed Exceptions on April 22, 2019. The Department timely filed responses to the Petitioner's Exceptions on May 2, 2019. This matter is now before the Secretary of the Department for final agency action.

BACKGROUND

On March 8, 2018, Mr. Lynn applied for, and on March 23, 2018, DEP issued, a verification of exemption from obtaining an ERP for the installation of nine pilings off his residential property's seawall (Project). On April 13, 2018, MarineMax timely filed a Petition for Formal Administrative Hearing with DEP, challenging the issuance of verification of exemption. MarineMax, thereafter, filed a Motion to Amend Petition for Administrative Hearing, dated June 14, 2018, and the previous Administrative Law Judge (ALJ) assigned to this

matter thereafter entered an Order Granting Petitioner's Motion to Amend Petition for Formal Administrative Hearing on June 15, 2018, accepting the Amended Petition for Formal Administrative Hearing as establishing the issues to be tried in the instant proceeding.

The ALJ conducted a final hearing on January 10, 2019, by video teleconference with locations in Tallahassee and Fort Myers, Florida. The parties offered the following exhibits into evidence, which the ALJ admitted: Joint Exhibits 1 through 7; MarineMax Exhibits P1 through P10; and DEP Exhibits DEP1 and DEP2.

MarineMax presented the testimony of Sam Lowrey, its corporate vice president of real estate; and Captain Ralph S. Robinson III, a U.S. Coast Guard-licensed boat captain, who the ALJ accepted as an expert in marine navigation. Respondents DEP and Mr. Lynn presented the testimony of Megan Mills, the environmental specialist and program administrator with DEP's South District Office, and Mr. Lynn.

The one-volume Transcript of this final hearing was filed with the Division on February 26, 2019. MarineMax, DEP and Mr. Lynn (jointly), timely filed proposed recommended orders that the ALJ considered in the preparation of his Recommended Order.

SUMMARY OF THE RECOMMENDED ORDER

Mr. Lynn has owned the real property located at 111 Placid Drive, Fort Myers, Florida, since 1994. Mr. Lynn's residential property is a corner lot with a house on it that fronts a canal on two of the four sides of his property. (RO ¶ 1).

MarineMax is a national boat dealer with approximately 65 locations throughout the United States and the British Virgin Islands. MarineMax has approximately 16 locations in Florida. MarineMax, through subsidiary companies, acquired the property at 14030 McGregor Boulevard, Fort Myers, Florida, in December 2014 (MarineMax Property). Prior to

MarineMax's acquisition, this property had been an active marina for more than 30 years. MarineMax continues to operate this property as a marina. (RO ¶¶ 2-3).

The MarineMax Property is a 26-acre contiguous parcel that runs north-south, surrounded by canals and a larger waterway that connects to the Gulf of Mexico. The "northern" parcel of the MarineMax Property is surrounded by two canals and the larger waterway that connects to the Gulf of Mexico. The "southern" parcel is a separate peninsula that, while contiguous to the northern parcel, is surrounded by a canal that it shares with the northern parcel, along with another canal that separates it from residential properties. (RO ¶ 4).

Mr. Lynn's property is located directly south of the northern parcel of the MarineMax Property, and the canal that runs east-west. As his property is a corner lot, it also fronts an eastern canal that is directly across from the southern parcel of the MarineMax Property. The eastern canal described above also serves as a border between MarineMax and a residential community that includes Mr. Lynn's residential property. (RO ¶¶ 5-6).

Mr. Lynn has moored a boat to an existing dock on the eastern canal described in paragraphs 5 and 6 for many years. (RO ¶ 7).

MarineMax holds ERPs for the business it conducts at its MarineMax Property, including the canal between the northern parcel of the MarineMax Property and Mr. Lynn's property. For example, these ERPs permit: (a) the docking of boats up to 85 feet in length with a 23-foot beam; (b) boat slips up to 70 feet in length; (c) up to 480 boats on the MarineMax Property; and (d) a boatlift and boat storage barn (located on the southern parcel). (RO ¶ 8).

The MarineMax Property also contains a fueling facility that is available for internal and public use, located on the northern parcel of the MarineMax Property, directly across the east-

west canal from Mr. Lynn's property. The prior owner of the marina constructed this fueling facility prior to 2003. (RO ¶ 9).

Request for Verification of Exemption from an ERP

Mr. Lynn testified that after MarineMax took over the property from the prior owner, he noticed larger boats moving through the canal that separates his property from the MarineMax Property. Concerned about the potential impact to his property, including his personal boat, Mr. Lynn contracted with Hickox Brothers Marine, Inc. (Hickox), to erect pilings off of his property in this canal. (RO ¶ 10).

On March 8, 2018, Hickox, on behalf of Mr. Lynn, submitted electronically a Request for Verification of Exemption from an Environmental Resource Permit to DEP. The "Project Description" stated, "INSTALL NINE 10 INCH DIAMETER PILINGS AS PER ATTACHED DRAWING FOR SAFETY OF HOMEOWNER'S BOAT." The attached drawing for this Project depicted the installation of these nine pilings 16 and 1/2 feet from Mr. Lynn's seawall, spaced 15 feet apart. (RO ¶ 11).

On March 23, 2018, DEP approved Mr. Lynn's Request for Verification of Exemption from an Environmental Resource Permit, stating that the activity, as proposed, was exempt under section 373.406(6), Florida Statutes, from the need to obtain a regulatory permit under part IV of chapter 373, Florida Statutes. The Request forVerification of Exemption from an Environmental Resource Permit stated:

> This determination is made because the activity, in consideration of its type, size, nature, location, use and operation, is expected to have only minimal or insignificant or cumulative adverse impacts on the water resources.

(RO ¶ 12).

The Verification of Exemption from an Environmental Resource Permit further stated that DEP did not require further authorization under chapter 253, Florida Statutes, to engage in proprietary review of the activity because it was not to take place on sovereign submerged lands. The Verification of Exemption from an Environmental Resource Permit also stated that DEP approved an authorization pursuant to the State Programmatic General Permit V, which precluded the need for Mr. Lynn to seek a separate permit from the U.S. Army Corps of Engineers. (RO ¶ 13).

Megan Mills, the environmental specialist and program administrator with DEP's South District Office, testified that DEP's granting of Mr. Lynn's Request for Verification of Exemption from an Environmental Resource Permit was routine, and that his Request for Verification of Exemption from an Environmental Resource Permit met the statutory criteria. (RO ¶ 14).

After DEP granted the Request for Verification of Exemption from an Environmental Resource Permit, Hickox, on behalf of Mr. Lynn, installed the nine pilings in the canal at various distances approximately 19 feet from Mr. Lynn's seawall and in the canal that divides Mr. Lynn's property from the MarineMax Property (and the fueling facility). (RO ¶ 15).

MarineMax timely challenged DEP's Verification of Exemption from an Environmental Resource Permit. (RO ¶ 16).

Impact on Water Resources

MarineMax presented the testimony of Sam Lowrey, its corporate vice president of real estate, who had detailed knowledge of the layout of the MarineMax Property. (RO ¶ 17).

Mr. Lowrey testified that the canal between the MarineMax Property and Mr. Lynn's residential property is active with boating activity, noting that MarineMax's ERP allows up to

480 vessels on-site. With the installation of the pilings, he testified that he was concerned that MarineMax customers "will be uncomfortable navigating their boats through this portion of the canal[,]" which would be detrimental to MarineMax's business. Mr. Lowery testified that he had no personal knowledge of whether MarineMax has lost any business since the installation of the pilings. (RO ¶¶ 18-19).

