

Consolidated Authorization), consisting of an environmental resource permit and sovereignty submerged lands lease (Lease), authorizing Workboats to construct and operate a commercial tugboat and barge mooring and loading/offloading facility (the Project) on the St. Johns River, in Jacksonville, Florida. The Petitioner City 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.

The final hearing initially was scheduled for December 10 through 12, 2018, but was rescheduled to December 12 and 13, 2018, pursuant to the City's Motion for Continuance filed on November 20, 2018.

On November 16, 2018, Workboats filed an Amended Motion in Limine and for Protective Order (Motion). On November 26, 2018, the City filed a response in opposition to Workboats' Motion. After a telephonic hearing, the ALJ issued an Order on Motion in Limine and for Protective Order (Order in Limine) on December 6, 2018, granting Workboats' Motion to exclude evidence and argument regarding alleged noncompliance of Workboats' upland land uses with the City's zoning code. The Order also denied Workboats' motion seeking to protect certain financial information from discovery, subject to conditions specified in the Order in Limine.

On December 11, 2018, the City filed a motion seeking clarification or reconsideration of the ALJ's order excluding evidence of the Project's alleged noncompliance with county zoning with respect to approval of the Lease, to which the City filed a response in opposition. Following oral argument on the motion and response in opposition at the final hearing, the ALJ denied the motion for reconsideration on the basis that the public interest determination pursuant to chapter 253, Florida Statutes, and chapter 18-21, Florida Administrative Code, does not

contemplate the consideration of upland zoning compliance issues in determining whether to grant or deny use of sovereignty submerged lands.

On December 11, 2018, the Department issued a Notice of Filing Amended Agency Action, correcting and updating information regarding the Project. On December 11, 2018, DEP also issued Respondent Department of Environmental Protection's Notice of Filing Amended Agency Action, correcting and updating information regarding the Project. The amended agency action consists of a draft amended Consolidated Authorization, which is the subject of this proceeding, and has been admitted into evidence as Joint Exhibit 3.

The ALJ held the final hearing on December 12 and 13, 2018. Joint Exhibits 1 through 6 and Exhibit A were admitted into evidence pursuant to the parties' stipulation. The City presented the testimony of Dr. A. Quinton White, Scott O'Conner, and Robert Wood. The City's Exhibits 7 through 15 were admitted into evidence without objection, and official recognition of the City's Exhibit 16 was taken. Respondent Workboats presented the testimony of Danielle Irwin, Bruce Hallett, and William Shafnacker, and Workboats' Exhibits 17 through 21 were admitted into evidence without objection. Respondent DEP presented the testimony of Thomas Kallemeyn.

A four-volume transcript of the final hearing was filed at DOAH on January 18, 2019. The parties timely filed their proposed recommended orders on January 28, 2019.

SUMMARY OF THE RECOMMENDED ORDER

I. The Parties

The Petitioner City is a consolidated municipality and county political subdivision of the State of Florida. The Project is located within the geographic boundary of the City. The City

initiated this proceeding by filing its Verified Petition for Formal Administrative Hearing (Petition) with DEP on August 17, 2018. (RO ¶ 1).

Respondent Workboats is the applicant for the Project. Its business address is 5118 Heckscher Drive, Jacksonville, Florida 32226. Workboats owns the property located upland of the sovereignty submerged lands on which the Project is proposed to be constructed and operated. (RO ¶ 2).

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 those statutes. Pursuant to that authority, DEP determines whether to issue or deny applications for environmental resource permits. 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 sovereignty submerged lands leases. (RO ¶ 3).

II. The Back Channel and Vicinity of the Project

The Project is proposed to be constructed and operated in the "Back Channel" area of the St. Johns River, directly across from Blount Island. The Back Channel, as a part of the St. Johns River, is classified as a Class III waterbody. It is not designated an Outstanding Florida Water, not located within an Aquatic Preserve, and not designated for shellfish propagation or harvesting. (RO ¶¶ 4-5).

The Back Channel is configured in the shape of an inverted "U" and runs between Blount Island and Heckscher Drive, from the southeast corner of Blount Island to the bridges located on the northwest side of Blount Island. It constitutes a portion of the historic main channel of the

St. Johns River and was used for all vessel navigation in the river until the Dames Point Cut was dredged through a peninsula to the south, creating Blount Island and a new straight channel to the Atlantic Ocean. Most vessels, including large ships, use the Dames Point Cut for ingress into and egress from the St. Johns River. However, the Back Channel remains navigable and is used for recreational activities and some commercial and industrial navigation. A mix of residential, commercial, and industrial land uses is located on the north shore of the Back Channel in the vicinity of the Project. These uses consist of approximately 90 single-family residences having docks, three fish camps/recreational marinas, two restaurants, and docking structures used for mooring inshore shrimping vessels. A docking facility owned by M & M Shrimp and used for mooring shrimping vessels is located on the Back Channel immediately to the west of the Project site. (RO ¶¶ 6-8).

Robert Wood owns a residence on the Back Channel immediately east of the Project site. Four other residences are located immediately east of Mr. Wood's residence, and back up to the Back Channel. Most of the shoreline on which these residences are located consists of riprap; however, a small patch of salt marsh borders the shoreline on Mr. Wood's residential parcel. (RO ¶ 9).

Although Blount Island is a heavy industrial port, its northern shoreline on the Back Channel, across from the proposed Project site, consists of relatively undisturbed salt marsh and trees. The northeastern shoreline of the Back Channel generally consists of salt marsh and riprap, with docks constructed along the shoreline. (RO ¶ 10).

The Back Channel is approximately 1,340 feet wide at the point at which the Project is proposed to be constructed. Two bridges connect Blount Island to the mainland a short distance west of the proposed Project. These bridges each have a clearance of approximately ten feet, so

they cannot be cleared by large vessels. As a practical matter, this has the effect of limiting the size of vessels that use the Back Channel in the vicinity of the Project. A slow speed, minimum wake zone for boat operations extends 300 feet out into the Back Channel from both the north and south shorelines. (RO ¶¶ 11, 13-14).

III. The Proposed Project

Workboats proposes to construct and operate the Project as a commercial tugboat/work boat mooring and loading/offloading facility. Moreover, it proposes to construct and operate the Project on sovereignty submerged lands and in surface waters subject to State of Florida regulatory jurisdiction. Therefore, an environmental resource permit and sovereignty submerged lands lease are required for construction and operation of the Project. (RO ¶¶ 15-16).

The Project will be located waterward of the mean high-water line on sovereignty submerged lands adjacent to four upland waterfront parcels that are owned by Workboats: Lot 6 (5100 Heckscher Drive, RE 159971 0000); Lot 7 (5110 Heckscher Drive, RE 159972 0000); Lot 8 (5118 Heckscher Drive, RE 159973 0000); and Lot 9 (5120 Heckscher Drive, RE 159974 0000). Collectively, these lots have approximately 425 feet of linear shoreline, as measured at the mean high-water line, bordering the Back Channel. This shoreline is comprised of salt marsh and riprap. (RO ¶ 17).

A substantial portion of lots 6, 7, and 8 consists of salt marsh wetlands. Workboats does not propose to construct any structures on Lot 6. The salt marsh areas on lots 7 and 8 are traversed by existing pile-supported piers/access docks. To the extent they are replaced, such replacement will be by like-for-like structures and will not cause new impact to the salt marsh wetlands on these lots. Most of Lot 9 consists of upland, some of which is authorized to be refilled under the Consolidated Authorization. A small wetland area consisting of approximately

18 square feet of salt marsh will be crossed by a new dock but will not be filled or otherwise physically impacted. (RO ¶ 18).

Workboats proposes to construct Dock A on sovereignty submerged lands waterward of Lot 7, consisting of a 15.4-foot-long by 8-foot-wide extension added to the waterward end of an existing 150.8-foot-long by 8-foot-wide wooden dock, plus a 4-foot-long gangway attached to the waterward end of the extension, which will connect to a 100-foot-long by 9.5-foot wide concrete floating dock. (RO ¶ 19).

Workboats proposes to construct Dock B on sovereignty submerged lands waterward of Lot 8, consisting of a 40-foot-long by 10.3-foot-wide concrete floating dock with an 18-foot-long by 6-foot-wide platform, and a 4-foot-long gangway attached to an existing 125.2-foot-long by 5-foot-wide wooden dock. (RO ¶ 20).

Workboats proposes to construct Dock C on Lot 9. Dock C will consist of a new inverted-L-shaped dock consisting of a 71-foot-long by four-foot wide pile-supported finger dock extending perpendicular to the shoreline into the Lease area, and a 26-foot long by 4-foot-wide dock running roughly parallel to the shoreline that will be constructed outside of the Lease area. Workboats also proposes to construct four wooden pilings waterward of Lot 9. Three of these pilings will be located along the eastern boundary of the Lease, and the piling closest to the shoreline of Lot 9 will be located outside of the Lease area. All of these pilings will be set back 25 feet from Workboats' eastern riparian rights line. The newly constructed additions to docks A and B, and new Dock C, will be elevated four feet above the marsh, and constructed by hand-laying planks from the shoreline outward into the water, using the previously-laid planks as support while laying the new planks. (RO ¶¶ 21-23).

Workboats also proposes to construct as part of the Project three mooring dolphins that will be installed within the Lease area, set back 38 feet from the southern boundary. No dredging is proposed or authorized for the Project. (RO ¶¶ 24-25).

The Department, on behalf of the Board of Trustees, proposes to issue a ten-year lease for the Project that will preempt approximately 49,746 square feet of sovereignty submerged lands. The western boundary of the Lease is located 25 feet east of the upland property's western riparian rights line, and the eastern boundary of the Lease is located 25 feet west of the upland property's eastern riparian rights line. (RO ¶ 26).

With the exception of a portion of Dock C and one wood piling all other structures proposed as part of the Project will be constructed within the boundaries of the Lease, and all vessel mooring and over-water operational activities authorized as part of the Project will occur within the Lease area. (RO ¶ 27).

The Consolidated Authorization authorizes the placement of approximately 3,500 square feet of fill landward of the mean high-water line and the jurisdictional wetland line, to replace historic fill eroded by hurricanes in 2017. Additionally, the authorization requires Workboats to restore approximately 250 square feet of salt marsh cord grass waterward of the mean high-water line on Lot 9 as corrective action for unauthorized filling/destruction of salt marsh wetlands. (RO ¶¶ 28-29).

The proposed Project will operate as a tugboat/work boats mooring and loading/unloading facility. Workboats owns a fleet of approximately 40 vessels, comprised of barges, tow/push boats, and work boats that are used to provide a range of marine services to third parties, including the transport/delivery of food and other supplies, artificial reef placement, marine demolition, and pile driving. These vessels will be moored at the docks, mooring

dolphins, and mooring piles comprising the Project. Of these 40 vessels, 28 are barges that range from ten to 130 feet in length with drafts ranging from 1.5 to 7.5 feet deep. The remaining 12 vessels are boats that range from 14 to 46.2 feet in length with drafts ranging from one foot to 6.8 feet deep. (RO ¶¶ 30-31).

The water depths within the Lease area range from one tenth of one foot immediately adjacent to the shoreline, to between 39.5 and 43.5 feet deep at mean low water at the southern boundary of the Lease. Only one or two of the smaller boats in Workboats' fleet have drafts that are shallow enough to enable them to moor on the shoreward sides of Docks A and B. In any event, all vessels must moor in areas within the Lease area having depths at mean low water sufficient to ensure they do not come into contact with submerged resources. To that end, a condition is included in the Consolidated Authorization requiring a minimum 12-inch clearance between the deepest draft of a vessel with the motor in the "down" position and the top of submerged resources at mean low water. (RO ¶¶ 32-33).

The parties stipulated, and Shafnacker testified, that except for the 32-foot-long Marlin Barge and the 10-foot-long Galligan barges, all other barges in Workboats' fleet will moor at the three-pile dolphins near the southern boundary of the Lease. Some barges will be anchored to the substrate by spuds, and the condition requiring 12 inches of clearance between the vessel bottom and the top of submerged resources would not apply to the spuds themselves. (RO ¶ 34).

The parties stipulated, and Shafnacker testified, that Workboats will only load vessels from Dock B, which is appurtenant to Lot 8, and that the only equipment that will be used to load vessels will be equipment small and light enough to traverse Dock B-specifically, a Takeuchi mini-excavator, small forklift, or similarly-sized equipment. These limitations regarding the loading of vessels within the Lease area are not currently included as conditions of

the Consolidated Authorization. Based on the parties' stipulation and competent substantial evidence in the record, the ALJ recommended that conditions be added to the Consolidated Authorization limiting the loading of vessels in the Lease area only to Dock B and limiting the type of equipment used for vessel loading and unloading to forklifts, mini-excavators, or similar light equipment. (RO ¶ 35, Conclusion and Recommendation). Shafnacker testified that the only other work that may be performed within the Lease area would consist of certain minor maintenance activities on Workboats' vessels, such as non-routine paint touchups and handrail painting, minor cable and winch repairs, and minor steel-rod (non-lead) welding. (RO ¶ 36).

IV. DEP Review and Approval of the Project

Workboats filed a Joint Application for an Individual Environmental Resource Permit/Authorization to Use State-Owned Submerged Lands/Federal Dredge and Fill Permit (Application) on or about June 15, 2018. DEP staff reviewed the Application and determined that the Project, as proposed, met the applicable statutory standards and rule requirements for issuance of the Consolidated Authorization. DEP issued the Consolidated Notice of Intent on or about July 20, 2018, proposing to issue the environmental resource permit and Lease for the Project. (RO ¶¶ 37-39).

V. Compliance with Rule 62-330.301, Florida Administrative Code

For Workboats to be entitled to issuance of the environmental resource permit for the Project, it must provide reasonable assurance that the Project meets the requirements of rule 62-330.301, Florida Administrative Code. (RO ¶ 41).

A. Water Quantity, Storage, Conveyance, and Flooding Impacts

The entire Project, as proposed, will be constructed waterward of the mean high-water line and consist of mooring piles, piling-supported docks, and floating docks. The ALJ found

that these structures will not affect, impound, store, divert, or impede the amount or flow of surface water. The ALJ found that the evidence demonstrated that the Project, if constructed and operated as proposed, will not (1) cause adverse water quantity impacts to receiving waters and adjacent lands, (2) cause adverse flooding to on-site or off-site property, or (3) cause adverse impacts to existing surface water storage and conveyance capabilities. (RO ¶¶ 42-43).