MarineMax also presented the testimony of Captain Ralph S. Robinson, III, who the ALJ accepted as an expert in marine navigation, without objection. Captain Robinson has been a boat captain, licensed by the U.S. Coast Guard, since 1991. He has extensive experience captaining a variety of vessels throughout the United States and the Bahamas. He is an independent contractor and works for MarineMax and other marine businesses. Captain Robinson is also a retired law enforcement officer. (RO ¶ 20).

Captain Robinson testified that he was familiar with the waterways surrounding the MarineMax Property, as he has captained boats in those waterways several times a month for the past 15 years. Captain Robinson testified that he has observed a number of boats with varying lengths and beams navigate these waterways, and particularly, the canal between the MarineMax Property and Mr. Lynn's property. Captain Robinson estimated that the beam of these boats range from eight to 22 feet. He also testified that the most common boats have a beam between eight and 10 feet. (RO ¶¶ 21-22).

Captain Robinson's first experience with the pilings in the canal occurred in April 2018, when he was captaining a 42-foot boat through the canal. He testified that an 85-foot boat was fueling on the fuel dock, and when he cleared the fueling boat and pilings, he had approximately one and a half feet on each side of his boat. He testified that "[i]t was very concerning." Captain Robinson testified that since this experience in April 2018, he calls ahead to MarineMax to

determine the number and size of boats in the portion of this canal that contains the pilings. (RO ¶¶ 23-24).

On behalf of MarineMax, in December 2018, Captain Robinson directed the recording of himself captaining a 59-foot Sea Ray boat with an approximately 15- to 16-foot beam through the canal separating the MarineMax Property and Mr. Lynn's residential property, with another boat of the same size parked at MarineMax's fueling dock. Captain Robinson testified that these two boats were typical of the boats that he would operate at the MarineMax Property and surrounding waterway. The video demonstration, and Captain Robinson's commentary, showed that when he passed through the canal between the fuel dock (with the boat docked) and Mr. Lynn's residential property (with the pilings), there was approximately four to five feet on either side of his boat. Captain Robinson stated:

> This is not an ideal situation for a boat operator. Yes, it can be done. Should it be done? Um, I wasn't happy or comfortable in this depiction.

(RO ¶¶ 25-26). Captain Robinson testified that his "personal comfort zone" of distance between a boat he captains and obstacles in the water is five or six feet. (RO ¶ 27).

Ultimately, Captain Robinson testified that he believed the pilings in the canal between the MarineMax Property and Mr. Lynn's property were a "navigational hazard." Specifically, Captain Robinson stated:

> Q: In your expert opinion, has Mr. Lynn's pilings had more than a minimal, or insignificant impact on navigation in the canal, in which they are placed?
>
> A: I believe they're a navigational hazard. The impact, to me personally, and I'm sure there's other yacht captains that move their boat through there, or a yacht owner, not a licensed captain, um, that has to take a different approach in their operation and diligence, um, taking due care that they can safely go through. It's been an impact.

> Q: Is a navigational hazard a higher standard for you as a boat captain, being more than minimal or insignificant?
>
> A: Yes. A navigational hazard is, in my opinion, something that its position could be a low bridge or something hanging off a bridge, a bridge being painted, it could be a marker, it could be a sandbar, anything that is going to cause harm to a boat by its position of normal operation that would cause injury to your boat, or harm an occupant or driver of that boat.

(RO ¶ 28).

Ms. Mills, the environmental specialist and program administrator with DEP's South District Office, testified that after MarineMax filed the instant Petition, she and another DEP employee visited Mr. Lynn's residential property. Although not qualified as an expert in marine navigation, Ms. Mills testified that, even after observing the placement of the pilings and the boating activity the day she visited, the pilings qualified for an exemption from an ERP. (RO ¶ 29).

STANDARDS OF REVIEW OF DOAH RECOMMENDED ORDERS

Section 120.57(1)(l), Florida Statutes, prescribes that an agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2018); *Charlotte County v. IMC Phosphates Co.*, 18 So. 3d 1079, 1082 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So. 2d 61, 62 (Fla. 1st DCA 2007). The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value or weight of the evidence. Rather, "competent substantial evidence" refers to the existence of some evidence as to each essential element and as to its admissibility under legal rules of evidence. *See e.g., Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm'n*, 671 So. 2d 287, 289 n.3 (Fla. 5th DCA 1996); *Nunez v. Nunez*, 29 So. 3d 1191, 1192 (Fla. 5th DCA 2010).

A reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See, e.g., Rogers v. Dep't of Health*, 920 So. 2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep't of Envtl. Prot.*, 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands County School Bd.*, 652 So. 2d 894, 896 (Fla. 2d DCA 1995). If there is competent substantial evidence to support an ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Constr. Co. v. Dyer*, 592 So. 2d 276, 280 (Fla. 1st DCA 1991); *Conshor, Inc. v. Roberts*, 498 So. 2d 622, 623 (Fla. 1st DCA 1986).

The ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. *See, e.g., Peace River/Manasota Reg'l Water Supply Authority v. IMC Phosphates Co.*, 18 So. 3d 1079, 1088 (Fla. 2d DCA 2009); *Collier Med. Ctr. v. State, Dep't of HRS*, 462 So. 2d 83, 85 (Fla. 1st DCA 1985); *Fla. Chapter of Sierra Club v. Orlando Utils. Comm'n*, 436 So. 2d 383, 389 (Fla. 5th DCA 1983). In addition, an agency has no authority to make independent or supplemental findings of fact. *See, e.g., North Port, Fla. v. Consol. Minerals*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994); *Fla. Power & Light Co. v. Fla. Siting Bd.*, 693 So. 2d 1025, 1026-1027 (Fla. 1st DCA 1997).

Section 120.57(1)(l), Florida Statutes, authorizes an agency to reject or modify an ALJ's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." *See Barfield v. Dep't of Health*, 805 So. 2d 1008, 1012 (Fla. 1st DCA 2001); *L.B. Bryan & Co. v. Sch. Bd. of Broward County*, 746 So. 2d 1194, 1197 (Fla. 1st DCA 1999); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140, 1141-42 (Fla. 2d DCA 2001). However,

the agency should not label what is essentially an ultimate factual determination as a "conclusion of law" to modify or overturn what it may view as an unfavorable finding of fact. *See, e.g., Stokes v. State, Bd. of Prof'l Eng'rs*, 952 So. 2d 1224, 1225 (Fla. 1st DCA 2007). Furthermore, agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be the only reasonable interpretations. It is enough if such agency interpretations are "permissible" ones. *See, e.g., Suddath Van Lines, Inc. v. Dep't of Envtl. Prot.*, 668 So. 2d 209, 212 (Fla. 1st DCA 1996).

Agencies do not have jurisdiction, however, to modify or reject rulings on the admissibility of evidence. Evidentiary rulings of the ALJ that deal with "factual issues susceptible to ordinary methods of proof that are not infused with [agency] policy considerations," are not matters over which the agency has "substantive jurisdiction." *See Martuccio v. Dep't of Prof'l Reg.*, 622 So. 2d 607, 609 (Fla. 1st DCA 1993); *Heifetz v. Dep't of Bus. Reg.*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). Evidentiary rulings are matters within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. *See Martuccio*, 622 So. 2d at 609.

RULINGS ON EXCEPTIONS

In reviewing a recommended order and any written exceptions, the agency's final order "shall include an explicit ruling on each exception." *See* 120.57(1)(k), Fla. Stat. (2018). However, the agency need not rule on an exception that "does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." *Id.*

A party that files no exceptions to certain findings of fact "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Envtl. Coal. of Fla., Inc. v. Broward County*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Med. Ctr., Inc. v. State of Fla., Agency for Health Care Admin.*, 847 So. 2d 540, 542 (Fla. 4th DCA 2003). However, an agency head reviewing a recommended order is free to modify or reject any erroneous conclusions of law over which the agency has substantive jurisdiction, even when exceptions are not filed. *See* § 120.57(1)(l), Fla. Stat. (2018); *Barfield,* 805 So. 2d at 1012; *Fla. Public Employee Council, v. Daniels,* 646 So. 2d 813, 816 (Fla. 1st DCA 1994).

RULINGS ON MARINEMAX'S EXCEPTIONS

MarineMax Exception No. 1 regarding Paragraph 19

MarineMax takes exception to the findings of fact in paragraph 19 of the RO, which reads, in totality, that "Mr. Lowery testified that he had no personal knowledge of whether MarineMax has lost any business since the installation of the pilings." RO ¶ 19. MarineMax objects that there is no competent substantial evidence in the record to support this finding, and it is irrelevant to the issue of navigation. Contrary to MarineMax's exception, the ALJ's findings of fact in paragraph 19 are supported by competent substantial evidence in the form of MarineMax employee Sam Lowery's testimony. (Lowery, T. Vol. I, pp. 100-101).

MarineMax disagrees with the ALJ's findings and seeks to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.,* 592 So. 2d at 280;

Conshor, Inc., 498 So. 2d at 623. For the abovementioned reasons, MarineMax's exception to paragraph 19 of the RO is rejected.

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

MarineMax Exception No. 2 regarding Footnote 6 to Paragraph 29

MarineMax takes exception to footnote [endnote] 6 to paragraph 29 of the RO, but specifies that it does not take exception to the findings of fact in paragraph 29 to which footnote [endnote] 6 is associated. MarineMax Exception No. 2, footnote 2.

Endnote 6 to paragraph 29 of the RO reads as follows:

> Ms. Mills also explained DEP's process in concluding that Mr. Lynn's pilings project qualified for federal authorization pursuant to the State Programmatic General Permit V (SPGP). Although the parties, in their Amended Joint Pre-hearing Stipulation, agreed that the pilings are not located in sovereign submerged lands, and MarineMax and DEP agreed that the 25-percent rule with regard to encroachment in a navigable waterway as set forth in Florida Administrative Code Chapter 18-21, did not apply to this case, the undersigned finds Ms. Mill's testimony concerning SPGP authorization, which included an analysis of the 25-percent rule, to be relevant to DEP's granting of the exemption.

RO ¶ 29, endnote 6, p. 23.

MarineMax contends that endnote 6 to paragraph 29 is in fact a conclusion of law within the substantive jurisdiction of the Department; and thus, may be rejected by the Department. MarineMax contends that the ALJ was in error, when he stated that Ms. Mill's testimony concerning the federal SPGP authorization, including the 25-percent rule, was relevant to DEP's granting of its state exemption.

The Department concludes that endnote 6 to paragraph 29 of the RO contains mixed findings of fact and conclusions of law. The Department concludes that the first sentence of endnote 6 is a finding of fact that is supported by competent substantial evidence; and thus, should not be rejected. The ALJ's first sentence in endnote 6 is supported by competent

substantial evidence in the form of Megan Mill's testimony. (Mills, T. Vol. I, pp. 62-64). Therefore, the Department denies MarineMax's exception to the first sentence of endnote 6 to paragraph 29 of the RO.

However, the Department concludes that the closing to the second sentence of endnote 6 to paragraph 29 of the RO is in fact a conclusion of law over which the Department has substantive jurisdiction. 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,* 805 So. 2d at 1012; *Fla. Public Employee Council, v. Daniels,* 646 So. 2d 813, 816 (Fla. 1st DCA 1994). The Department disagrees with the ALJ's conclusion that Ms. Mills' testimony concerning the criteria for the federal SPGP authorization is relevant to DEP's granting of the state exemption from an ERP permit under section 373.406(6), Florida Statutes. The Department concludes that the criteria for a federal authorization -- the SPGP authorization -- are not relevant to the criteria for a state authorized ERP exemption. Thus, MarineMax's exception to the second sentence of endnote 6 to paragraph 29 of the RO is granted. The Department concludes that its legal interpretation in this Final Order is more reasonable than the interpretation in the second sentence of endnote 6 to paragraph 29 of the RO. *See* § 120.57(1)(l), Fla. Stat. (2018). The ALJ's second sentence of endnote 6 to paragraph 29 of the RO is rejected and accordingly modified in this Final Order. For the abovementioned reasons, MarineMax's exception to footnote [endnote] 6 to paragraph 29 is accepted in part and rejected in part.

Based on the foregoing reasons, MarineMax's Exception No. 2 is accepted in part, and denied in part.

MarineMax Exception No. 3 regarding Paragraph 41

MarineMax takes exception to the conclusions of law in paragraph 41 of the RO, which quote the criteria for an applicant to qualify for an exemption under Section 403.813(1)(b),

Florida Statutes. The Applicant filed a request for verification that it qualifies for the "de minimus" exemption in section 373.406(6), Florida Statutes, from the need for an ERP. The Department issued a verification that the Applicant qualified for the "de minimus" exemption in section 373.406(6), Florida Statutes, from the need to obtain an ERP for his Project to install nine pilings off his residential property's seawall. The Department's agency verification did not mention chapter 403, Florida Statutes, let alone the ERP exemptions in section 403.813(1)(b), Florida Statutes. The Department agrees that section 403.813(1)(b), Florida Statutes, has no bearing on this hearing or exemptions issued pursuant to section 373.406(6), Florida Statutes. Section 403.813(1)(b), Florida Statutes, only mentions part IV of chapter 373, because section 403.813(1)(b), Florida Statutes, contains criteria for several exemptions from the need to obtain an ERP permit, which permits are issued under part IV of chapter 373, Florida Statutes. The criteria for an exemption from an ERP permit contained in Section 403.813(1)(b), Florida Statutes, are separate and distinct from the "de minimus" exemption identified in chapter 373, Florida Statutes. The Department concludes that its legal interpretation in this Final Order is more reasonable then the ALJ's interpretation in paragraph 41 of the RO. *See* § 120.57(1)(l), Fla. Stat. (2018). For the abovementioned reasons, MarineMax's exception to paragraph 41 is accepted.

Based on the foregoing reasons, MarineMax's Exception No. 3 is adopted, and paragraph 41 of the RO is stricken.

MarineMax Exception No. 4 regarding Paragraph 42

MarineMax takes exception to the conclusions of law in paragraph 42 of the RO, which states, in pertinent part, that "[a]ccording to MarineMax, DEP's previous interpretations of

equating 'minimal or insignificant individual or cumulative impacts on the water resources' with the 'navigational hazard' standard is not entitled to deference by the undersigned, see Art. V, § 21, Fla. Const., is inconsistent with Pirtle, and would constitute an unadopted rule." RO ¶ 42. MarineMax contends that it is not, and never has been, MarineMax's position that DEP has previously equated these two standards. MarineMax contends that "[i]n fact, it is MarineMax's position that the DEP in the past has, correctly, applied these as separate standards." MarineMax Exception No. 4, pp. 8-9.

The Department concludes that paragraph 42 of the RO does not contain conclusions of law, but instead factual *statements* by the ALJ identifying MarineMax's position in this proceeding. An agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2018); *Charlotte County*, 18 So. 3d at 1082; *Wills,* 955 So. 2d at 62. The Department finds that the first sentence of paragraph 42 of the RO is supported by competent substantial evidence; and, thus must be accepted. (Joint Prehearing Stipulation pp. 1-2; MarineMax Proposed Recommended Order, pp. 16-18). *See Gibby Family Trust v. Blueprint 2000 and Dep't of Envtl. Prot.*, DOAH Case No. 10-9292, p. 10 (Fla. DOAH March 28, 2011; DEP Dec. 26, 2011)(Joint Pre-Hearing Stipulation provided competent substantial evidence to support findings made in DOAH RO); *Hasselback v. Wentz and Dep't of Envtl. Prot.*, DOAH Case No. 07-5216)(Fla. DOAH January 28, 2010; DEP March 15, 2010).