B. Impacts to Value of Functions Provided to Fish, Wildlife, Listed Species, and Habitat

Two types of habitat exist at the Project site: salt marsh and submerged benthic habitat. The ALJ found that the evidence established that the salt marsh at the Project site is healthy, high-quality, high-functioning salt marsh habitat. Among the functions the salt marsh provides are preservation and improvement of water quality by filtering runoff, serving as a nursery for fish species, preventing shoreline erosion, and forming the base of the estuarine food chain. The ALJ also found that the salt marsh, in combination with existing riprap at the edge of the salt marsh, forms a “living shoreline” at the Project site that helps protect the shoreline from erosion and scouring due to wave action. This living shoreline is not being removed or otherwise affected and will not be affected by the Projected. (RO ¶¶ 44-46).

The submerged benthic sediment at the Project site consists of high organic silts and a sand base. The ALJ found that the evidence established that the benthic sediment provides habitat for infauna, such as polychaete worms; and for epifauna, such as shrimp, crabs, and mollusks. No submerged aquatic vegetation or oyster bars were found at the Project site. (RO ¶ 47).

Workboats proposes to extend two existing docks, Docks A and B, that previously were constructed through the salt marsh. These extensions will be constructed four feet above the marsh floor to reduce shading, using minimally-impactful construction techniques to help avoid

and minimize construction impacts to the marsh. The ALJ found that the floating components of Docks A and B will not impact the salt marsh habitat. (RO ¶ 48).

Dock C will be constructed waterward of Lot 9, across a very small section of salt marsh grass. The dock will be elevated four feet above the marsh floor to reduce shading; and constructed using the same minimally-impactful technique to avoid and minimize impacts to the marsh. The ALJ found that because Dock C will have only de minimis impacts on the salt marsh, no mitigation has been required. The Consolidated Authorization contains conditions prohibiting Workboats from impacting emergent grasses during construction and operation of the Project, or storing or stockpiling tools, equipment, materials, and debris within wetlands. The ALJ found these conditions will help ensure that the Project will have only minimal impacts on the salt marsh habitat at the Project site. (RO ¶¶ 49-50).

The Consolidated Authorization requires Workboats to maintain 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. Additionally, the authorization prohibits the construction of mooring areas over submerged grass beds. The ALJ found that these conditions will help protect benthic habitat at the Project site. (RO ¶ 51).

The Florida Manatee is the only listed species that inhabits the Project site. Video evidence presented by the City showed manatees present at, and in the vicinity of, the Project site. (RO ¶ 52).

The Project is located in an area designated, in the most recent Duval County Manatee Protection Plan (November 2017) (MPP), as “preferred” for boat facility siting. Boating facilities located in designated “preferred” areas generally do not have any limits on the number of slips at the facility. “Preferred” boat facility siting areas were designated in the MPP based on

many factors, including manatee abundance, presence of manatee feeding habitat, proximity to boating destinations, manatee mortality in the area, existing boating slip numbers and locations, boating facility type and number, and existence of speed zones. (RO ¶ 53).

To protect manatees in the Back Channel, the Florida Fish and Wildlife Conservation Commission (FWC) has, by rule, established a slow speed, minimum wake zone extending 300 feet from the shorelines into the Back Channel. A slow speed, minimum wake zone means that a vessel must be fully off-plane and completely settled into the water, proceeding at a speed which is reasonable and prudent under the prevailing circumstances. See Fla. Admin. Code R. 68C-22.02(4). The existence and enforcement of this speed zone will help protect manatees in the Back Channel. The Consolidated Authorization also contains conditions to help protect manatees from impacts from the Project. (RO ¶¶ 54-55).

For each vessel, a minimum 12-inch clearance between the deepest draft with the motor down, and the top of the submerged resources at mean low water, must be maintained. This condition will help ensure that manatees do not become trapped under or crushed by a vessel while moored in the Lease area. Additionally, bumpers or fenders must be installed and maintained to provide at least three feet of separation between moored vessels and between the docks/mooring piles and vessels, to help prevent trapping or crushing of manatees. (RO ¶¶ 56-57).

The Consolidated Authorization also requires the Project to be constructed and operated in accordance with the Standard Manatee Conditions for In-Water Work. These conditions include: instructing all personnel, including construction personnel, about the presence of manatees and manatee speed zones, and the need to avoid collisions with and injury to manatees, as well as about civil and criminal penalties imposed for harming, harassing, or killing manatees;

operating all vessels associated with construction of the Project at “idle speed/no wake” at all times in the vicinity of the Project and where the draft of the vessel provides less than a four-foot clearance from the bottom; the requirement that all in-water operations, including vessels, must shut down if a manatee comes within 50 feet of the operation and cannot resume until the manatee either moves beyond the 50-foot radius of the operation or 30 minutes has elapsed and the manatee has not reappeared within 50 feet of the operation; the installation of specified temporary signage; and the installation of specified permanent signage. (RO ¶ 58).

The inclusion of these conditions in the Consolidated Authorization provides reasonable assurance that the construction and operation of the Project will not adversely affect the value of functions provided to fish, wildlife, or listed species and their habitats. (RO ¶ 59).

C. Water Quality Impacts

As previously noted, the St. Johns River, including the Back Channel, is a Class III waterbody. Accordingly, the surface water quality standards and criteria applicable to Class III waters under rule 62-302.300, Florida Administrative Code, apply to the Back Channel. The Back Channel portion of the St. Johns River has been identified as impaired for lead, pursuant to Chapter 62-303, Florida Administrative Code. (RO ¶ 60).

The credible, persuasive evidence demonstrates that the Project, if constructed and operated in accordance with the conditions currently included in the Consolidated Authorization along with additional conditions recommended by the ALJ in the RO, discussed below, will not cause or contribute to water quality violations. (RO ¶ 61).

Specifically, the Project will be required to install and maintain turbidity barriers during the construction phase to help ensure that any sediment disturbed during construction does not cause or contribute to water quality violations. Additionally, a minimum 12-inch clearance

between the deepest draft of each vessel, with the motor down, and the top of the submerged resources at mean low water must be maintained. This will help prevent the suspension of sediments, and any constituents in those sediments, from being suspended in the water column and causing or contributing to water quality violations as a result of the Project. (RO ¶¶ 62-63).

The Consolidated Authorization also prohibits the storage or stockpiling of tools, equipment, materials, such as lumber, pilings, riprap, and debris within wetlands or other waters of the state; prohibits the discharge of construction debris into waters of the state; prohibits the overboard discharge of trash, human or animal waste and fuel at the docks; and requires all work to be done in periods of average or low water, so that impacts to submerged resources, including bottom sediment, can be avoided. (RO ¶ 64).

Collectively, these conditions help provide reasonable assurance that the construction and operation of the Project, including the mooring and operation of vessels in the Lease area, will not violate water quality standards. (RO ¶ 65).

White testified that, generally, the water quality in, and in the vicinity of, marinas degrades over time due to the discharge of oils, greases, and other waste; and the suspension in the water column of sediments and toxins, pesticides, herbicides, and heavy metals in those sediments, as a result of propeller dredging. However, Irwin testified that because the Project site is located in a tidally-influenced area, with an approximate 3.5-foot tide range over multiple tide changes per day, the Project site will be adequately flushed such that there will not be an accumulation of pollutants that may violate water quality standards. Based on Irwin's persuasive testimony, the ALJ concluded that water quality violations will not occur due to an accumulation of pollutants at the Project site. (RO ¶ 66).

To further ensure that the Project will not degrade water quality or violate water quality standards at the Project site, the Consolidated Authorization requires Workboats to submit a facility management plan to address maintenance and unexpected spills of fuels and other pollutants. The facility management plan must include a spill response plan for fuel spills; a plan for maintenance of gray water collection systems and return systems, to the extent applicable; a plan addressing garbage collection and vessel cleaning systems to prevent disposal of waste in wetlands; and an education plan for all employees at the Project regarding fueling, sewage and gray water pump operations, waste management, and facility maintenance. (RO ¶ 67).

Sewage pump-out facilities are not proposed as part of the Project. Shafnacker testified, and the Consolidated Authorization, Project Description section currently states, that domestic waste from boat heads will be handled through use of a waterless incinerating toilet (Incinolet or similar), and the remaining ash shall not be disposed in waters of the state. However, the ALJ noted that this requirement is not currently included as an enforceable condition of the Consolidated Authorization. The ALJ found that a specific condition expressly prohibiting any sewage pump-out at the docks or on vessels, requiring the use of an incinerator toilet, and prohibiting the discharge of ash waste should be included in the Consolidated Authorization to provide reasonable assurance that the Project will not violate water quality standards due to the discharge of sewage into waters of the state. (RO ¶ 68).

The Consolidated Authorization, Project Description section, states:

This permit does not authorize the installation and use of fueling equipment at the Dock; the discharge of waste into the water; liveaboards; fish cleaning or the installation of fish cleaning stations; repair and maintenance activities involving scraping, sanding, stripping, recoating, and other activities that may degrade water quality or release pollutants into Waters of the State. Major repair, reconstruction, and/or other service must be performed at a

facility approved for vessel haul-out and repair. This does not preclude the light maintenance allowed under Specific Condition 18 to be performed at the facility.

The ALJ found that the above language, which expressly identifies numerous activities that are prohibited in connection with the operation of the Project, is not currently included as an enforceable condition in the Consolidated Authorization. The ALJ determined that to protect water quality at the Project site, this language must be included as a specific condition in the Consolidated Authorization. (RO ¶ 69).

As previously noted above, the Back Channel is impaired for lead. Both Irwin and Hallett testified that Workboats would not use lead paint or lead-containing welding equipment on the docks or vessels moored in the Lease area. The ALJ determined that to provide reasonable assurance that the Project will not constitute a source of lead that will contribute to the impaired status of the Back Channel, a specific condition prohibiting the use of lead-based paints and other sources of lead should be included as an enforceable condition in the Consolidated Authorization. (RO ¶ 70).

Based on the foregoing, the ALJ found that, with the addition of the conditions discussed in paragraphs 68, 69, and 70 of the RO, Workboats has provided reasonable assurance that applicable water quality standards will not be violated as a result of construction or operation of the Project. (RO ¶ 71).

D. Adverse Secondary Impacts to Water Resources

Secondary impacts are impacts caused by other relevant activities very closely linked or causally related to the activity itself, rather than the direct impacts of the proposed activity itself. (RO ¶ 72).

The ALJ found that the conditions currently included in the Consolidated Authorization, along with the conditions addressed in paragraphs 68, 69, and 70 of the RO, provide reasonable assurance that the Project will not cause adverse secondary impacts to water quality. In addition, the ALJ found that the Project will not cause adverse secondary impacts to the functions of wetlands and surface waters, aquatic or wetland-dependent species, or listed species. (RO ¶¶ 73-74).

The ALJ found that the salt marsh habitat will not be disturbed during construction and operation of the Project, and the benthic habitat will be protected by a minimum 12-inch vessel to the top of submerged resource clearance requirement. These Project features and conditions will help ensure no adverse impacts to wetland functions and aquatic or wetland-dependent species, such as fish and benthic fauna. (RO ¶ 75).

In addition, the Project will be located within a slow speed, minimum wake zone, and Workboats will be required to operate all of its vessels in compliance with that standard within the 300-foot buffer along the shorelines of the Back Channel. The ALJ concluded that this operational constraint, along with additional manatee protection conditions discussed above, provide reasonable assurance that the Project will not cause adverse secondary impacts to manatees. (RO ¶ 76).

Based on the foregoing, the ALJ determined that, with the addition of the conditions identified in paragraphs 68, 69, and 70 of the RO, Workboats has provided reasonable assurance that the Project will not have adverse secondary impacts to the water resources. (RO ¶ 77).

E. Impacts to Ground and Surface Water Levels and Surface Water Flows

The Project will be constructed waterward of the mean high water line, and will consist of piling-supported and floating docks and mooring piles that will not adversely impact the

maintenance of minimum surface or ground water levels or surface water flows at the Project site. (RO ¶ 78).

F. Impacts to Works of the District

The Project is not proximate to any works of the district, as approved pursuant to section 373.086, Florida Statutes; accordingly, it will not cause adverse impacts to such works. (RO ¶ 79).

G. Capable of Performing and Functioning as Designed

The Project was designed by an engineer and will be installed by Shafnacker, who is an experienced marine contractor. (RO ¶ 80).

The Consolidated Authorization requires that the Project must be implemented in accordance with the approved plans, specifications, and performance criteria. Within 30 days of completion of construction of the Project, Workboats must submit an as-built survey, signed and sealed by a Florida licensed Surveyor and Mapper in accordance with Chapter 61G17-7, Florida Administrative Code, depicting the boundaries of the Lease, and showing the size and dimensions of all existing overwater structures and activities within the Lease area. In addition, the surveyor must provide a statement that all of the depicted structures and activities are located within the Lease area; or identify, and depict on an as-built survey, any structures or activities outside of the Lease area. The ALJ found that these requirements will ensure that the Project performs and functions as designed. (RO ¶ 81).

H. Financial, Legal, and Administrative Capability

Rule 62-330.301(1)(j), Florida Administrative Code, requires an applicant for an environmental resource permit to provide reasonable assurance that the project will be conducted

with a person having the financial, legal, and administrative capability to ensure that the activity will be undertaken in accordance with the terms and conditions of the permit. (RO ¶ 82).

The Environmental Resource Permit Applicant's Handbook (Handbook), Volume I (General and Environmental), section 1.5.1., provides further guidance regarding compliance with the requirements in rule 62-330.301(1)(j), Florida Administrative Code. Section 1.5.1 states that "[c]ompliance with this requirement must be demonstrated through subsections 62-330.060(3) and (4), the certification required in the Application Form 62-330.060(1), and section 12.0 of the Handbook." (RO ¶ 83).

As part of the Application, Workboats submitted copies of warranty deeds for lots 6, 7, and 8, and Disclaimer No. 22146 for Lot 9. These documents establish that Shafnacker holds title to the uplands on lots 6 through 9 and to certain submerged lands waterward of Lot 9. Pursuant to Handbook section 4.2.3, these documents satisfy the "sufficient upland interest" requirement in rules 62.330.060(3) and 62-330.301(1)(j), Florida Administrative Code. (RO ¶ 84).

Rule 62-330.060(3), Florida Administrative Code, also requires the applicant and/or the applicant's agent to sign specific parts of the application. Here, Workboats, and Shafnacker, as Workboats' agent, signed the pertinent portions of the Application, as required by this rule. (RO ¶ 85).

Rule 62-330.060(4), Florida Administrative Code, and pertinent provisions of section 12.0 of the Handbook-specifically, provisions in sections 12.1 and 12.2-require that once construction of the permitted activity is complete, it must be converted to the operational phase by submitting an as-built certification and a form to request conversion to an operational phase.