Florida case law holds that a pretrial stipulation prescribing issues on which a case is to be tried is binding upon the parties and the court and should be strictly enforced. *See, e.g., Broche v. Cohn*, 987 So. 2d 124, 127 (Fla. 4th DCA 2008), *citing Gunn Plumbing, Inc., v. Dania*

Bank, 252 So. 2d 1, 4 (Fla. 1971), and *Lotspeich Co. v. Neogard Corp.*, 416 So. 2d 1163, 1165 (Fla. 3d DCA 1982); *cf. State Farm Fire & Cas. Co. v. Higgins*, 788 So. 2d 992, 1007 (Fla. 4th DCA 2001), *approved,* 894 So. 2d 5 (Fla. 2004)("We agree with the trial court that the original complaint filed in the negligence action was admissible against Ingalls under section 90.803(18)(b), Florida Statutes (2000), as a statement offered against a party 'of which the party has manifested an adoption or belief in its truth.'" Thus, the matters set forth in the Joint Prehearing Stipulation, entered into by the parties in this administrative proceeding, are binding upon the parties, the ALJ and the agency head. *Id.*

However, the Department finds that the second sentence of paragraph 42 of the RO is not supported by competent substantial evidence. MarineMax contends that it never stated that DEP previously equated the "minimal or insignificant individual or cumulative impacts" standard with the "navigational hazard" standard, as stated by the ALJ in Exception No. 4 of the RO. DEP agrees with MarineMax's position and found no competent substantial evidence to support the second sentence of paragraph 42. (Transcript, Joint Prehearing Stipulation pp. 1 and 10; MarineMax Proposed Recommended Order, pp. 16-17). For the abovementioned reasons, MarineMax's exception to paragraph 42 of the RO is accepted in part and rejected in part.

Based on the foregoing reasons, MarineMax's Exception No. 4 is accepted in part, and denied in part; and the second sentence of paragraph 42 of the RO is rejected in this Final Order.

MarineMax Exception No. 5 regarding Paragraph 43

MarineMax takes exception to the conclusion of law in paragraph 43 of the RO, which states that "[t]he undersigned notes that MarineMax's expert, Captain Robinson, when asked whether the pilings at issue have 'minimal or insignificant individual or cumulative impact on the water resources,' instead opined that they constitute a 'navigational hazard.'" RO ¶ 43.

MarineMax alleges that this statement was taken out of context and "leaves the RO vulnerable to the interpretation that the expert witness felt the pilings were a 'navigational hazard' but did not have 'more than a minimal or insignificant' effect on navigation." MarineMax Exception No. 43.

The Department concludes that paragraph 43 of the RO is actually a finding of fact. An agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2018); *Charlotte County*, 18 So. 3d at 1082; *Wills,* 955 So. 2d at 62. Contrary to MarineMax's exception, the ALJ's finding in paragraph 43 of the RO is supported by competent substantial evidence in the form of expert testimony from MarineMax's expert Captain Robinson. (Robinson, T. Vol. I, p. 151).

The Department is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. Since there is competent substantial evidence to support the ALJ's findings, MarineMax's exception to paragraphs 43 of the RO is rejected.

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

MarineMax Exception No. 6 regarding Paragraph 44

MarineMax takes exception to the conclusion of law in paragraph 44 of the RO, which states that "[t]he undersigned further notes that section 403.813(1)(b)3. specifically incorporates the 'navigational hazard' prohibition as a criteri[on] for DEP to consider in determining whether an activity, such as the installation of mooring pilings, is exempt from an ERP." MarineMax contends that section 403.813(1)(b), Florida Statutes, has no applicability to this case, and should be stricken in its entirety.

As explained above in ruling on MarineMax's Exception No. 3, the Applicant filed a request that it qualify for the "de minimus" exemption in section 373.406(6), Florida Statutes, from the need for an ERP; and the Department issued a verification that the Applicant qualified for the "de minimus" exemption in section 373.406(6), Florida Statutes, from the need to obtain an ERP for his Project. The Department's agency verification did not mention chapter 403, Florida Statutes, let alone the ERP exemptions in section 403.813(1)(b), Florida Statutes. The Department agrees that section 403.813(1)(b), Florida Statutes, has no bearing on this hearing or exemptions issued pursuant to section 373.406(6), Florida Statutes. Section 403.813(1)(b), Florida Statutes, only mentions part IV of chapter 373, because section 403.813(1)(b), Florida Statutes, contains criteria for several exemptions from the need to obtain an ERP permit, which permits are issued under part IV of chapter 373, Florida Statutes.

The criteria for an exemption from an ERP permit contained in Section 403.813(1)(b), Florida Statutes, are separate and distinct from the criteria for a "de minimus" exemption identified in chapter 373, Florida Statutes. The Department concludes that its legal interpretation in this Final Order is more reasonable then the ALJ's interpretation in paragraph 44 of the RO. *See* § 120.57(1)(l), Fla. Stat. (2018). For the abovementioned reasons, MarineMax's exception to paragraph 44 of the RO is accepted.

Based on the foregoing reasons, MarineMax's Exception No. 6 is adopted, and paragraph 44 of the RO is stricken.

MarineMax Exception No. 7 regarding Paragraphs 47 and 48

MarineMax takes exception to the conclusions of law in paragraphs 47 and 48 of the RO, which distinguish the facts in the current authorization for an ERP exemption under section 373.406(6), Florida Statutes, from the facts in the case of *Pirtle v. Voss*, DOAH Case No.

13-0515 (Fla. DOAH Sept. 27, 2013; DEP Dec. 26, 2013), in which DEP denied an ERP exemption under section 373.403(6), Florida Statutes, and consent by rule to use sovereign submerged lands.

In the final sentence of paragraph 47 of the RO, describing the facts in *Pirtle v. Voss,* the ALJ stated that "[a]dditionally, the ALJ [in Pirtle] found that [the] marina owner's ability to operate his marine was substantially impaired by the pilings." RO ¶ 47. Similarly, in the final sentence of paragraph 48 of the RO, describing the facts in the current proceeding, the ALJ found "[a]dditionally, MarineMax presented no direct evidence of substantial impairment of its ability to operate its marina as a result of Mr. Lynn's pilings." RO ¶ 48. MarineMax contends that these findings in paragraphs 47 and 48 "present a legal conclusion that business or economic interests should play a role in determining whether this permit exemption was properly granted." MarineMax Exception No. 7. MarineMax contends that any conclusion that business and economic interests are protected under Part IV of Chapter 373, Florida Statutes, is erroneous.

The Department agrees that consideration of business or economic interests are not a factor in determining whether a proposed project qualifies for an ERP permit exemption. *See Vill. Of Key Biscayne v. Dep't of Envtl. Prot.*, 206 So. 3d 788, 791 (Fla. 3d DCA 2016); *Mid-Chattahoochee River Users v. Fla. Dep't of Envtl. Prot.*, 948 So. 2d 794, 797 (Fla. 1st DCA 2006). However, the Department concludes that in both *Pirtle v. Voss* and the current proceeding, the ALJs statements quoted above in paragraphs 47 and 48 of the RO were intended to identify whether the proposed pilings would impair navigability in the water body so as to impair the petitioner's ability to operate its marina. The Department concludes that paragraphs 447 and 48 contain mixed findings of fact and conclusions of law.

MarineMax concludes its exception by citing to testimony and exhibits presented at the hearing, which it claims identify "the significant deleterious effect of the pilings on navigation" in this proceeding. RO ¶ 48. MarineMax disagrees with the ALJ's findings and seeks to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307. For the abovementioned reasons, MarineMax's exception to paragraphs 47 and 48 of the RO is rejected.

Based on the foregoing reasons, MarineMax's Exception No. 7 is denied.

MarineMax Exception No. 8 regarding Paragraphs 48 and 49

MarineMax takes exception to the conclusions in paragraphs 48 and 49 of the RO, which conclude that the Applicant's pilings do not constitute a navigational hazard, but "at most, an inconvenience to operators of larger boats, causing MarineMax customers to exercise caution during ingress and egress through the canal separating the MarineMax Property and Mr. Lynn's property . . . ." (RO ¶ 48). MarineMax cites to the exemption at section 373.406(6), Florida Statutes, which states that to qualify for the exemption, projects must have "minimal or insignificant individual or cumulative adverse impacts on the water resources of the district." § 373.406(6), Fla. Stat. (2018). MarineMax then concludes that when the cumulative impacts of the pilings are assessed in light of previously authorized activities, the pilings lead to more than a minimal or insignificant impact.

MarineMax disagrees with the ALJ's findings earlier in the RO, which lead to the ALJ's conclusions of law in paragraphs 48 and 49 of the RO. Consequently, MarineMax seeks to have DEP reweigh the evidence to reach a different conclusion of law. However, DEP is not authorized to reweigh evidence presented at a DOAH final hearing, attempt to resolve conflicts

therein, or judge the credibility of a witness. *See, e.g., Rogers,* 920 So. 2d at 30; *Belleau,* 695 So. 2d at 1307.

In addition, MarineMax requests that the Department consider additional findings of fact to the ones contained in the RO. For example, MarineMax finds that "[f]or a boat which is authorized to dock east of Lynn's pilings, or which needs to traverse the canal to get to a dry dock – to be completely prohibited from all navigation past Lynn's pilings for the length of time it takes for a large boat to refuel at MarineMax's fuel dock is certainly more than a minimal or insignificant effect on navigation." However, an agency has no authority to make independent or supplemental findings of fact. *See, e.g., North Port, Fla. v. Consol. Minerals*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994*); Fla. Power & Light Co. v. Fla. Siting Bd.*, 693 So. 2d 1025, 1026-1027 (Fla. 1st DCA 1997).

The Department agrees with the ALJ's conclusion that the effect of the various impacts create merely an inconvenience to MarineMax and its customers. For the abovementioned reasons, MarineMax's exception to paragraphs 48 and 49 of the RO is rejected.

Based on the foregoing reasons, MarineMax's Exception No. 8 is denied.

MarineMax Exception No. 9 regarding Paragraph 49

MarineMax takes exception to the conclusion of law in paragraph 49 of the RO, in which the ALJ "concludes that Mr. Lynn's pilings do not constitute a navigational hazard, as an inconvenience does not constitute a navigational hazard." MarineMax contends that the consideration of whether a project constitutes a navigational hazard is the standard for exemptions under section 403.813(1)(b), Florida Statutes, and not the standard for the exemption under section 373.406(6), Florida Statutes.

No where in paragraph 49 of the RO, does the ALJ reference section 403.813(1)(b), Florida Statutes, as the exemption under consideration. When read in its entirety, the RO is unambiguous that the ALJ applied the exemption and criteria pursuant to section 373.406(6), Florida Statutes, and not any of the exemptions in section 403.813(1)(b), Florida Statutes. For example, paragraph 40 of the RO identifies that DEP issued the verification of qualification for an exemption from an ERP "pursuant to section 373.406(6), also known as the "de minimus" exemption." (RO ¶ 40). The ALJ then quotes the text of the de minimus exemption contained in section 373.406(6), Florida Statutes, which states in pertinent part, that "[a]ny district or the department may exempt from regulation under this part those activities that the district or department determines will have only *minimal or insignificant* individual or [cumulative] adverse impacts on the water resources of the district." (RO ¶ 40); § 373.406(6), Fla. Stat. (2018)(emphasis added). The ALJ moreover concluded in paragraph 39 of the RO that MarineMax must "prove that the pilings in question are more than a minimal impact on navigation." (RO ¶ 39). In addition, the ALJ concluded in paragraph 46 of the RO that "MarineMax did not establish, by a preponderance of the evidence, that the pilings at issue have a significant impact on navigation." (RO ¶ 46).

In conclusion, the ALJ states in paragraph 50 of the RO -- the final paragraph before the Recommendations Section -- that the Applicant "met his burden and showed, by a preponderance of the evidence, that the pilings met the criteria set forth in section 373.406(6)[, Florida Statutes]. (RO ¶ 50). The Department concludes that the ALJ was applying the minimal or insignificant standard for this exemption to the addition of pilings to a water body, concluding that the pilings constitute an inconvenience and not a navigational hazard. The ALJ was merely concluding that if the pilings constituted a navigational hazard, then the effect of the pilings would be more than

a "minimal or insignificant" impact. For the abovementioned reasons, MarineMax's exception to paragraph 49 of the RO is rejected.

Based on the foregoing reasons, MarineMax's Exception No. 9 is denied.

CONCLUSION

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

ORDERED that:

A. The Recommended Order (Exhibit A) is adopted, except as modified by the above rulings on Exceptions, and is incorporated by reference herein;

B. Larry Lynn's qualification for an exemption under section 373.406(6), Florida Statutes, from an environmental resource permit is approved, and MarineMax, Inc.'s challenge to the Department's verification is dismissed.

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 21st day of May, 2019, 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.

Deputy Clerk Cindi Kinsey CLERK

5/21/19 DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order has been sent by electronic mail to:

Richard S. Brightman, Esq. Amelia Savage, Esq. Felecia L. Kitzmiller, Esq. Hopping Green & Sams, P.A. Post Office Box 6526 Tallahassee, FL 32314 RichardB@hgslaw.com AmeliaS@hgslaw.com FeliciaK@hgslaw.com	Larry Lynn 111 Placid Drive Fort Myers, FL 33919 rockeyandpr@aol.com
Lorraine Novak, Esq. Department of Environmental Protection 3900 Commonwealth Blvd., MS 35 Tallahassee, FL 32399 Lorraine.M.Novak@FloridaDEP.gov	

this 21st day of May, 2019.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

Stacey D. Cowley

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARINEMAX, INC.,

Petitioner,

vs. Case No. 18-2664

LARRY LYNN AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.
_____/

RECOMMENDED ORDER

On January 10, 2019, Administrative Law Judge Robert J. Telfer III, of the Florida Division of Administrative Hearings (Division), conducted a duly-noticed hearing in Tallahassee and Fort Myers, Florida, by video teleconference, pursuant to sections 120.569 and 120.57(1), Florida Statutes (2018).

APPEARANCES

For Petitioner MarineMax, Inc.:

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Felicia L. Kitzmiller, Esquire
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For Respondent Larry Lynn:

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For Respondent Department of Environmental Protection:

Lorraine M. Novak, Esquire
Department of Environmental Protection
Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

The issue to determine in this matter is whether Respondent Department of Environmental Protection (DEP) properly issued its proposed verification of an Environmental Resource Permit (ERP) exemption, dated March 23, 2018, for the installation of nine pilings off of Respondent Larry Lynn's residential property, in the direction of Petitioner MarineMax, Inc.'s commercial property (MarineMax), pursuant to section 373.406(6), Florida Statutes, commonly known as the "de minimus" exemption.