The Consolidated Authorization for the Project requires submittal of this conversion form, once construction is complete, as a condition for operation of the Project. (RO ¶ 86).

These are the only rules and Handbook provisions regarding demonstration of financial, legal, and administrative capability that are pertinent to the Project. No other environmental resource permitting rules or Handbook provisions impose any other requirements regarding financial capability. Moreover, the City did not identify any case law, or other statutes or rules, imposing additional pertinent financial capability requirements. The City also did not present any evidence to show that Workboats lacks the financial, legal, and administrative capability to undertake the Project as permitted. Accordingly, the ALJ found the evidence establishes that Workboats meets rule 62-330.301(1)(j), Florida Administrative Code, and all other pertinent rules and Handbook requirements, showing it has the financial, legal, and administrative capability to ensure the Project will be undertaken in accordance with the terms and conditions of the Consolidated Authorization. (RO ¶¶ 87-89).

VI. Compliance with Rule 62-330.302, Florida Administrative Code

For Workboats to be entitled to issuance of an environmental resource permit for the Project, it also must provide reasonable assurance that the Project meets the requirements of rule 62-330.302, Florida Administrative Code, which establishes additional standards for issuance of environmental resource permits for activities in surface waters or wetlands. (RO ¶ 90).

A. Adverse Effects to Public Health, Safety, or Welfare, or Property of Others

In determining whether a proposed activity in surface waters or wetlands would adversely affect the public health, safety, or welfare, or the property of others, the focus is on environmental hazards or injuries that may result from the proposed activity. Thus, alleged threats to personal safety and enjoyment of neighboring property resulting from alleged unlawful

activities on the upland areas of lots 6, 7, and 9-which are not part of the Project-are not appropriately considered as part of the public interest determination under rule 62-330.302, Florida Administrative Code. (RO ¶ 91).

The Consolidated Authorization contains conditions aimed at ensuring that water quality is not degraded and water quality standards are not violated due to the Project. These conditions, along with conditions addressed in paragraphs 68, 69, and 70 of the RO, provide reasonable assurance that the public health, safety and welfare, and property of others will not be adversely affected as a result of water quality degradation or violations. (RO ¶ 92).

The Project, as designed and approved, will have 25-foot setbacks from the eastern and western riparian rights lines for lots 6 through 9. These setbacks will help ensure that the construction and operation of the Project will not interfere with the adjoining properties' riparian rights. (RO ¶ 93).

The City presented the testimony of O'Connor, who opined that some of Workboats' vessels, operated at full throttle, were capable of generating a wake as high as three feet. O'Connor testified that a wake of this height could damage docks along the shoreline of the Back Channel, cause shoreline erosion, and create a safety hazard for recreational boaters, kayakers, and others engaged in in-water recreational activities. (RO ¶ 94).

The Back Channel is approximately 1,300 feet wide at the Project site. Per the location map provided as part of the specific purpose survey, the portion of the Back Channel east of the Project site is at least this wide for its entire length. The ALJ found that Shafnacker testified, credibly, that Workboats' vessels typically operate closer to the Blount Island shoreline than the northern shoreline of the Back Channel, so are approximately 800 feet away from the northern shoreline where the residential docks and access points for boaters, kayakers, and other

recreational uses are located. In addition, the ALJ found that Shafnacker credibly testified that Workboats' boats and barges would be operated at speeds such that the highest wake that any of his vessels would generate is two feet. (RO ¶¶ 95-96).

Based on the foregoing, and with the inclusion in the Consolidated Authorization of the conditions identified in paragraphs 68, 69, and 70, above, the ALJ concluded that Workboats has provided reasonable assurance that the Project will not adversely affect the public health, safety, welfare, and property of others. (RO ¶ 97).

B. Adverse Effects to Conservation of Fish, Wildlife, Listed Species, and their Habitats

The ALJ found that the Consolidated Authorization requires Workboats to avoid impacts to emergent grasses during construction and operation of the Project, and prohibits Workboats from storing or stockpiling tools, equipment, materials, and debris within wetlands. The ALJ concluded that these conditions will help ensure that the Project will have minimal impact on the salt marsh habitat at the Project site. (RO ¶ 98).

The Consolidated Authorization also contains a condition prohibiting the construction of mooring areas over submerged grass beds. The ALJ concluded that this condition, along with the condition requiring a minimum 12-inch clearance between vessel bottom and submerged resources, will help protect the benthic habitat at the Project site. (RO ¶ 99).

In addition, the Consolidated Authorization imposes conditions to protect manatees from impacts due to the Project. Specifically, bumpers or fenders must be installed and maintained to provide at least three feet of separation between docks or mooring piles and vessels, and between vessels; and a minimum 12-inch clearance between the deepest draft of the vessel and the top of the submerged resources at mean low water must be maintained. The Project also must be constructed and operated in accordance with FWC's Standard Manatee Conditions for In-Water

Work, which imposes construction and operational requirements to protect manatees for the life of the Project. (RO ¶ 100).

The ALJ concluded that the inclusion of these conditions in the Consolidated Authorization provides reasonable assurance that the Project will not adversely affect the conservation of fish and wildlife, including threatened species and their habitats. (RO ¶ 101).

C. Adverse Effects to Navigation, Flow of Water, or Shoaling

The Back Channel is navigable and over 1,300 feet wide at the point at which the Project is proposed to be located. It is used by a mix of recreational vessels and commercial and industrial vessels; although, the low-clearance bridges on the western end of Blount Island effectively limit the commercial and industrial traffic to smaller-sized vessels. (RO ¶ 102).

As depicted on the specific purpose survey submitted as part of the Application, the southern boundary of the Lease extends waterward approximately 196 feet from the shoreline at the eastern boundary of the Lease, and approximately 174 feet from the shoreline at the western boundary of the Lease. Thus, at its most waterward point, the preempted area of the Lease will extend waterward approximately 14 percent of the width of the Back Channel. (RO ¶ 103).

The specific purpose survey shows docks A and C extending waterward approximately 60 feet from the shoreline; and shows Dock B extending waterward approximately 45 feet from the shoreline. (RO ¶ 104).

The three three-pile dolphins, which will be used to moor the largest barges, will be set back approximately 38 feet from the southern boundary of the Lease. Shafnacker testified that barges moored at the three-pile mooring dolphins will be tied between the dolphins, by ropes at their bows and sterns, to ensure they do not drift out of the Lease area and create a navigational hazard. (RO ¶ 105).

The Consolidated Authorization contains a condition requiring the waterward ends of the docks and the mooring dolphins to be marked by reflectors so as to be visible from the water at night by reflected light. However, at the hearing, Shafnacker testified that he intended to mark the dolphins and barges with solar battery-powered lights so they would be more visible at night than if only reflectors are used. Based on this testimony, the ALJ recommended that Specific Condition No. 13 in the Consolidated Authorization be modified to require the barges and mooring dolphins be marked by lights, as well as reflectors, to make them more visible from the water. (RO ¶ 106).

Based on the foregoing, the ALJ determined that the Project, as proposed, will not adversely impact navigation in the Back Channel. Specifically, the Lease will not extend a significant distance out into the Back Channel; approximately 86 percent of the width of the Back Channel at the Project site remains open for navigation by the public. In addition, the docks will be located relatively close to the shoreline, well within the Lease preempted area, and will be marked so they are visible from the water. The mooring dolphins also will be set back a substantial distance from the Lease boundary and will be marked so as to be visible from the water. (RO ¶ 107).

The ALJ found that the evidence establishes that the Project will not have any adverse effects on the flow of water; since the Project will not impede, impound, or otherwise affect the flow of water. The ALJ also found that the evidence establishes that the Project will not cause harmful shoaling or erosion. No dredging or placement of dredged spoil is proposed or authorized as part of the project, and the Consolidated Authorization requires Workboats to use silt fencing and other specified best management practices to stabilize the sediment and prevent erosion and shoaling during construction of the Project. (RO ¶¶ 108-109).

For these reasons, the ALJ concluded that the Project will not adversely impact navigation in the Back Channel, will not adversely affect the flow of water, and will not result in harmful shoaling or erosion. (RO ¶ 110).

D. Adverse Effects to Fishing, Recreational Values, or Marine Productivity

The Back Channel is a meander of the St. Johns River that no longer is used as the main navigational channel for the river. Thus, it is relatively calm and extensively used for boating, kayaking, swimming, fishing, jet skiing, and other in-water recreational activities. (RO ¶ 111).

The ALJ found that the evidence establishes that the Project will not adversely affect fishing, recreational values, or marine productivity in the vicinity. The ALJ also found that the salt marsh habitat in the vicinity of the Project, which serves as the base of the estuarine food chain and as a nursery and refuge for small fish, will not be disturbed during construction of the Project. As such, the Project will not adversely affect fish habitat or marine productivity. (RO ¶¶ 112-113).

The ALJ also found that because the Project will be constructed within the boundaries of the Lease and set back 25 feet from the riparian lines for the adjoining properties, it will not physically interfere with or displace fishing activities from those properties, or from any other property in the vicinity. (RO ¶ 114).

The Consolidated Authorization imposes conditions to protect water quality during construction and operation of the Project. The ALJ concluded that these conditions, and the additional conditions identified in paragraphs 68, 69, and 70 of the RO will protect water quality, and therefore help protect fish habitat and marine productivity. (RO ¶ 115).

The ALJ also found that credible evidence establishes that vessel operation associated with the Project will not adversely affect boating, kayaking, fishing, or other recreational

activities in the vicinity. The Project is located in a slow speed, minimum wake zone that extends 300 feet from the shoreline into the Back Channel, and all vessels traversing into and out of the Lease area must operate at this speed until they are beyond 300 feet from the shorelines. In addition, the ALJ found that Shafnacker credibly testified that once out of the 300-foot slow speed, minimum wake zone, the vessels will operate at speeds such that they will generate a wake of two feet, at most. The evidence showed that wakes of this height are not anticipated to adversely affect recreational activities in the Back Channel. (RO ¶¶ 116-117).

E. Temporary or Permanent Activity

The Project will be permanent. However, the evidence establishes that there are numerous permanent docking facilities along the northern shoreline of the Back Channel, so the Project is not unique in that regard. (RO ¶ 118).

F. Adverse Impacts to Significant Historical or Archaeological Resources

The Department of State, Division of Historical Resources (DHR), did not provide any comments indicating that significant historical or archaeological resources are anticipated to be present at the Project site, and no evidence was presented showing that the Project would have any adverse impacts to such resources. (RO ¶ 119).

As a precaution, the Consolidated Authorization contains a specific condition requiring Workboats to immediately cease all activities involving subsurface disturbance and to contact DHR if any prehistoric or historic artifacts, such as pottery or ceramics, project points, dugout canoes, metal implements, historic building materials, or any other physical remains that could be associated with Native American, early European, or American settlements are encountered at any time within the Project site. (RO ¶ 120).

Accordingly, the ALJ concluded that the Project will not adversely affect significant historical or archaeological resources. (RO ¶ 121).

G. Current Condition and Relative Value of Functions

The salt marsh wetlands in the vicinity of the Project are healthy, high-functioning, and part of a “living shoreline” that will not be disturbed by construction or operation of the Project. Although Dock C will be constructed across a very small patch of salt marsh, it will be elevated to reduce shading and constructed using minimally-impactful construction techniques. Based on the evidence, the ALJ found that any impacts to the salt marsh from the Project will be de minimis. The ALJ also found that the Project is not anticipated to adversely affect the condition and relative value of the benthic habitat on the Project site. The Consolidated Authorization imposes a minimum 12-inch clearance from vessel bottom to top of submerged resources requirement, which the ALJ found will help prevent physical impact to, and propeller dredging of, the benthic habitat at the Project site. (RO ¶¶ 122-124).

The ALJ also found that conditions in the Consolidated Authorization, as well as the conditions addressed in paragraphs 68, 69, and 70 of the RO will help protect the current condition and relative value of the salt marsh and benthic habitat on the Project site. (RO ¶ 125).

H. Unacceptable Cumulative Impacts to Wetlands and Surface Waters

With the conditions currently contained in the Consolidated Authorization, along with the conditions addressed in paragraphs 68, 69, and 70 of the RO, the ALJ concluded that the Project is not anticipated to have adverse water quality impacts. In addition, the ALJ found that the Project is not anticipated to cause adverse impacts to fish, wildlife, protected species, and their habitat. (RO ¶¶ 126-127).

The ALJ concluded that with the inclusion of the conditions discussed in paragraphs 68, 69, and 70 of the RO, reasonable assurance has been provided that the Project will not have unacceptable cumulative impacts, in violation of rule 62-330.302(1)(b), Florida Administrative Code. (RO ¶ 128).

I. Past Violations of Water and Wetlands Statutes and Rules

The City presented evidence consisting of videos and photographs taken from the Wood residence immediately east of Lot 9. These videos and photographs show a variety of activities that are potentially damaging to surface waters and wetlands, including dumping sediment into surface waters from a moored vessel; earthmoving; moving floating docks onto, and off of, the shoreline using heavy equipment; operating heavy equipment in wetlands and surface waters along the shoreline; and mooring boats in extremely shallow water. (RO ¶ 129).

The ALJ found that Mr. Wood testified, credibly, that he contacted DEP numerous times; and that DEP occasionally visited Shafnacker's property-typically days after Wood had contacted the agency. (RO ¶ 130).

Upon inspecting the Workboats' site, DEP determined that barges or other equipment or materials had been dragged onto the shoreline without proper authorization; and DEP issued a compliance assistance offer letter to address this noncompliance. DEP ultimately determined that, rather than taking enforcement action for this noncompliance, a salt marsh restoration corrective action requirement should be included in the Consolidated Authorization. The corrective action conditions require Workboats to submit a salt marsh restoration plan and impose restoration plan completion timeframes, success criteria, and monitoring requirements. (RO ¶ 131).

Given Workboats' noncompliance history, the ALJ determined that to provide reasonable assurance that the Project will not violate environmental resource permitting statutes and rules, the conditions identified in paragraphs 35, 68, 69, and 70 of the RO must be included as enforceable conditions in the Consolidated Authorization. (RO ¶ 132).

VII. Compliance with Chapter 18-21 for Issuance of the Lease

For Workboats to be entitled to issuance of the Lease, it must demonstrate, by a preponderance of the evidence, that it will meet the applicable requirements and standards codified in chapter 18-21, Florida Administrative Code, for issuance of a sovereignty submerged lands lease. (RO ¶ 133).