PRELIMINARY STATEMENT

On March 8, 2018, Mr. Lynn applied for, and on March 23, 2018, DEP issued, a verification of exemption from obtaining an ERP for the installation of nine pilings off his residential property's seawall. On April 13, 2018, MarineMax timely filed a Petition for Formal Administrative Hearing with DEP, challenging the issuance of verification of exemption. MarineMax, thereafter, filed a Motion to Amend Petition for Administrative Hearing, dated June 14, 2018, and the previous Administrative Law Judge (ALJ) assigned to this matter thereafter entered an Order Granting Petitioner's Motion to Amend Petition for Formal

Administrative Hearing on June 15, 2018, accepting the Amended Petition for Formal Administrative Hearing as establishing the issues to be tried in the instant proceeding.

On June 18, 2018, MarineMax filed an Unopposed Motion to Continue Final Hearing. On July 3, 2018, the undersigned granted the Unopposed Motion to Continue Final Hearing and scheduled the final hearing for October 10 and 11, 2018. The parties filed a Joint Pre-hearing Stipulation on October 3, 2018. However, because of Hurricane Michael, the undersigned and parties rescheduled the final hearing for January 10, 2019. The parties submitted an Amended Joint Pre-hearing Stipulation on January 3, 2019.

Pursuant to a Second Notice of Hearing by Video Teleconference, the undersigned conducted a final hearing on January 10, 2019, by video teleconference with locations in Tallahassee and Fort Myers, Florida. The parties offered the following exhibits into evidence, which the undersigned admitted: Joint Exhibits 1 through 7; MarineMax Exhibits P1 through P10; and DEP Exhibits DEP1 and DEP2.[1/]

MarineMax presented the testimony of Sam Lowrey, its corporate vice president of real estate; and Captain Ralph S. Robinson III, a U.S. Coast Guard-licensed boat captain, who the undersigned accepted as an expert in marine navigation.

Respondents DEP and Mr. Lynn presented the testimony of Megan Mills, the environmental specialist and program administrator with DEP's South District Office, and Mr. Lynn.

The one-volume Transcript of this final hearing was filed with the Division on February 26, 2019. MarineMax, and DEP and Mr. Lynn (jointly), timely filed proposed recommended orders that the undersigned considered in the preparation of this Recommended Order.

All statutory references are to the 2018 codification of the Florida Statutes unless otherwise indicated.

FINDINGS OF FACT

1. Mr. Lynn has owned the real property located at 111 Placid Drive, Fort Myers, Florida, since 1994. Mr. Lynn's residential property is a corner lot that fronts a canal on two of the four sides of his property, and also contains his home.

2. MarineMax is a national boat dealer with approximately 65 locations throughout the United States and the British Virgin Islands. MarineMax has approximately 16 locations in Florida.

3. MarineMax, through subsidiary companies, acquired the property at 14030 McGregor Boulevard, Fort Myers, Florida, in December 2014 (MarineMax Property). Prior to MarineMax's acquisition, this property had been an active marina for more than 30 years. MarineMax continues to operate this property as a marina.

4. The MarineMax Property is a 26-acre contiguous parcel that runs north-south and that is surrounded by canals and a larger waterway that connects to the Gulf of Mexico. The "northern" parcel of the MarineMax Property is surrounded by two canals and the larger waterway that connects to the Gulf of Mexico. The "southern" parcel is a separate peninsula that, while contiguous to the northern parcel, is surrounded by a canal that it shares with the northern parcel, along with another canal that separates it from residential properties.

5. Mr. Lynn's property is located directly south of the northern parcel of the MarineMax Property, and the canal that runs east-west. As his property is a corner lot, it also fronts an eastern canal that is directly across from the southern parcel of the MarineMax Property.

6. The eastern canal described above also serves as a border between MarineMax and a residential community that includes Mr. Lynn's residential property.

7. Mr. Lynn has moored a boat to an existing dock on the eastern canal described in paragraphs 5 and 6 for many years.

8. MarineMax holds ERPs for the business it conducts at its MarineMax Property, including the canal between the northern parcel of the MarineMax Property and Mr. Lynn's property. For example, these ERPs permit: (a) the docking of boats up to 85

feet in length with a 23-foot beam; (b) boat slips up to 70 feet in length; (c) up to 480 boats on the MarineMax Property; and (d) a boatlift and boat storage barn (located on the southern parcel).

9. The MarineMax Property also contains a fueling facility that is available for internal and public use. It is located on the northern parcel of the MarineMax Property, directly across the east-west canal from Mr. Lynn's property. The prior owner of the marina constructed this fueling facility prior to 2003.

Request for Verification of Exemption from an ERP

10. Mr. Lynn testified that after MarineMax took over the property from the prior owner, he noticed larger boats moving through the canal that separates his property from the MarineMax Property. Concerned about the potential impact to his property, including his personal boat, Mr. Lynn contracted with Hickox Brothers Marine, Inc. (Hickox), to erect pilings off of his property in this canal.[2/]

11. On March 8, 2018, Hickox, on behalf of Mr. Lynn, submitted electronically a Request for Verification of Exemption from an Environmental Resource Permit to DEP. The "Project Description" stated, "INSTALL NINE 10 INCH DIAMETER PILINGS AS PER ATTACHED DRAWING FOR SAFETY OF HOMEOWNER'S BOAT." The attached drawing for this project depicted the installation of

these nine pilings 16 and 1/2 feet from Mr. Lynn's seawall, spaced 15 feet apart.

12. On March 23, 2018, DEP approved Mr. Lynn's Request for Verification of Exemption from an Environmental Resource Permit, stating that the activity, as proposed, was exempt under section 373.406(6) from the need to obtain a regulatory permit under part IV of chapter 373. The Request for Verification of Exemption from an Environmental Resource Permit further stated:

> This determination is made because the activity, in consideration of its type, size, nature, location, use and operation, is expected to have only minimal or insignificant or cumulative adverse impacts on the water resources.

13. The Request for Verification of Exemption from an Environmental Resource Permit further stated that DEP did not require further authorization under chapter 253, Florida Statutes, to engage in proprietary review of the activity because it was not to take place on sovereign submerged lands. The Request for Verification of Exemption from an Environmental Resource Permit also stated that DEP approved an authorization pursuant to the State Programmatic General Permit V, which precluded the need for Mr. Lynn to seek a separate permit from the U.S. Army Corps of Engineers.

14. Megan Mills, the environmental specialist and program administrator with DEP's South District Office, testified that

DEP's granting of Mr. Lynn's Request for Verification of Exemption from an Environmental Resource Permit was routine, and that his Request for Verification of Exemption from an Environmental Resource Permit met the statutory criteria.

15. After DEP granted the Request for Verification of Exemption from an Environmental Resource Permit, Hickox, on behalf of Mr. Lynn, installed the nine pilings in the canal at various distances approximately 19 feet from Mr. Lynn's seawall and in the canal that divides Mr. Lynn's property from the MarineMax Property (and the fueling facility).[3/]

16. MarineMax timely challenged DEP's Request for Verification of Exemption from an Environmental Resource Permit.

Impact on Water Resources

17. MarineMax presented the testimony of Sam Lowrey, its corporate vice president of real estate, who had detailed knowledge of the layout of the MarineMax Property.

18. Mr. Lowrey testified that the canal between the MarineMax Property and Mr. Lynn's residential property is active with boating activity, noting that MarineMax's ERP allows up to 480 vessels on-site. With the installation of the pilings, he testified that he was concerned that MarineMax customers "will be uncomfortable navigating their boats through this portion of the canal[,]" which would be detrimental to MarineMax's business.

19. Mr. Lowery testified that he had no personal knowledge of whether MarineMax has lost any business since the installation of the pilings.