A. Water Dependent Activities

Rule 18-21.004(1)(g), Florida Administrative Code, requires activities on sovereignty submerged lands to be limited to those that are water dependent. 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. Fla. Admin. Code R. 18-21.003(71). (RO ¶¶ 134-135).

The ALJ found that the Project's proposed docks, mooring piles, mooring dolphins, and vessel mooring operations are water dependent activities. The Project's primary purpose is the water dependent activity of mooring vessels and the ancillary activity of loading vessels with supplies as part of Workboats' operation. Case law interpreting chapter 18-21, Florida Administrative Code, holds that because the primary purpose of docks and other mooring structures is to moor vessels, they are "water dependent" activities for purposes of rule 18-21.004(1)(g), Florida Administrative Code. (RO ¶ 136).

As discussed in paragraphs 35, 68, 69, and 70 of the RO, the ALJ directed that a condition should be included in the environmental resource permit and Lease specifically prohibiting any major repair, reconstruction, or maintenance activities within the Lease area to ensure that only water dependent activities are conducted within the Lease area. (RO ¶ 137).

B. Resource Management Requirements

Rule 18-21.004(2)(a), Florida Administrative Code, requires sovereignty submerged lands to be managed primarily for the maintenance of natural conditions, propagation of fish and wildlife, and traditional recreational uses such as fishing, boating, and swimming. In addition, the rule authorizes compatible secondary uses that will not detract from or interfere with these primary purposes. (RO ¶ 138).

The ALJ found that the evidence establishes that the Project, as proposed and conditioned in the Consolidated Authorization, will not adversely affect salt marsh or benthic habitat, will not degrade water quality or cause or contribute to water quality violations, and will not adversely affect fish, wildlife, listed species, and marine productivity. Accordingly, the ALJ found that the Project will not detract from, or interfere, with fish and wildlife propagation. (RO ¶ 139).

The ALJ also found that the evidence establishes that the Project will not detract from, or interfere with, traditional recreational uses. The evidence establishes that the Back Channel is wide enough to accommodate vessels traveling to and from the Project site without detracting from or interfering with recreational activities conducted in the Back Channel. In addition, vessels traveling to and from the Project site must be operated in accordance with the slow speed, minimum wake zone within the 300-foot shoreline buffer; and will be operated at speeds that will generate a maximum two-foot wake outside of the shoreline buffer. The evidence

shows that these speeds will not detract from, or interfere with, traditional recreational uses in the Back Channel. (RO ¶ 140).

The ALJ found that the Project has been designed, and will be operated, to minimize or eliminate wetland vegetation impacts and impacts to fish and wildlife habitat and cultural resources. Specifically, impacts to the salt marsh habitat have been minimized through the use of minimally- impactful construction techniques and elevating docks four feet above the marsh to reduce shading of the marsh grasses. In addition, the 12-inch minimum vessel/submerged resource clearance condition will reduce impacts to the benthic habitat in the Lease area. (RO ¶ 141).

DHR did not provide comments indicating that significant historical or archaeological resources are anticipated to be present at the Project site, and no evidence was presented showing that the Project would have any impacts to such resources. In addition, the Consolidated Authorization contains a specific condition establishing protocol for Workboats to follow if any specified artifacts are encountered at any time within the Project site. (RO ¶ 142).

Rule 18-21.004(7)(e), Florida Administrative Code, requires that construction, use, or operation of the structure or activity not adversely affect any species listed as endangered, threatened, or of special concern in FWC rules. The ALJ found the evidence established that the Florida Manatee is the only listed species determined to be present in or near the Project site. The Project site is located within an established slow speed, minimum wake zone, and vessels entering and leaving the Project site must comply with this speed limitation within the 300-foot shoreline buffer area. In addition, the Consolidated Authorization includes several conditions designed to reduce and minimize potential impacts to manatees that may enter the Lease area.

The ALJ found that, collectively, these requirements and conditions will help ensure that the construction and operation of the Project will not adversely affect manatees. (RO ¶¶ 143-144).

C. Riparian Rights

As part of the Application, Workboats submitted deeds and Disclaimer No. 22146, demonstrating that Shafnacker holds title to lots 6, 7, 8, and 9. These documents constitute “satisfactory evidence of sufficient upland interest,” as that term is defined in rule 18.21.003(60), Florida Administrative Code. (RO ¶ 145).

Consistent with rule 18-21.004(3)(d), Florida Administrative Code, the Project is proposed to be constructed in the riparian area appurtenant to lots 6, 7, 8, and 9; and all structures that are part of the Project will be set back at least 25 feet from the eastern and western riparian lines for the upland property. The ALJ found that no evidence was presented showing that the construction or operation of the Project would unreasonably restrict or infringe upon the riparian rights of adjacent upland owners, in violation of rule 18-21.004(3)(c), Florida Administrative Code. The ALJ determined that the Project will not unreasonably infringe on or restrict the riparian rights of adjacent upland riparian owners; thus, the Project meets the requirements and standards in rule 18-21.004(3), Florida Administrative Code, regarding riparian rights. (RO ¶¶ 146-148).

D. Navigational Hazard

For the reasons discussed in paragraphs 102 through 107 of the RO, the ALJ determined that the Project will not constitute a navigational hazard, in violation of rule 18-21.004(7)(g), Florida Administrative Code. However, the ALJ recommended the inclusion of a condition requiring lighting of the mooring dolphins to ensure the Project will not constitute a navigational hazard. (RO ¶ 149).

E. Lease Fees

As part of the Application, Workboats submitted a financial affidavit attesting to its ability to pay the required fees for the Lease, imposed pursuant to rules 18-21.008 and 18-21.011, Florida Administrative Code. (RO ¶ 150).

F. Not Contrary to the Public Interest

Rule 18-21.004, Florida Administrative Code, establishes the sovereignty submerged lands management policies, standards, and criteria to be used to determine whether to approve activities on sovereignty submerged lands. (RO ¶ 151).

The term “public interest” is defined to mean “demonstrable environmental, social, and economic benefits which would accrue to the public at large as a result of the proposed action, and which would clearly exceed all demonstrable environmental, social, and economic costs of the proposed action.” Fla. Admin. Code R. 18-21.003(51). (RO ¶ 152).

To meet the “not contrary to the public interest” standard in rule 18-21.004(1)(a), Florida Administrative Code, 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 v. Palmer*, Case Nos. 96-0736, 96-5879 (Fla. DOAH Sept. 1, 1998; Fla. DEP Oct. 19, 1998). (RO ¶ 153).

The City asserts that the Lease is contrary to the public interest, because it will cause adverse impacts to benthic and salt marsh habitat; discharge pollutants into the waters of the Back Channel; harm manatees; pose a navigational hazard; and detract from, and interfere with, recreational activities in the Back Channel. (RO ¶ 154).

However, the ALJ found that the evidence shows that the Project has been designed specifically to minimize many of these impacts, and the Consolidated Authorization contains conditions specifically aimed at preventing these alleged impacts. In addition, the ALJ recommended adding additional conditions to the Consolidated Authorization, discussed in paragraphs 68, 69, 70, 106, and 138 of the RO, to ensure that the Project will not cause adverse impacts to habitat resources, water quality, manatees, and navigation. (RO ¶ 155).

Case law interpreting the public interest test applicable to proprietary approvals in rule 18-21.004(1)(a), Florida Administrative Code, holds that when proposed structures or activities meet the applicable standards and criteria in chapter 18-21, Florida Administrative Code, those structures or activities are presumed to be not contrary to the public interest. *See Spinrad v. Guerra and Dep't of Env'tl. Prot.*, Case No. 13-2254 (Fla. DOAH July 25, 2014), *modified in part*, Case No. 13-0858 (Fla. DEP Sept. 8, 2014); *Haskett v. Rosati and Dep't of Env'tl. Prot.*, Case No. 13-0465 (Fla. DOAH July 31, 2013), *modified in part*, Case No. 13-0040 (Fla. DEP Oct. 29, 2013). (RO ¶ 156).

The ALJ concluded that Workboats has demonstrated that the Project meets all applicable standards and criteria in chapter 18-21, Florida Administrative Code; thus, the Project is presumed to be not contrary to the public interest under rule 18-21.004(1)(a), Florida Administrative Code. The ALJ found that the City did not present persuasive evidence showing that, on balance, the demonstrable environmental, social, and economic costs of the Project exceed the demonstrable environmental, social, and economic benefits accruing to the public. Accordingly, the ALJ determined that the Project meets the public interest test in rule 18-21.004(1)(a), Florida Administrative Code. (RO ¶ 157).

VIII. Entitlement to Environmental Resource Permit

The ALJ concluded that Workboats met its burden under section 120.569(2)(p), Florida Statutes, to present a prima facie case of entitlement to the environmental resource permit by entering into evidence the Application, Notice of Intent, Consolidated Authorization, and supporting information. The ALJ found that Workboats also presented credible, competent, and substantial evidence beyond that required to meet its burden to demonstrate prima facie entitlement to the environmental resource permit. (RO ¶ 158).

The ALJ concluded that the burden then shifted to the City to demonstrate, by a preponderance of the competent substantial evidence, that the Project does not comply with sections 373.413 and 373.414, Florida Statutes, and applicable environmental resource permitting rules. For the reasons discussed above, the ALJ determined that the City did not meet its burden of persuasion under section 120.569(2)(p), Florida Statutes. (RO ¶ 159).

Accordingly, the ALJ determined that, with the inclusion of conditions in the Consolidated Authorization addressed in paragraphs 35, 68, 69, 70, and 106 of the RO, Workboats meets all applicable requirements for issuance of the environmental resource permit for the Project. (RO ¶ 160).

IX. Entitlement to Lease

The ALJ concluded that Workboats bore the burden of proof in this proceeding to demonstrate, by a preponderance of the evidence, that the Project meets all applicable statutory and rule requirements for issuance of the Lease. The ALJ determined that Workboats met this burden; and, therefore, is entitled to issuance of the Lease for the Project. (RO ¶¶ 161-162).

X. The City's Standing

The City is a consolidated municipality and county political subdivision of the State of Florida; and the Project is located within the geographic boundary of the City. (RO ¶ 163).

On or about July 26, 2018, the Council of the City of Jacksonville, Florida, adopted Resolution 2018-499-A, finding that issuance of the environmental resource permit and Lease affects the substantial interests of a significant number of residents in Duval County. (RO ¶ 164).

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, 1087 (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 (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 (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, 1196-97 (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).

In addition, 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 DEFENDANT WORKBOATS' EXCEPTIONS

Workboat's Exception No. 1 regarding Paragraphs 2, 17, 27 (endnote thereto), 84 and 145

The Defendant Workboat takes exception to the findings of fact in paragraphs 2, 17, 27, endnote 7 to paragraph 27, 84 and 145 of the RO, which state that Bill Shafnacker owns the upland property adjacent to the sovereign submerged lands at issue, and "certain submerged lands waterward of Lot 9." (RO at ¶ 84). Workboats alleges that Workboats owns the upland property adjacent to the sovereign submerged lands at issue and referenced submerged lands waterward of Lot 9.

After reviewing the evidence, including the hearing testimony and exhibits, the Department concludes that there is no competent substantial evidence to support the ALJ's conclusions that Bill Shafnacker owns the upland property adjacent to the sovereign submerged lands at issue and "certain submerged lands waterward of Lot 9." *See* § 120.57(1)(l), Fla. Stat. (2018); *Charlotte County*, 18 So. 3d at 1087; *Wills*, 955 So. 2d at 62. Instead, the evidence supports that the above-mentioned lands are owned by the applicant Dames Point Workboats, LLC, for which Mr. Shafnacker is the managing member. *See, e.g.*, Joint Exhibit 1 at pp. 74-88, 96. For the above-mentioned reasons, Workboat's exceptions to the above cited findings in paragraphs 2, 17, 27, endnote 7 to paragraph 27, 84 and 145 of the RO, are accepted.

Based on the foregoing reasons, the Defendant Workboat's Exception No. 1 is granted. The ALJ's findings of fact are accordingly modified in accordance with this Final Order.

Workboat's Exception No. 2 regarding Paragraphs 155 and 192

The Defendant Workboat takes exception to the findings of fact in paragraph 155 and the conclusions of law in paragraph 192 of the RO, alleging that paragraph 155 accidentally omitted a reference to paragraph 35, and that paragraph 192 accidentally omitted a reference to paragraph 137. Upon a thorough review of the RO, the transcript, and the hearing exhibits, the Department agrees that paragraphs 155 and 192 contain scrivener's errors; and that paragraph 155 should have included a reference to paragraph 35, and paragraph 192 should have contained a reference to paragraph 137.

In addition, Workboat takes exception to paragraph 155, alleging that it accidentally cited to paragraph 138 instead of paragraph 137. Upon a thorough review of the RO, the Department agrees that paragraph 155 contains a scrivener's error, and should have cited to paragraph 138, and not to paragraph 137. For the above-mentioned reasons, the Defendant Workboat's exceptions to paragraphs 155 and 192 are accepted.

Based on the foregoing reasons, the Defendant Workboat's Exception No. 2 is granted. The ALJ's findings of fact in paragraph 155 and the conclusions of law in paragraph 192 are accordingly modified in accordance with this Final Order.

RULINGS ON THE PETITIONER CITY'S EXCEPTIONS

The City's Exception No. 1 regarding Paragraph 39

The Petitioner takes exception to the findings of fact in paragraph 39 of the RO, alleging that it "fails to also reference the amended agency action issued on December 11, 2018." City's Exception No. 1, p. 1. The City's exception does not contest that any of the statements in paragraph 39 are not supported by competent substantial evidence. Instead it objects to language not being included. It is irrelevant that paragraph 39 does not reference the amended agency

action issued on December 11, 2018. It is sufficient that the RO references the amended agency action issued on December 11, 2018, on pages 2 and 4 of the RO. *See* RO, p. 2 (Statement of the Issues), and p. 4 (Preliminary Statement). For the abovementioned reasons, the Petitioner's exception to paragraph 39 is rejected.

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

The City's Exception No. 2 regarding Paragraph 63

The Petitioner takes exception to the findings of fact in paragraph 63 of the RO, alleging that this finding of fact "relies on a permit condition and the enforcement of that condition, rather than a specific operational plan and analysis concerning the proposed operations of the facility, regarding suspension of sediments." City's Exception No. 2, p. 1.

When challenging a finding of fact in a RO, the challenging party must allege that the finding is not supported by competent substantial evidence or that the proceeding did not comply with the essential requirements of the law. § 120.57(1)(l), Fla. Stat. (2018); *Charlotte County*, 18 So. 3d at 1087; *Wills*, 955 So. 2d at 62. The Petitioner fails to allege either basis for challenging the findings of fact in paragraph 63 of the RO. Even if the Petitioner had alleged that the findings in paragraph 63 were not supported by competent substantial evidence, its argument still would have failed. The Applicant's findings of fact in paragraph 63 are supported by competent substantial evidence in the form of expert testimony. (Kallemeyn, T. Vol. I, pp. 71-73; Irwin, T. Vol. II, pp. 188-189, 214). For the abovementioned reasons, the Petitioner's exception to paragraph 63 is rejected.

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

The City's Exception No. 3 regarding Paragraph 65

The Petitioner takes exception to the findings of fact in paragraph 65 of the RO, alleging that “reasonable assurances, including but not limited to those regarding sediment re-suspension and operational discharges of pollutants, cannot be established by permit conditions in lieu of a specific analysis of the proposed operations.” City’s Exception No. 3, p. 2.

When challenging a finding of fact in a RO, the challenging party must allege that the finding is not supported by competent substantial evidence or that the proceeding did not comply with the essential requirements of the law. § 120.57(1)(l), Fla. Stat. (2018); *Charlotte County*, 18 So. 3d at 1087; *Wills*, 955 So. 2d at 62. The Petitioner fails to allege either basis for challenging the findings of fact in paragraph 65 of the RO. Even if the Petitioner had alleged that the findings in paragraph 65 were not supported by competent substantial evidence, its argument still would have failed. The ALJ’s findings of fact in paragraph 65 are supported by competent substantial evidence in the form of expert testimony. (Kallemeyn, T. Vol. I, pp. 62-66, 70-73, 82, 130-131; Irwin, T. Vol. II, pp. 188-189, 211-214).

The Petitioner 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.

Moreover, Petitioner’s reference to *Metro Dade Cnty. v. Coscan Fla., Inc.*, 609 So. 2d 644 (Fla. 3d DCA 1992), which is fully cited in Petitioner’s Exception No. 2, is misplaced. The

appellate court in *Coscan* requires that the ALJ weigh the effects of the permit conditions and determine that they provide reasonable assurance before the project is started. *Coscan*, 609 So. 2d at 648. Petitioner appears to contend that the Project's permit conditions are enforcement mechanisms, improperly substituted for required reasonable assurance for the project. Nevertheless, the ALJ's finding in Paragraph 65 is consistent with the holding in *Coscan*, because the ALJ examined the anticipated effects of the permit conditions before finding the permit conditions of the proposed Project provided reasonable assurances regarding compliance with water quality standards. For the abovementioned reasons, the Petitioner's exception to paragraph 65 is rejected.

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

The City's Exception No. 4 regarding Paragraph 66

The Petitioner takes exception to the findings of fact in paragraph 66 of the RO stating that there is no competent substantial evidence in the record to support a finding that the "[p]roject site will be adequately flushed." RO ¶ 66. Contrary to the Petitioner's exception, the ALJ's findings of fact in paragraph 66 are supported by competent substantial evidence in the form of DEP expert testimony by Danielle Irwin. (Irwin, T. Vol. II, pp. 213-14; *see also* Irwin, T. Vol. II, pp. 210-13, for compliance with water quality standards).

In addition, the Petitioner alleges that the Applicant must provide hydrographic information or studies for docking facilities of greater than 10 slips pursuant to section 10.2.4.3 of the Applicant's Handbook, Vol. I. The Petitioner even acknowledged that expert witness Danielle Irwin specifically noted that DEP did not require flushing models for this Project, nor did she think that flushing models would be appropriate, given the tide exchange. (Irwin, T; Vol. II, p. 213-14).

The Petitioner 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, the Petitioner's exception to paragraph 66 is rejected.

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

The City's Exception No. 5 regarding Paragraph 67

The Petitioner takes exception to the findings of fact in paragraph 67 of the RO, stating that "there is no competent substantial evidence in the record to support a finding that the 'submission of a facility management plan to address maintenance and unexpected spills of fuels and other pollutants'" will help ensure that the Project will not violate water quality standards. Petitioner's Exception No. 5, p. 7; RO ¶ 67. Contrary to the City's exception, the ALJ's findings of fact in paragraph 67 are supported by competent substantial evidence in the form of expert testimony. (Kallemeyn, T. Vol. I, pp. 70-72, 142; Irwin, T. Vol II, p. 205).

The Petitioner contends that DEP's proposed permit condition that requires submittal of a facility management plan is conditioning reasonable assurance to sometime in the future, citing generically to *Metro Dade Cnty. v. Coscan Fla., Inc.*, 609 So. 2d 644 (Fla. 3d DCA 1992), without a page citation. The Petitioner has again misinterpreted *Coscan*. *Coscan* requires that the ALJ weigh the effects of the permit conditions and determine that they provide reasonable assurance before the project is started. *Coscan*, 609 So. 2d at 648. The ALJ's finding in

paragraph 67 of the RO is consistent with the holding in *Coscan*, because the ALJ examined the anticipated effects of the permit conditions before finding the permit conditions of the proposed Project provided reasonable assurances regarding compliance with water quality standards. For the abovementioned reasons, the Petitioner's exception to paragraph 67 is rejected.

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

The City's Exception No. 6 regarding Paragraph 71

The Petitioner takes exception to the finding of fact in paragraph 71 of the RO, which finds that "with the addition of the conditions discussed in paragraphs 68, 69, and 70 above [of the RO], Workboats has provided reasonable assurance that applicable water quality standards will not be violated as a result of construction or operation of the Project." (RO ¶ 71). Contrary to the Petitioner's exception, the ALJ's finding of fact in paragraph 71 is supported by competent substantial evidence in the form of DEP expert testimony by Danielle Irwin. (Irwin, T. Vol. II, pp. 210-14).

The Petitioner 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, the Petitioner's exception to paragraph 71 is rejected.

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

The City's Exception No. 7 regarding Paragraph 87

The Petitioner takes exception to the finding of fact in paragraph 87 of the RO, which states that “[n]o other environmental resource permitting rule or Handbook provisions impose any other requirements regarding financial capability” other than the requirements identified in paragraphs 82 through 86 of the RO. The Petitioner takes exception with the financial rule requirements in rule 62-330.301, Florida Administrative Code, the ERP Applicant’s Handbook, and the ERP application, as spelled out in paragraphs 82 through 86 of the RO. The Petitioner summarizes the financial showing required by an ERP applicant as follows: (1) evidence of sufficient upland interest, (2) signature on the application by an applicant and/or an agent of the applicant, and (3) submission of as-built drawings at the end of the construction phase. However, the Petitioner urges that more is required. Specifically, the Petitioner argues that rule 62-330.301(1)(j), Florida Administrative Code, requires more than what the ERP statutes and rules require.

The Department concludes that paragraph 87 is actually a conclusion of law, and not a finding of fact, which refers back to the financial rule requirements in chapter 62-330.301, Florida Administrative Code, the Environmental Resource Permit (ERP) Applicant’s Handbook (Handbook), and the ERP application, as spelled out by the ALJ in paragraphs 82 through 86 of the RO. The Petitioner rejected the ALJ’s conclusions of law in paragraph 87 without any legal analysis. Exception No. 7 fails to identify, by citation to statute, rule or case law, why the ALJ’s conclusions of law in paragraph 87 are erroneous. Moreover, the Department is not required to consider exceptions that do not clearly identify the legal basis for the exception. *See* §120.57(1)(k), Fla. Stat. (2018).

Moreover, the Department agrees with the ALJ's interpretation of the financial assurance requirements for an ERP permit. An agency's interpretation of its statutes and rules within its regulatory jurisdiction does not have to be the only reasonable interpretation. It is enough if such agency interpretation is a "permissible" one. *See, e.g., Suddath Van Lines, Inc. v. Dep't of Envtl. Prot.*, 668 So. 2d 209, 212 (Fla. 1st DCA 1996). For the abovementioned reasons, the Petitioner's exception to paragraph 88 is rejected.

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

The City's Exception No. 8 regarding Paragraph 88

The Petitioner takes exception to the finding of fact in paragraph 88 of the RO, alleging that there is no competent substantial evidence establishing that Workboats "has the financial . . . capability to ensure the Project will be undertaken in accordance with the terms and conditions of the Consolidated Authorization." (RO ¶ 88). Contrary to the Petitioner's exception, the ALJ's finding of fact in paragraph 88 is supported by competent substantial evidence in the form of DEP expert testimony by Thomas Kallemeyn and Joint Exhibit 1. (Kallemeyn, T. Vol. I, pp. 79-81; Joint Ex. 1, pp. 11, 18, 84-88, 96).

The Petitioner 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, the Petitioner's exception to paragraph 88 is rejected.

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

The City's Exception No. 9 regarding Paragraphs 89, 159 and 180

The Petitioner takes exception to the findings of fact in paragraphs 89 and 159, and the conclusions of law in paragraph 180 of the RO, alleging that the "City was under no burden to affirmatively prove the applicant's lack of project financing." Petitioner's Exception No. 9, p. 4.

The Petitioner misstates the provisions of section 120.569(2)(p), Florida Statutes, which reads, in pertinent part, as follow:

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.

§ 120.569(2)(p), Fla. Stat. (2018) (emphasis added).

The Applicant Dames Point met its burden to present a prima facie case by entering into evidence the Application, Notice of Intent, Consolidated Authorization, and supporting documentation. (RO ¶ 158). Nevertheless, the Petitioner argues that it does not have the burden to prove a case in opposition to the Applicant's prima facie case demonstrating entitlement to the proposed ERP permit. The Petitioner does not contest the finding in paragraph 89 that the Petitioner "did not present any evidence to show that Workboats lacks the financial, legal, and administrative capability to undertake the Project as permitted." (RO ¶ 89). The Petitioner has mis-construed the burden shifting in section 120.569(2)(p), Florida Statutes. Contrary to the

Petitioner's analysis, the burden of persuasion and proof shifted to the Petitioners to "prove the applicant's lack of project financing." City's Exception No. 9, p. 4.

Moreover, the Petitioner reasoned that based on its interpretation of the burden of proof in Section 120.569(2)(p), Florida Statutes, findings of fact 89 and 159 "mis-construct the nature of the shifted burden." City's Exception No. 9, p. 5. Since the Department rejects the Petitioners legal interpretation of section 120.569(2)(p), Florida Statutes, the Department also rejects the Petitioner's contention that paragraphs 89 and 159 of the RO "mis-construct the nature of the shifted burden." *Id.*

Last, but not least important, 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*, 805 So. 2d at 1012; *L.B. Bryan & Co.*, 746 So. 2d at 1196-97; *Deep Lagoon Boat Club, Ltd.*, 784 So. 2d at 1141-42. DEP does not have authority to reject the ALJ's interpretation of Section 120.569(2)(p), Florida Statutes, since this statutory provision is not one over which it has substantive jurisdiction. Even if DEP disagreed with the ALJ's interpretation of Section 120.569(2)(p), Florida Statutes, it does not have the authority to reject the ALJ's interpretation of this statutory provision. For the abovementioned reasons, the Petitioner's exception to paragraphs 89, 159, and 180 is rejected.

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

The City's Exception No. 10 regarding Paragraphs 92, 100, 101, and 139

The Petitioner takes exception to the findings of fact in paragraphs 92, 100, 101, and 139 of the RO, stating that manatee protection and resuspension of bottom sediments are established only by compliance with the permit conditions. The Petitioner alleges that an operational plan must be prepared to provide "reasonable assurance that violations of the 12-inch clearance

requirement will not occur.” City’s Exception No. 10, p. 5. Contrary to the Petitioner’s exception, the ALJ’s findings of fact in paragraphs 92, 100, 101, and 139 regarding manatee protection and compliance with surface water quality standards are supported by competent substantial evidence in the form of expert testimony by Thomas Kallemeyn and Danielle Irwin, Joint Exhibits from the DOAH hearing, and conditions in the Consolidated Authorization. (Kallemeyn, T. Vol. I, pp. 73-75, 85-95; Irwin, T. Vol. II, pp. 210-14; and Joint Ex. 3, pp. 137-39, 140-41, 146, 148 (Standard Manatee Conditions for In-Water Work), 149 (Manatee Caution Sign); Joint Ex. 4, pp. 150-323 (City of Jacksonville’s Manatee Protection Plan, 4th ed.).

The Petitioner 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, the Petitioner’s exception to paragraphs 92, 100, 101, and 139 is rejected.

Based on the foregoing reasons, the Petitioner’s Exception No. 10 is denied.

The City’s Exception No. 11 regarding Paragraphs 157 and 162

The Petitioner takes exception to the findings of fact in paragraphs 157 and 162 of the RO, alleging in totality that “For the specific reasons set forth in paragraph 10 above, the City takes exception to the general proposition in Findings of Fact 157 and 162 that the project meets all applicable standards and criteria in Chapter 18-21, F.A.C.” Paragraph 157 of the RO states that “Workboats has demonstrated that the Project meets all applicable standards and criteria in

chapter 18-21; thus, the Project is presumed to be not contrary to the public interest under rule 18-21.004(1)(a).” Paragraph 162 states in totality that “For the reasons discussed above, it is determined that Workboats met this burden, and therefore, is entitled to issuance of the Lease for the Project.” The Department concludes that paragraphs 157 and 162 contain mixed findings of fact and conclusions of law.

The Petitioner’s terse Exception No 11 does not articulate a clear legal basis for its exception to paragraphs 157 and 162 of the RO. 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.” (emphasis added). *Id.* For this reason alone, the Department should reject Exception No. 11 or not rule on it at all. Nevertheless, the Department will attempt to make sense of Petitioner’s Exception No. 11.

The Petitioner takes exception to the ALJ’s position that the project meets all applicable standards and criteria in chapter 18-21, Florida Administrative Code. Contrary to the Petitioner’s exception, the ALJ’s findings of fact in paragraphs 157 and 162 are supported by competent substantial evidence in the form of expert testimony by Thomas Kallemeyn and Danielle Irwin, Joint Exhibits from the DOAH hearing, and conditions in the Consolidated Authorization. (Kallemeyn, T. Vol. I, pp. 65-66, 68, 84-85, 89; Irwin, T. Vol. II, pp. 182-183, 189-198, 210-214; White, T. Vol. III, pp. 366, 370). The Department agrees with the ALJ’s mixed conclusions of law and findings of fact.

The Petitioner 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, the Petitioner's exception to paragraphs 157 and 162 is rejected.

Based on the foregoing reasons, the Petitioner's Exception No. 11 is denied.