20. MarineMax also presented the testimony of Captain Ralph S. Robinson III, who the undersigned accepted as an expert in marine navigation, without objection.[4/] Captain Robinson has been a boat captain, licensed by the U.S. Coast Guard, since 1991. He has extensive experience captaining a variety of vessels throughout the United States and the Bahamas. He is an independent contractor and works for MarineMax and other marine businesses. Captain Robinson is also a retired law enforcement officer.

21. Captain Robinson testified that he was familiar with the waterways surrounding the MarineMax Property, as he has captained boats in those waterways several times a month for the past 15 years.

22. Captain Robinson testified that he has observed a number of boats with varying lengths and beams navigate these waterways, and particularly, the canal between the MarineMax Property and Mr. Lynn's property. Captain Robinson estimated that the beam of these boats range from eight to 22 feet. He also testified that the most common boats have a beam between eight and 10 feet.

23. Captain Robinson's first experience with the pilings in the canal occurred in April 2018, when he was captaining a 42-foot boat through the canal. He testified that an 85-foot boat was fueling on the fuel dock, and when he cleared the fueling boat and pilings, he had approximately one and a half feet on each side of his boat. He testified that "[i]t was very concerning."

24. Captain Robinson testified that since this experience in April 2018, he calls ahead to MarineMax to determine the number and size of boats in the portion of this canal that contains the pilings.

25. On behalf of MarineMax, in December 2018, Captain Robinson directed the recording of himself captaining a 59-foot Sea Ray boat with an approximately 15- to 16-foot beam through the canal separating the MarineMax Property and Mr. Lynn's residential property, with another boat of the same size parked at MarineMax's fueling dock.[5/] Captain Robinson testified that these two boats were typical of the boats that he would operate at the MarineMax Property and surrounding waterway.

26. The video demonstration, and Captain Robinson's commentary, showed that when he passed through the canal between the fuel dock (with the boat docked) and Mr. Lynn's residential property (with the pilings), there was approximately four to five feet on either side of his boat. Captain Robinson stated:

> This is not an ideal situation for a boat operator. Yes, it can be done. Should it be done? Um, I wasn't happy or comfortable in this depiction.

27. Captain Robinson testified that his "personal comfort zone" of distance between a boat he captains and obstacles in the water is five or six feet.

28. Ultimately, Captain Robinson testified that he believed the pilings in the canal between the MarineMax Property and Mr. Lynn's property were a "navigational hazard." Specifically, Captain Robinson stated:

> Q: In your expert opinion, has Mr. Lynn's pilings had more than a minimal, or insignificant impact on navigation in the canal, in which they are placed?
>
> A: I believe they're a navigational hazard. The impact, to me personally, and I'm sure there's other yacht captains that move their boat through there, or a yacht owner, not a licensed captain, um, that has to take a different approach in their operation and diligence, um, taking due care that they can safely go through. It's been an impact.
>
> Q: Is a navigational hazard a higher standard for you as a boat captain, being more than minimal or insignificant?
>
> A: Yes. A navigational hazard is, in my opinion, something that its position could be a low bridge or something hanging off a bridge, a bridge being painted, it could be a marker, it could be a sandbar, anything that is going to cause harm to a boat by its position of normal operation that would cause injury to your boat, or harm an occupant or driver of that boat.

29. Ms. Mills, the environmental specialist and program administrator with DEP's South District Office, testified that after MarineMax filed the instant Petition, she and another DEP employee visited Mr. Lynn's residential property. Although not qualified as an expert in marine navigation, Ms. Mills testified that, even after observing the placement of the pilings and the boating activity the day she visited, the pilings qualified for an exemption from the ERP.[6/]

CONCLUSIONS OF LAW

Jurisdiction

30. The Division has jurisdiction over the subject matter and the parties to this proceeding in accordance with sections 120.569 and 120.57(1), Florida Statutes.

Standing

31. Section 120.52(13) defines a "party," in pertinent part, as a person "whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party." Section 120.569(1) further provides, in pertinent part, that "[t]he provisions of this section apply in all proceedings in which the substantial interests of a party are determined by an agency."

32. In Agrico Chemical Corporation v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981), the court held:

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

33. Although DEP and Mr. Lynn disputed whether MarineMax has standing to bring the instant administrative law challenge in the Amended Joint Pre-hearing Statement, neither presented further argument at the final hearing, or in their Joint Proposed Recommended Order, concerning MarineMax's standing.

34. The undersigned concludes that MarineMax has standing to bring this administrative challenge. MarineMax has a substantial interest in the safe operation of boats into and out of the MarineMax Property. It has sufficiently alleged that the pilings in the canal between the MarineMax Property and Mr. Lynn's property could potentially result in a navigational hazard.

Nature of the Proceeding

35. This is a de novo proceeding, intended to formulate final agency action, and not to review action taken earlier and preliminarily. See Young v. Dep't of Cmty. Aff., 625 So. 2d 831, 833 (Fla. 1993); Hamilton Cnty. Bd. of Cnty. Comm'rs v. Dep't of Envtl. Reg., 587 So. 2d 1378, 1387 (Fla. 1st DCA 1991); and

McDonald v. Dep't of Banking & Fin., 587 So. 2d 569, 584 (Fla. 1st DCA 1977).

36. DEP approved Mr. Lynn's Request for Verification of Exemption from an Environmental Resource Permit pursuant to chapter 373, Florida Statutes. Pursuant to section 120.569(2)(p), the burden of proof is as follows:

> 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 permit, license, 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.

37. In Pirtle v. Voss, Case No. 13-0515 (Fla. DOAH Sept. 27, 2013; Fla. DEP Dec. 26, 2013), the ALJ applied section 120.569(2)(p)'s burden-shifting requirements to an application for an exemption from an ERP to install mooring

pilings, concluding that the DEP's written determination is a licensure under chapter 373. The undersigned agrees that section 120.569(2)(p) applies to this proceeding, and conducted the final hearing in accordance with this statutory requirement.

Analysis

38. Mr. Lynn satisfied his prima facie case of entitlement to the Verification of Exemption from an Environmental Resource Permit by entering into evidence the complete electronic submission Request for Verification of Exemption from an Environmental Resource Permit, dated March 8, 2018, and DEP's written approval of his Request for Verification of Exemption from an Environmental Resource Permit, dated March 23, 2018. Additionally, Mr. Lynn and DEP presented the testimony of Mr. Lynn and Ms. Mills.

39. With Mr. Lynn having made his prima facie case, the burden of ultimate persuasion falls to MarineMax to prove its case in opposition to the approval of the Request for Verification of Exemption from an ERP by a preponderance of the competent and substantial evidence, and thereby prove that the pilings in question are more than a minimal impact on navigation.

40. DEP issued the approval of Mr. Lynn's Request for Verification of Exemption from an ERP pursuant to section 373.406(6), also known as the "de minimus" exemption, which provides:

> Any district of the department may exempt from regulation under this part those activities that the district or department determines will have only minimal or insignificant individual or adverse impacts on the water resources of the district. The district and the department are authorized to determine, on a case-by-case basis, whether a specific activity comes within this exemption. Requests to qualify for this exemption shall be submitted in writing to the district or department, and such activities shall not be commenced without a written determination from the district or department confirming that the activity qualifies for the exemption.