The City's Exception No. 12 regarding Paragraphs 157 and 162

The Petitioner takes exception to the findings of fact in paragraphs 157 and 162 of the RO, alleging that "the ALJ failed to consider evidence of the upland zoning restrictions on Lots 6, 7, and 9," citing to rule 18-008(1)(a)6., Florida Administrative Code.¹

The ALJ repeatedly rejected the Petitioner's contention that the Board of Trustee's rules require DEP staff, on behalf of the Board of Trustees, to consider zoning restrictions under the public interest test in rule 18.21.004, Florida Administrative Code. The ALJ succinctly stated in footnote 21 to paragraph 157 of the RO that

The City also asserts that 'upland zoning restrictions prohibit the Applicant from lawfully using two of the three proposed docks for the stated purpose,' so that granting of the Lease would unnecessarily preempt sovereignty submerged lands from public use, this further reducing any benefits of the Project for purposes of the public interest test in rule 18-2.004(1)(a). However, rule 18-21.004(1)(a) states that for approval, all activities on sovereignty lands must not be contrary to the public interest. Thus, alleged unlawful use of privately-owned upland property is not germane to the public interest test under rule 18-21.004(1)(a).

¹ The Petitioner erroneously cited to rule 18-21.008(1)(a)6.008, Florida Administrative Code, which does not exist. Based on the context of the exception and the quotation cited by the Petitioner, the Department concludes that the Petitioner intended to cite to rule 18-21.008(1)(a)6., Florida Administrative Code.

RO, footnote 21 to ¶ 157.

The Petitioner never once cited to rule 18-21.008, Florida Administrative Code, as the reason the Board of Trustees was required to consider zoning. The Petitioner did not cite to this rule when it (1) stipulated to prehearing issues, (2) twice filed pleadings, directly on-point, in response to a motion in limine, and in a motion for reconsideration after the ALJ excluded zoning issues, (3) twice raised zoning during significant oral argument (T. Vol. I, pp. 12-31), (4) proffered zoning evidence and argument at the end of the hearing, and (5) raised zoning requirements in its PRO.² The Petitioner cannot raise this argument for the first time in its Exceptions.

Moreover, the ALJ found that competent substantial evidence was presented at the hearing that the application and Project meet the standards required by Chapter 18-21, Florida Administrative Code. 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 187; *Wills*, 955 So. 2d at 62.

Contrary to the Petitioner’s arguments, the ALJ’s findings in paragraphs 157 and 162 are supported by competent substantial evidence. (Kallemeyn, T. Vol. I, pp. 65-66, 68, 84-85, 89; Irwin, T. Vol. II, pp. 182-183, 189-198, 211-214; White, T. Vol. III, pp. 366, 370).

² The ALJ also ruled that upland zoning was outside the jurisdiction of this hearing in her Order on Motion in Limine and for Protective Order. The order stated that section 1.5.3 of the ERP Applicant’s Handbook Volume I “expressly excludes, from the scope of this proceedings, any requirement that the land use to be served by the proposed project be consistent with the site’s existing zoning.” Order dated Dec. 6, 2018, p. 2. Section 1.5.3 of the Applicant’s Handbook specifically states that “[t]he proposed land use to be served by an activity regulated under Chapter 62-330, F.A.C., does not have to be consistent with the local government’s comprehensive plan or existing zoning for the site.”

The Petitioner seeks to have the Department reweigh the evidence. However, 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*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307; *Dunham*, 652 So. 2d at 896. 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.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623. Since the findings of fact disputed by the Petitioner in Exception 12 are based on competent substantial evidence, the Department may not reject the ALJ's findings of fact.

Furthermore, the Petitioner cites to a rule that is no longer in effect. Rule 18-008, Florida Administrative Code, was amended effective March 21, 2019. Petitioner was on notice of this amendment to the rule, because it was published several weeks before the Petitioner filed its exceptions on March 18, 2019. Rule 18-21.008, Florida Administrative Code, as amended, removes any consideration of upland zoning. An "agency must apply the law in effect at the time it makes its final decision" *AHCA v. Mt. Sinai Med. Center*, 690 So. 2d 689, 691 (Fla. 1st DCA 1997) (applies the broad standard to administrative rules); *Lavernia v. Dep't of Prof'l Regulation*, 616 So. 2d 53, 54-55 (Fla. 1st DCA 1993). Because this Final Order will be entered in accordance with amended rule 18-21.008, Florida Administrative Code, upland zoning is not applicable to the BOT authorization. For the abovementioned reasons, the Petitioner's exception to paragraphs 157 and 162 is rejected.

Based on the foregoing reasons, the Petitioner's Exception No. 12 is denied.

The City's Exception No. 13 regarding Paragraphs 160, 192, and 198

The Petitioner takes exception to the findings of fact in paragraph 160, and the conclusions of law in paragraphs 192 and 198 of the RO. To begin, the Department concludes that paragraph 160 is a conclusion of law and not a finding of fact, because the paragraph concludes that with the addition of the conditions in paragraphs 35, 68, 69, 70, and 106 of the RO "Workboats meets all applicable requirements for issuance of the environmental resource permit for the Project." (RO ¶ 160). Similarly, the conclusion of law in paragraph 192 of the RO states that:

with the inclusion of the conditions currently contained in the Consolidated Authorization, as well as the conditions addressed in paragraphs 35, 68, 69, 70, and 106, above, the Project meets the pertinent requirements of sections 373.413 and 373.414(1)(a) and implementing rules, so [it] is entitled to issuance of the environmental resource permit for the Project.

RO ¶ 192.

Moreover, the ALJ similarly concludes in paragraph 198 of the RO that the proposed Project meets the requirements for issuance of an environmental resource permit, in addition to the requirements for a Lease. Paragraph 198, reads, in pertinent part, that:

with the inclusion of the [sic] all of the conditions currently included in the draft Consolidated Authorization, and the inclusion of the conditions addressed in paragraphs 35, 68, 69, 70, 106, and 137 above, the Project will meet all applicable statutory and rule requirements for issuance of the environmental resource permit and the Lease.

RO ¶ 198.

The Petitioner contends that the ALJ could not, as a matter of law, conclude that the Project application meets the statutory and rule criteria for issuance of an environmental resource permit without the factual findings in paragraphs 63, 65, 66, 67, 71, 88, 89, 92, 100, 101, and 159. However, the Department herein above has rejected each of the Petitioner's exceptions to

the findings in paragraphs 63, 65, 66, 67, 71, 88, 89, 92, 100, 101, and 159, finding each paragraph was supported by competent substantial evidence. As a result, the Petitioner has no basis to allege that the Project application does not meet the statutory and rule criteria for issuance of an environmental resource permit. For the abovementioned reasons, the Petitioner's exceptions to paragraphs 160, 192, and 198 are rejected.

Based on the foregoing reasons, the Petitioner's Exception No. 13 is denied.

The City's Exception No. 14 regarding Paragraphs 157, 162, 197, and 198

The Petitioner takes exception to the findings of fact in paragraphs 157 and 162, and the conclusions of law in paragraphs 197 and 198 of the RO, alleging that the ALJ could not "as a matter of law, conclude that the application meets the statutory and rule criteria for ERP issuance." City's Exception No. 14, p. 7. However, the Petitioner does not clearly articulate any legal basis for its exception and confuses the ERP criteria with the BOT criteria. 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." (emphasis added). *Id.* For this reason alone, the Department should reject Exception No. 14 or not rule on it at all. Nevertheless, the Department will attempt to make sense of the Petitioner's Exception No. 14.

The Petitioner appears to take the position that its exception to the ALJ's findings of fact in paragraph 139 in the RO will be accepted by the Department. *See* City's Exception No. 10, p. 5. Similarly, the Petitioner takes the position that Dames Point will be unable to lawfully use

two of its three proposed docks; however, the Petitioner provides no legal or factual explanation or reference to any previous exception. The Department assumes that the Petitioner intends to rely on its arguments in Exception No. 12 that consideration of the upland zoning restrictions on Lots 6, 7, and 9 will prohibit Dames Point from “lawfully access[ing] two of the three proposed docks for the commercial purposes stated in the application.” City’s Exception No. 12, p. 6.

First, the Department denied the Petitioner’s Exception No. 10, in which it took exception to four findings of fact, including the findings in paragraph 139 of the RO. Contrary to the Petitioner’s exception, the ALJ’s findings of fact in paragraph 139 are supported by competent substantial evidence in the form of expert testimony by Thomas Kallemeyn and Danielle Irwin, Joint Exhibits from the DOAH hearing, and conditions in the Consolidated Authorization. (Kallemeyn, T. Vol. I, pp. 73-75, 85-95; Irwin, T. Vol. II, pp. 210-14; and Joint Ex. 3, pp. 137-39, 140-41, 146, 148 (Standard Manatee Conditions for In-Water Work), 149 (Manatee Caution Sign); Joint Ex. 4, pp. 150-323 (City of Jacksonville’s Manatee Protection Plan, 4th ed.).

The Petitioner 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, the Department rejected the Petitioner’s Exception to paragraph 139 of the RO when articulated in Petitioner’s Exception No. 10.

Second, the Petitioner's exception to paragraphs 157, 162, 197, and 198 of the RO alleges that the ALJ could not "as a matter of law, conclude that the application meets the statutory and rule criteria for ERP issuance." City's Exception No. 14, p. 7. However, paragraphs 157, 162, and 197, do not mention the proposed ERP permit or ERP statutory or rule criteria. Instead, paragraphs 157, 162, and 197 discuss the BOT statutory and rule criteria and the BOT Lease. This alone serves as a basis to deny Petitioner's exception to paragraphs 157, 162, and 197 of the RO. The Petitioner took exception to the ultimate conclusion of law in paragraph 198 of the RO in Exception No. 13 above. In paragraph 198, the ALJ concludes that the proposed Project meets the requirements for issuance of an environmental resource permit, in addition to the requirements for a BOT Lease. The Petitioner contends that the ALJ could not, as a matter of law, conclude that the Project application meets the statutory and rule criteria for issuance of an environmental resource permit without the factual findings in paragraphs 63, 65, 66, 67, 71, 88, 89, 92, 100, 101, and 159. However, the Department herein above has rejected each of the Petitioner's exceptions to the findings in paragraphs 63, 65, 66, 67, 71, 88, 89, 92, 100, 101, and 159, finding each paragraph was supported by competent substantial evidence. The Department incorporates its rationale above for ruling on these findings within this ruling on Petitioner's Exception No. 14. As a result, the Petitioner has no basis to allege that the Project application does not meet the statutory and rule criteria for issuance of an environmental resource permit. For the abovementioned reasons, the Petitioner's exception to paragraphs 157, 162, 197, and 198 is rejected.

Based on the foregoing reasons, the Petitioner's Exception No. 14 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. Consolidated Environmental Resource Permit No. 16-0345934-003-EI and State-owned Submerged Lands Authorization BOT No. 160354092 is APPROVED, as modified to include the additional conditions addressed in paragraphs 35, 68, 69, 70, 106, and 137 of the DOAH Recommended Order. In accordance thereto, the following conditions shall be added (or modified) to both the ERP permit and the State-owned Submerged Lands Authorization:

1. The permittee shall only load vessels from Dock B, which is appurtenant to Lot 8. In addition, the permittee shall only use small and light equipment, such as mini-excavators, small forklifts, or similarly-sized equipment, to load and unload equipment to and from Dock B.

2. This Permit prohibits sewage pump-outs at the docks or on vessels, and the discharge of ash waste. In addition, domestic waste from boat heads shall be handled through use of a waterless incinerating toilet (i.e., Incinolet or similar such toilet).

3. This Permit prohibits the installation and use of fueling equipment at any of the Docks; the discharge of waste into the water; liveaboards; fish cleaning or the installation of fish cleaning stations; repair and maintenance activities involving scraping, sanding, stripping, recoating, and other activities that may degrade water quality or release pollutants into waters of the state. Major repair, reconstruction, and/or other service must be performed at a facility

approved for vessel haul-out and repair. This does not preclude the light maintenance allowed under Specific Condition 18 to be performed at the facility.

4. The permittee shall not use lead-based paints or other sources of lead, such as lead-containing welding equipment, on Docks A, B, and C or vessels moored in the Lease area.

5. Specific Condition No. 13 (Docks) of the permit shall be modified as follows:
The permittee shall mark each barge and mooring dolphin by both a sufficient number of reflectors and solar battery-powered lights, so they will be visible from the water at night. The reflectors shall **not** be green or red in color.

6. The permittee is prohibited from conducting any major repair, reconstruction, or maintenance activities within the Lease area, to ensure that only water dependent activities are conducted within the Lease area.

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 12th day of April, 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.

Spide-Kuy 4/14/19
CLERK DATE
Deputy


CERTIFICATE OF SERVICE

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

Sidney F. Ansbacher, Esquire Upchurch, Bailey, and Upchurch, P.A. Post Office Drawer 3007 St. Augustine, FL 32085-3007 sfansbacher@ubulaw.com	Jason R. Teal, Esquire Jeffrey C. Close, Esquire City of Jacksonville 117 West Duval Street, Suite 480 Jacksonville, FL 32202 jteal@coj.net jclose@coj.net
J. Patrick Reynolds, Esquire Kathryn E.D. Lewis, Esquire Department of Environmental Protection 3900 Commonwealth Blvd., MS 35 Tallahassee, FL 32399-3000 Patrick.Reynolds@FloridaDEP.gov Kathryn.Lewis@FloridaDEP.gov	

this 12th day of April, 2019.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION


STACEY D. COWLEY
Administrative Law Counsel

3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000
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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CITY OF JACKSONVILLE,

Petitioner,

vs

Case No. 18-5246

DAMES POINT WORKBOATS, LLC, 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),^{1/} before Cathy M. Sellers, an Administrative Law Judge of the Division of Administrative Hearings ("DOAH"), on December 12 and 13, 2018, in Jacksonville, Florida.

APPEARANCES

For Petitioners: Jason R. Teal, Esquire
Jeffrey C. Close, Esquire
City of Jacksonville
117 West Duval Street, Suite 480
Jacksonville, Florida 32202

For Respondent Dames Point Workboats, LLC:

Sidney F. Ansbacher, Esquire
Upchurch, Bailey, and Upchurch, P.A.
Post Office Drawer 3007
St. Augustine, Florida 32085-3007

Exhibit A

For Respondent Department of Environmental Protection:

Jay Patrick Reynolds, Esquire
Kathryn E.D. Lewis, Esquire
Department of Environmental Protection
Douglas Building, Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

STATEMENT OF THE ISSUE

The issue is whether Respondent, Dames Point Workboats, LLC, is entitled to issuance of the Consolidated Environmental Resource Permit and Recommended Intent to Grant Sovereignty Submerged Lands Authorization, Permit No. 16-0345934-003-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 20, 2018, and subsequently amended on December 11, 2018.

PRELIMINARY STATEMENT

On July 20, 2018, the Department of Environmental Protection ("DEP") issued a Consolidated Notice of Intent to Issue Environmental Resource Permit and Lease to Use Sovereign Submerged Lands ("Notice of Intent") to Dames Point Workboats, LLC ("Workboats"), proposing to issue a Consolidated Environmental Resource Permit and Recommended Intent to Grant Sovereignty Submerged Lands Authorization (the "Consolidated Authorization"), consisting of an environmental resource permit

and sovereignty submerged lands lease ("Lease"), authorizing Workboats to construct and operate a commercial tugboat and barge mooring and loading/offloading facility ("Project") on the St. Johns River, in Jacksonville, Florida. Petitioner, City of Jacksonville ("City"), 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).

The final hearing initially was scheduled for December 10 through 12, 2018, but was rescheduled to December 12 and 13, 2018, pursuant to Petitioner City of Jacksonville's Motion for Continuance filed on November 20, 2018.

On November 16, 2018, Workboats filed an Amended Motion in Limine and for Protective Order ("Motion"). On November 26, 2018, the City filed Petitioner City of Jacksonville's Response in Opposition to Respondent Dames Point Workboats, LLC's Motion in Limine and for Protective Order ("Response"). The undersigned conducted a telephonic motion hearing on the Motion and Response, and issued an Order on Motion in Limine and for Protective Order ("Order in Limine") on December 6, 2018, granting Workboats' Motion to exclude evidence and argument regarding alleged noncompliance of Workboats' upland land uses with the City's zoning code,^{2/} and denying Workboats' Motion

seeking to protect certain financial information from discovery, subject to conditions specified in the Order in Limine.

On December 11, 2018, the City filed Petitioner City of Jacksonville's Motion for Clarification and/or Reconsideration ("Motion for Reconsideration"), seeking clarification or reconsideration of the exclusion of evidence regarding the Project's alleged noncompliance with zoning with respect to approval of the Lease. That same day, Workboats filed Respondent Dames Point Workboats LLC's Response in Opposition to Petitioner City of Jacksonville Motion for Clarification and/or Reconsideration ("Response in Opposition"). The undersigned heard oral argument on the Motion and Response in Opposition at the final hearing and ore tenus denied the Motion for Reconsideration, on the basis that the public interest determination pursuant to chapter 253, Florida Statutes, and Florida Administrative Code Chapter 18-21 does not contemplate the consideration of upland zoning compliance issues in determining whether to grant or deny use of sovereignty submerged lands.^{3/}

Also on December 11, 2018, DEP issued Respondent Department of Environmental Protection's Notice of Filing Amended Agency Action, correcting and updating information regarding the Project. The amended agency action consists of a draft amended

Consolidated Authorization, which is the subject of this proceeding, and has been admitted into evidence as Joint Exhibit 3.

The final hearing was held on December 12 and 13, 2018. Joint Exhibits 1 through 6 and Exhibit A were admitted into evidence pursuant to the parties' stipulation. The City presented the testimony of Dr. A. Quinton White, Scott O'Conner, and Robert Wood. Petitioner's Exhibits 7 through 15 were admitted into evidence without objection, and official recognition of Petitioner's Exhibit 16 was taken. Respondent Workboats presented the testimony of Danielle Irwin, Bruce Hallett, and William Shafnacker, and Respondent's Exhibits 17 through 21 were admitted into evidence without objection. Respondent DEP presented the testimony of Tom Kallemeyn.

The four-volume Transcript of the final hearing was filed at DOAH on January 18, 2019. The parties timely filed their proposed recommended orders on January 28, 2019, and the undersigned has given them due consideration in preparing this Recommended Order.

FINDINGS OF FACT

I. The Parties

1. Petitioner City is a consolidated municipality and county political subdivision of the State of Florida. The Project is located within the geographic boundary of the City.

The City initiated this proceeding by filing its Verified Petition for Formal Administrative Hearing ("Petition") with DEP on August 17, 2018.

2. Respondent Workboats is the applicant for the Project. Its business address is 5118 Heckscher Drive, Jacksonville, Florida 32226. Workboats' owner, Shafnacker, owns the property located upland of the sovereignty submerged lands on which the Project is proposed to be constructed and operated.

3. 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 those statutes. Pursuant to that authority, DEP determines whether to issue or deny applications for environmental resource permits. Pursuant to section 253.002, 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 sovereignty submerged lands leases.

II. The Back Channel and Vicinity of the Project

4. The Project is proposed to be located in the "Back Channel" area of the St. Johns River, directly across from Blount Island.

5. The Back Channel, as a part of the St. Johns River, is classified as a Class III waterbody. It is not designated an Outstanding Florida Water, is not located within an Aquatic Preserve, and is not designated for Shellfish Propagation or Harvesting.

6. The Back Channel is configured in the shape of an inverted "U" and runs between Blount Island and Heckscher Drive, from the southeast corner of Blount Island to the bridges located on the northwest side of Blount Island. It constitutes a portion of the historic main channel of the St. Johns River and was used for all vessel navigation in the river until the Dames Point Cut was dredged through a peninsula to the south, creating Blount Island and a new straight channel to the Atlantic Ocean. Most vessels, including large ships, use the Dames Point Cut for ingress into and egress from the St. Johns River. However, the Back Channel remains navigable and is used for recreational activities and some commercial and industrial navigation.

7. A mix of residential, commercial, and industrial and land uses is located on the north shore of the Back Channel in the vicinity of the Project. These uses consist of approximately 90 single-family residences having docks, three fish camps/recreational marinas, two restaurants, and docking structures used for mooring inshore shrimping vessels.

8. A docking facility owned by M & M Shrimp and used for mooring shrimping vessels is located on the Back Channel immediately to the west of the Project site.

9. A residence owned by Wood is located on the Back Channel immediately east of the Project site. Four other residences are located immediately east of Wood's residence, and back up to the Back Channel. Most of the shoreline on which these residences are located consists of riprap; however, a small patch of salt marsh borders the shoreline on Wood's residential parcel.

10. Although Blount Island is a heavy industrial port, its northern shoreline on the Back Channel, across from the proposed Project site, consists of relatively undisturbed salt marsh and trees. The northeastern shoreline of the Back Channel generally consists of salt marsh and riprap, with docks constructed along the shoreline.

11. Two bridges connect Blount Island to the mainland a short distance west of the proposed Project. These bridges each have a clearance of approximately ten feet, so they cannot be cleared by large vessels. As a practical matter, this has the effect of limiting the size of vessels that use the Back Channel in the vicinity of the Project.

12. The Back Channel west of the bridges to the southwestern tip of Blount Island is fronted by heavy industrial

uses, and numerous multi-family residential and industrial docking facilities are located in this area.

13. A slow speed, minimum wake zone for boat operations extends 300 feet out into the Back Channel from both the north and south shorelines.

14. The Back Channel is approximately 1,340 feet wide at the point at which the Project is proposed to be constructed.

III. The Proposed Project

15. The proposed Project will be constructed and operated^{4/} as a commercial tugboat/work boats mooring and loading/offloading facility.

16. The Project is proposed to be constructed and operated on sovereignty submerged lands^{5/} and in surface waters subject to State of Florida regulatory jurisdiction. Therefore, an environmental resource permit and sovereignty submerged lands lease are required for construction and operation of the Project.^{6/}

17. The Project will be located waterward of the mean high water line on sovereignty submerged lands adjacent to four upland waterfront parcels that are owned by Shafnacker. These lots are: Lot 6 (5100 Heckscher Drive, RE 159971 0000); Lot 7 (5110 Heckscher Drive, RE 159972 0000); Lot 8 (5118 Heckscher Drive, RE 159973 0000); and Lot 9 (5120 Heckscher Drive, RE 159974 0000). Collectively, these lots have approximately

425 feet of linear shoreline, as measured at the mean high water line, bordering the Back Channel. This shoreline is comprised of salt marsh and riprap.

18. A substantial portion of lots 6, 7, and 8 consists of salt marsh wetlands. No structures are proposed to be constructed on Lot 6. The salt marsh areas on lots 7 and 8 are traversed by existing pile-supported piers/access docks. To the extent they are replaced, such replacement will be by like-for-like structures, so there will be no new impact to the salt marsh wetlands on these lots. Most of Lot 9 consists of upland, some of which is authorized to be refilled under the Consolidated Authorization. A small wetland area consisting of approximately 18 square feet of salt marsh will be crossed by a new dock, but will not be filled or otherwise physically impacted.

19. Dock A is proposed to be located on sovereignty submerged lands waterward of Lot 7, and will consist of a 15.4-foot-long by 8-foot-wide extension added to the waterward end of an existing 150.8-foot-long by 8-foot-wide wooden dock, plus a 4-foot-long gangway attached to the waterward end of the extension, which will connect to a 100-foot-long by 9.5-foot wide concrete floating dock.

20. Dock B is proposed to be located on sovereignty submerged lands waterward of Lot 8, and will consist of a

40-foot-long by 10.3-foot-wide concrete floating dock with an 18-foot-long by 6-foot-wide platform, and a 4-foot-long gangway attached to an existing 125.2-foot-long by 5-foot-wide wooden dock.

21. Dock C is proposed to be located on Lot 9, and will consist of a new inverted-L-shaped dock consisting of a 71-foot-long by four-foot wide pile-supported finger dock extending perpendicular to the shoreline into the Lease area, and a 26-foot long by 4-foot-wide dock running roughly parallel to the shoreline that will be constructed outside of the Lease area.

22. Four wooden pilings also are proposed to be installed waterward of Lot 9. Three of these pilings will be located along the eastern boundary of the Lease, and the piling closest to the shoreline of Lot 9 will be located outside of the Lease area. All of these pilings will be set back 25 feet from Workboats' eastern riparian rights line.

23. The newly constructed piling-supported dock additions to docks A and B, and new Dock C, will be elevated four feet above the marsh and will be constructed by hand-laying planks from the shoreline outward into the water, using the previously-laid planks as support while laying the new planks.

24. Three three-pile mooring dolphins also are proposed as part of the Project. They will be installed within the Lease area, set back 38 feet from the southern boundary.

25. No dredging is proposed or authorized for the Project.

26. The Lease will be issued for a term of ten years and will preempt approximately 49,746 square feet of sovereignty submerged lands. The western boundary of the Lease is located 25 feet east of the upland property's western riparian rights line, and the eastern boundary of the Lease is located 25 feet west of the upland property's eastern riparian rights line.

27. With the exception of a portion of Dock C and one wood piling that will be constructed on submerged land owned by Shafnacker,^{7/} all other structures proposed as part of the Project will be constructed within the boundaries of the Lease, and all vessel mooring and over-water operational activities authorized as part of the Project will occur within the Lease area.

28. The Consolidated Authorization authorizes the placement of approximately 3,500 square feet of fill landward of the mean high water line and the jurisdictional wetland line, to replace historic fill eroded by hurricanes in 2017.

29. Additionally, as a condition of the Consolidated Authorization, Workboats is required to restore approximately 250 square feet of salt marsh cord grass waterward of the mean high water line on Lot 9 as corrective action for unauthorized filling/destruction of salt marsh wetlands.

30. As noted above, when constructed, the Project will operate as a tugboat/work boats mooring and loading/unloading facility. Workboats owns a fleet of approximately 40 vessels, comprised of barges, tow/push boats, and work boats, which are used to provide a range of marine services to third parties, including the transport/delivery of food and other supplies; artificial reef placement; marine demolition; and pile driving. These vessels will be moored at the docks, mooring dolphins, and mooring piles comprising the Project.^{8/}

31. Of these 40 vessels, 28 are barges that range from ten to 130 feet in length, and have drafts ranging from 1.5 to 7.5 feet deep. The remaining 12 vessels are boats that range from 14 to 46.2 feet in length, and have drafts ranging from one foot to 6.8 feet deep.

32. The water depths within the Lease area range from one tenth of one foot immediately adjacent to the shoreline, to between 39.5 and 43.5 feet deep at mean low water at the southern boundary of the Lease.

33. Only one or two of the smaller boats in Workboats' fleet have drafts that are shallow enough to enable them to moor on the shoreward sides of Docks A and B. In any event, all vessels must moor in areas within the Lease area having depths at mean low water sufficient to ensure that they do not come into contact with submerged resources. To that end, a condition

is included in the Consolidated Authorization requiring a minimum 12-inch clearance between the deepest draft of a vessel with the motor in the "down" position and the top of submerged resources at mean low water.

34. The parties stipulated, and Shafnacker testified, that with the exception of the 32-foot-long Marlin Barge and the 10-foot-long Galligan barges, all other barges in Workboats' fleet will moor at the three-pile dolphins near the southern boundary of the Lease. Some barges will be anchored to the substrate by spuds, and the condition requiring 12 inches of clearance between the vessel bottom and the top of submerged resources would not apply to the spuds themselves.

35. The parties stipulated, and Shafnacker testified, that Workboats will only load vessels from Dock B, which is appurtenant to Lot 8, and that the only equipment that will be used to load vessels will be equipment small and light enough to traverse Dock B—specifically, a Takeuchi mini-excavator, small forklift, or similarly-sized equipment. These limitations regarding the loading of vessels within the Lease area are not currently included as conditions of the Consolidated Authorization. Based on the parties' stipulation and competent substantial evidence in the record, conditions should be added to the Consolidated Authorization expressly limiting the loading of vessels in the Lease area to occurring only on Dock B, and

limiting the type of equipment used for vessel loading and unloading to forklifts, mini-excavators, or similar light equipment.

36. Shafnacker testified that the only other work that may be performed within the Lease area would consist of certain minor maintenance activities on Workboats' vessels; these minor repair activities include non-routine paint touchups and handrail painting, minor cable and winch repairs, and minor steel-rod (non-lead) welding.

IV. DEP Review and Approval of the Project

37. Workboats filed a Joint Application for Individual Environmental Resource Permit/Authorization to Use State-Owned Submerged Lands/Federal Dredge and Fill Permit ("Application") on or about June 15, 2018.

38. The Application was determined to be complete. DEP staff reviewed the Application and determined that the Project, as proposed, met the applicable statutory standards and rule requirements for issuance of the Consolidated Authorization.

39. DEP issued the Consolidated Notice of Intent on or about July 20, 2018, proposing to issue the environmental resource permit and Lease for the Project.

40. The Application, Consolidated Notice of Intent, and Consolidated Authorization were admitted into evidence at the final hearing.