41. Section 403.813(1)(b), Florida Statutes, explains the criteria for an activity that is exempt from the need to obtain an ERP under part IV of chapter 373. Section 403.813(1)(b) states:

> (1) A permit is not required under this chapter, chapter 373, chapter 61-691, Laws of Florida, or chapter 25214 or chapter 25270, 1949, Laws of Florida, for activities associated with the following types of projects; however, except as otherwise provided in this subsection, this subsection does not relieve an applicant from any requirement to obtain permission to use or occupy lands owned by the Board of Trustees of the Internal Improvement Trust Fund or a water management district in its governmental or proprietary capacity or from complying with applicable local pollution control programs authorized under this chapter or

other requirements of county and municipal governments:

* * *

(b) The installation and repair of mooring pilings and dolphins associated with private docking facilities or piers and the installation of private docks, piers and recreational docking facilities, or piers and recreational docking facilities of local governmental entities when the local governmental entity's activities will not take place in any manatee habitat, any of which docks:

1. Has 500 square feet or less of over-water surface area for a dock which is located in an area designated as Outstanding Florida Waters or 1,000 square feet or less of over-water surface area for a dock which is located in an area which is not designated as Outstanding Florida Waters;

2. Is constructed on or held in place by pilings or is a floating dock which is constructed so as not to involve filling or dredging other than that necessary to install the pilings;

3. Shall not substantially impede the flow of water or create a navigational hazard;

4. Is used for recreational, noncommercial activities associated with the mooring or storage of boats and boat paraphernalia; and

5. Is the sole dock constructed pursuant to this exemption as measured along the shoreline for a distance of 65 feet, unless the parcel of land or individual lot as platted is less than 65 feet in length along the shoreline, in which case there may be one exempt dock allowed per parcel or lot.

Nothing in this paragraph shall prohibit the department from taking appropriate

> enforcement action pursuant to this chapter to abate or prohibit any activity otherwise exempt from permitting pursuant to this paragraph if the department can demonstrate that the exempted activity has caused water pollution in violation of this chapter.

42. MarineMax contends in its Proposed Recommended Order that "navigational hazard" is not the applicable standard for its challenge, and that instead, the undersigned should apply the "minimal or insignificant individual or cumulative adverse impacts on the water resources" standard enunciated in section 373.406(6). According to MarineMax, DEP's previous interpretations of equating "minimal or insignificant individual or cumulative impacts on the water resources" with the "navigational hazard" standard is not entitled to deference by the undersigned, see Art. V, § 21, Fla. Const., is inconsistent with Pirtle, and would constitute an unadopted rule.

43. The undersigned notes that MarineMax's expert, Captain Robinson, when asked whether the pilings at issue have "minimal or insignificant individual or cumulative impacts on the water resources," instead opined that they constitute a "navigational hazard."

44. The undersigned further notes that section 403.813(1)(b)3. specifically incorporates the "navigational hazard" prohibition as a criteria for DEP to

consider in determining whether an activity, such as the installation of mooring pilings, is exempt from an ERP.

45. However, the undersigned also notes that DEP's written approval of Mr. Lynn's Request for Verification of Exemption from an Environmental Resource Permit specifically states that DEP's determination is pursuant to section 373.406(6) and "is made because the activity, in consideration of its type, size, nature, location, use and operation, is expected to have only minimal or insignificant individual or cumulative adverse impacts on the water resources."

46. The undersigned concludes that MarineMax did not establish, by a preponderance of the evidence, that the pilings at issue have a significant impact on navigation. The gravamen of Captain Robinson's testimony was that the location of the pilings were not ideal, not within his "personal comfort zone," that he was not "happy or comfortable" with the pilings, and would require him, or other boat operators, to take a "different approach in their operation and diligence." Captain Robinson also opined that, when he captained the 59-foot Sea Ray boat with a 15- to 16-foot beam through the canal, with another boat of the same size parked at MarineMax's fueling dock, there was approximately four to five feet on either side of the boat, but that he would prefer five or six feet on either side.

47. Pirtle is distinguishable and does not provide support for MarineMax's position. In Pirtle, the closest distance between the T-shaped end of a dock (which operated as a marina) and the nearest mooring piling (that was the subject of an exemption from an ERP) was about eight and a half feet, meaning that only boats with a beam less than eight and a half feet could pass this point. Further, after DEP issued the authorization for exemption, it conducted a site inspection. During this site inspection, DEP employees had difficulty piloting their boat into and out of the slips on the T-shaped end of the dock, and had to be assisted by other DEP employees. Additionally, the ALJ found that marina owner's ability to operate his marina was substantially impaired by the pilings.

48. In contrast, Mr. Lynn's pilings, while being, at most, an inconvenience to operators of larger boats, causing MarineMax customers to exercise caution during ingress and egress through the canal separating the MarineMax Property and Mr. Lynn's property, and invading a distinguished and credible boat captain's "personal comfort zone," do not constitute the level of adverse impacts that the ALJ considered in Pirtle. Additionally, MarineMax presented no direct evidence of substantial impairment of its ability to operate its marina as a result of Mr. Lynn's pilings.

49. Further, the undersigned concludes that Mr. Lynn's pilings do not constitute a navigational hazard, as an inconvenience does not constitute a navigational hazard. See Shanosky v. Town of Ft. Myers Beach, Case No. 18-1940 (Fla. DOAH Nov. 20, 2018, Fla. DEP Jan. 2, 2019)("While it may create an inconvenience for Petitioners, or cause them to be more cautious during ingress and egress from their docks, the new dock will not create a navigational hazard."); Woolshlager v. Rockman, Case No. 06-3296 (Fla. DOAH May 7, 2007, Fla. DEP June 21, 2007)("mere inconvenience does not constitute the type of navigational hazard contemplated by the rule."); Scully v. Patterson, Case No. 05-0058 (Fla. DOAH April 14, 2005, Fla. DEP May 12, 2005).

50. The undersigned further concludes that Mr. Lynn met his burden and showed, by a preponderance of the evidence, that the pilings met the criteria set forth in section 373.406(6), and are therefore exempt from the need to obtain an ERP.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned recommends that DEP enter a final order dismissing MarineMax's challenge to the determination that Mr. Lynn's pilings qualify for an exemption from an environmental resources permit pursuant to its March 23, 2018, approval of Mr. Lynn's Request for Verification of Exemption from an Environmental Resources Permit.

DONE AND ENTERED this 28th day of March, 2019, in Tallahassee, Leon County, Florida.

ROBERT J. TELFER III
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of March, 2019.

ENDNOTES

[1/] Mr. Lynn also sought to introduce a recently conducted survey of his property at the final hearing. The undersigned declined to admit this document, as it was not disclosed to the other parties prior to the final hearing.

[2/] Mr. Lynn testified that, after preliminary discussions with representatives from MarineMax about these concerns, MarineMax erected signs in the canal to direct boats to turn around in other areas for safety purposes.

[3/] At the final hearing, Ms. Mills testified that while DEP's Verification was for installation of the pilings 16 1/2 feet off of Mr. Lynn's property, her opinion would not change if Mr. Lynn's Request for Verification of Exemption from an Environmental Resource Permit requested that the pilings be placed 19 feet off his property. Ms. Mills stated that "it's common for differences to exist between plans and reality. Things get installed slightly off based on installation techniques and site conditions." She further testified, "after reviewing the site conditions that the activity still qualifies for the exemption granted."

[4/] Captain Robinson was the only expert witness to testify at the final hearing.

[5/] In addition to a video recording of Captain Robinson on the boat for this presentation, Captain Robinson also utilized a drone, operated by another person, which provided an overhead video recording of this demonstration.

[6/] Ms. Mills also explained DEP's process in concluding that Mr. Lynn's pilings project qualified for federal authorization pursuant to the State Programmatic General Permit V (SPGP). Although the parties, in their Amended Joint Pre-hearing Stipulation, agreed that the pilings are not located in sovereign submerged lands, and MarineMax and DEP agreed that the 25-percent rule with regard to encroachment in a navigable waterway as set forth in Florida Administrative Code Chapter 18-21, did not apply to this case, the undersigned finds Ms. Mills's testimony concerning SPGP authorization, which included an analysis of the 25-percent rule, to be relevant to DEP's granting of the exemption.

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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.