V. Compliance with Rule 62-330.301

41. For Workboats to be entitled to issuance of the environmental resource permit for the Project, it must provide reasonable assurance^{9/} that the Project meets the requirements of rule 62-330.301.^{10/}

A. Water Quantity, Storage, Conveyance, and Flooding Impacts

42. The entire Project, as proposed, will be constructed waterward of the mean high water line and will consist of mooring piles, piling-supported docks, and floating docks. These structures will not affect, impound, store, divert, or impede the amount or flow of surface water.

43. The evidence demonstrated that the Project, if constructed and operated as proposed, will not cause adverse water quantity impacts to receiving waters and adjacent lands; will not cause adverse flooding to on-site or off-site property; and will not cause adverse impacts to existing surface water storage and conveyance capabilities.

B. Impacts to Value of Functions Provided to Fish, Wildlife, Listed Species, and Habitat

44. Two types of habitat exist at the Project site: salt marsh and submerged benthic habitat.

45. The evidence established that the salt marsh at the Project site is healthy, high-quality, high-functioning salt marsh habitat. Among the functions the salt marsh provides are

preservation and improvement of water quality by filtering runoff, serving as a nursery for fish species, preventing shoreline erosion, and forming the base of the estuarine food chain.

46. The salt marsh, in combination with existing riprap at the edge of the salt marsh, forms a "living shoreline" at the Project site that helps protect the shoreline from erosion and scouring due to wave action. This living shoreline is not being removed or otherwise affected, and will remain in place at the Project site.

47. The submerged benthic sediment at the Project site consists of high organic silts and a sand base. The evidence established that the benthic sediment provides habitat for infauna, such as polychaete worms; and for epifauna, such as shrimp, crabs, and mollusks. No submerged aquatic vegetation or oyster bars were found at the Project site.

48. Docks A and B consist of extensions that will be added to two existing docks that previously were constructed through the salt marsh. These extensions will be constructed four feet above the marsh floor to reduce shading, using minimally-impactful construction techniques, discussed above, to help avoid and minimize construction impacts to the marsh. The floating components of docks A and B will not have any impact on the salt marsh habitat.

49. Dock C will be constructed waterward of Lot 9, across a very small section of salt marsh grass. It also will be elevated four feet above the marsh floor to reduce shading, and will be constructed using the same minimally-impactful technique, to avoid and minimize impacts to the marsh. Because Dock C will have only de minimis impacts on the salt marsh, no mitigation has been required.

50. The Consolidated Authorization contains conditions requiring Workboats to avoid impacts to emergent grasses during construction and operation of the Project, and prohibiting Workboats from storing or stockpiling tools, equipment, materials, and debris within wetlands. These conditions will help ensure that the Project will have only minimal impacts on the salt marsh habitat at the Project site.

51. The Consolidated Authorization contains a specific condition requiring maintenance of 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. Additionally, the construction of mooring areas over submerged grass beds is prohibited. These conditions will help protect benthic habitat at the Project site.

52. The Florida Manatee is the only listed species that inhabits the Project site. Video evidence presented by the City

showed manatees present at, and in the vicinity of, the Project site.

53. The Project is located in an area designated, in the most recent Duval County Manatee Protection Plan (November 2017) ("MPP"), as "preferred" for boat facility siting. Boating facilities located in designated "preferred" areas generally do not have any limits on the number of slips at the facility. "Preferred" boat facility siting areas were designated in the MPP based on many factors, including manatee abundance, presence of manatee feeding habitat, proximity to boating destinations, manatee mortality in the area, existing boating slip numbers and locations, boating facility type and number, and existence of speed zones.

54. To protect manatees in the Back Channel, the Florida Fish and Wildlife Conservation Commission ("FWC") has, by rule, established a slow speed, minimum wake zone extending 300 feet from the shorelines into the Back Channel. A slow speed, minimum wake zone means that a vessel must be fully off-plane and completely settled into the water, proceeding at a speed which is reasonable and prudent under the prevailing circumstances so as to avoid the creation of an excessive wake or other hazardous condition which endangers or is likely to endanger other persons using the waterway.^{11/} Fla. Admin.

Code R. 68C-22.02(4). The existence and enforcement of this speed zone will help protect manatees in the Back Channel.

55. Conditions also have been included in the Consolidated Authorization to help protect manatees from impacts from the Project.

56. As previously discussed, for each vessel, a minimum 12-inch clearance between the deepest draft with the motor down, and the top of the submerged resources at mean low water, must be maintained. This condition will help ensure that manatees do not become trapped under or crushed by a vessel while moored in the Lease area.

57. Additionally, bumpers or fenders must be installed and maintained to provide at least three feet of separation between moored vessels and between the docks/mooring piles and vessels, to help prevent trapping or crushing of manatees.

58. The Consolidated Authorization also requires the Project to be constructed and operated in accordance with the Standard Manatee Conditions for In-Water Work. These conditions include: instructing all personnel, including construction personnel, about the presence of manatees and manatee speed zones, and the need to avoid collisions with and injury to manatees, as well as about civil and criminal penalties imposed for harming, harassing, or killing manatees; operating all vessels associated with construction of the Project at "idle

speed/no wake" at all times in the vicinity of the Project and where the draft of the vessel provides less than a four-foot clearance from the bottom; the requirement that all in-water operations, including vessels, must shut down if a manatee comes within 50 feet of the operation and cannot resume until the manatee either moves beyond the 50-foot radius of the operation or 30 minutes has elapsed and the manatee has not reappeared within 50 feet of the operation; the installation of specified temporary signage; and the installation of specified permanent signage.

59. The inclusion of these conditions in the Consolidated Authorization provides reasonable assurance that the construction and operation of the Project will not adversely affect the value of functions provided to fish, wildlife, or listed species and their habitats.

C. Water Quality Impacts

60. As previously noted, the St. Johns River, including the Back Channel, is a Class III waterbody. Accordingly, the surface water quality standards and criteria applicable to Class III waters in Florida codified in Florida Administrative Code Rule 62-302.300 apply to the Back Channel. The Back Channel portion of the St. Johns River has been identified as impaired for lead, pursuant to Florida Administrative Code Chapter 62-303.

61. The credible, persuasive evidence demonstrates that the Project, if constructed and operated in accordance with the conditions currently included in the Consolidated Authorization along with additional conditions discussed below, will not cause or contribute to water quality violations.

62. Specifically, the Project will be required to install and maintain turbidity barriers during the construction phase to help ensure that any sediment disturbed during construction does not cause or contribute to water quality violations.

63. Additionally, as discussed above, a minimum 12-inch clearance between the deepest draft of each vessel, with the motor down, and the top of the submerged resources at mean low water must be maintained. This will help prevent the suspension of sediments, and any constituents in those sediments, from being suspended in the water column and causing or contributing to water quality violations, as a result of the Project.

64. The Consolidated Authorization also prohibits the storage or stockpiling of tools, equipment, materials, such as lumber, pilings, riprap, and debris within wetlands or other waters of the state; prohibits the discharge of construction debris into waters of the state; prohibits the overboard discharge of trash, human or animal waste and fuel at the docks; and requires all work to be done in periods of average or low

water, so that impacts to submerged resources, including bottom sediment, can be avoided.

65. Collectively, these conditions help provide reasonable assurance that the construction and operation of the Project, including the mooring and operation of vessels in the Lease area, will not violate water quality standards.

66. White testified that, generally, the water quality in, and in the vicinity, of marinas degrades over time due to the discharge of oils, greases, and other waste; and the suspension in the water column of sediments and toxins, pesticides, herbicides, and heavy metals in those sediments, as a result of propeller dredging. However, Irwin testified that because the Project site is located in a tidally-influenced area, with an approximate 3.5-foot tide range over multiple tide changes per day, the Project site will be adequately flushed such that there will not be an accumulation of pollutants that may violate water quality standards. Based on Irwin's persuasive testimony, it is determined that water quality violations will not occur due to an accumulation of pollutants at the Project site.

67. To further ensure that the Project will not degrade water quality or violate water quality standards at the Project site, the Consolidated Authorization requires Workboats to submit a facility management plan to address maintenance and unexpected spills of fuels and other pollutants. The facility

management plan must include a spill response plan for fuel spills; a plan for maintenance of gray water collection systems and return systems, to the extent applicable; a plan addressing garbage collection and vessel cleaning systems to prevent disposal of waste in wetlands; and an education plan for all employees at the Project regarding fueling, sewage and gray water pump operations, waste management, and facility maintenance.

68. Sewage pump-out facilities are not proposed as part of the Project. Shafnacker testified, and the Consolidated Authorization, Project Description section currently states, that domestic waste from boat heads will be handled through use of a waterless incinerating toilet (Incinolet or similar), and the remaining ash shall not be disposed of in waters of the state. However, it is noted that this requirement is not currently included as an enforceable condition. The undersigned finds that a specific condition expressly prohibiting any sewage pump-out at the docks or on vessels, requiring the use of an incinerator toilet, and prohibiting the discharged of ash waste should be included in the Consolidated Authorization to provide reasonable assurance that the Project will not violate water quality standards due to the discharge of sewage into waters of the state.

69. The Consolidated Authorization, Project Description section, states:

This permit does not authorize the installation and use of fueling equipment at the Dock; the discharge of waste into the water; liveaboards; fish cleaning or the installation of fish cleaning stations; repair and maintenance activities involving scraping, sanding, stripping, recoating, and other activities that may degrade water quality or release pollutants into Waters of the State. Major repair, reconstruction, and/or other service must be performed at a facility approved for vessel haul-out and repair. This does not preclude the light maintenance allowed under Specific Condition 18 to be performed at the facility.

This language, which expressly identifies numerous activities that are prohibited in connection with the operation of the Project, is not currently included as an enforceable condition in the Consolidated Authorization. The undersigned determines that in order to protect water quality at the Project site, this language must be included as a specific condition in the Consolidated Authorization.

70. As previously noted above, the Back Channel is impaired for lead. Both Irwin and Hallett testified that Workboats would not use lead paint or lead-containing welding equipment on the docks or vessels moored in the Lease area. To provide reasonable assurance that the Project will not constitute a source of lead that will contribute to the impaired

status of the Back Channel, a specific condition prohibiting the use of lead-based paints and other sources of lead should be included as an enforceable condition in the Consolidated Authorization.

71. Based on the foregoing, the undersigned finds that, with the addition of the conditions discussed in paragraphs 68, 69, and 70 above, Workboats has provided reasonable assurance that applicable water quality standards will not be violated as a result of construction or operation of the Project.

D. Adverse Secondary Impacts to Water Resources

72. Secondary impacts are impacts caused by other relevant activities very closely linked or causally related to the activity itself, rather than the direct impacts of the proposed activity itself.^{12/}

73. The conditions currently included in the Consolidated Authorization, along with the conditions addressed in paragraphs 68, 69, and 70 above, provide reasonable assurance that the Project will not cause adverse secondary impacts to water quality.

74. Additionally, the Project will not cause adverse secondary impacts to the functions of wetlands and surface waters, aquatic or wetland-dependent species, or listed species.

75. As discussed above, the salt marsh habitat will not be disturbed during construction and operation of the Project, and

the benthic habitat will be protected by the minimum 12-inch vessel to the top of submerged resource clearance requirement discussed above. These Project features and conditions will help ensure that there are no adverse impacts to wetland functions and to aquatic or wetland-dependent species, such as fish and benthic fauna.

76. Additionally, the Project will be located within a slow speed, minimum wake zone, and Workboats will be required to operate all of its vessels in compliance with that standard within the 300-foot buffer along the shorelines of the Back Channel. This operational constraint, along with additional manatee protection conditions discussed above, provide reasonable assurance that the Project will not cause adverse secondary impacts to manatees.

77. Based on the foregoing, it is determined that, with the addition of the conditions addressed in paragraphs 68, 69, and 70, above, Workboats has provided reasonable assurance that the Project will not have adverse secondary impacts to the water resources.

E. Impacts to Ground and Surface Water Levels and Surface Water Flows

78. As discussed above, the Project will be constructed waterward of the mean high water line, and will consist of piling-supported and floating docks and mooring piles that will

not adversely impact the maintenance of minimum surface or ground water levels or surface water flows at the Project site.

F. Impacts to Works of the District

79. The Project is not proximate to any works of the district, as approved pursuant to section 373.086; accordingly, it will not cause adverse impacts to such works.

G. Capable of Performing and Functioning as Designed

80. The Project was designed by an engineer and will be installed by Shafnacker, who is an experienced marine contractor.

81. The Consolidated Authorization requires that the Project must be implemented in accordance with the approved plans, specifications, and performance criteria. Within 30 days of completion of construction of the Project, Workboats must submit an as-built survey, signed and sealed by a Florida licensed Surveyor and Mapper in accordance with Florida Administrative Code Chapter 61G17-7, depicting the boundaries of the Lease, and showing the size and dimensions of all existing overwater structures and activities within the Lease area. Additionally, the surveyor must provide a statement that all of the depicted structures and activities are located within the Lease area; or identify, and depict on an as-built survey, any structures or activities outside of the Lease area. These

requirements will ensure that the Project performs and functions as designed.

H. Financial, Legal, and Administrative Capability

82. Rule 62-330.301(1)(j) requires an applicant for an environmental resource permit to provide reasonable assurance that the project will be conducted with a person having the financial, legal, and administrative capability to ensure that the activity will be undertaken in accordance with the terms and conditions of the permit.^{13/}

83. The Environmental Resource Permit Applicant's Handbook, Volume I (General and Environmental) ("Handbook"), section 1.5.1., which provides further guidance regarding compliance with the requirement in rule 62-330.301(1)(j), states that "[c]ompliance with this requirement must be demonstrated through subsections 62-330.060(3) and (4), the certification required in the Application Form 62-330.060(1), and section 12.0 of the Handbook."

84. As part of the Application, Workboats submitted copies of warranty deeds for lots 6, 7, and 8, and Disclaimer No. 22146 for Lot 9. These documents establish that Shafnacker holds title to the uplands on lots 6 through 9 and to certain submerged lands waterward of Lot 9. Pursuant to Handbook section 4.2.3, these documents satisfy the "sufficient upland

interest" requirement in rules 62.330.060(3) and 62-330.301(1)(j).

85. Rule 62-330.060(3) also requires the applicant and/or the applicant's agent to sign specific parts of the application. Here, Workboats, and Shafnacker, as Workboats' agent, signed the pertinent portions of the Application, as required by this rule.

86. Rule 62-330.060(4) and pertinent provisions of section 12.0 of the Handbook—specifically, provisions in sections 12.1 and 12.2—require that once construction of the permitted activity is complete, it must be converted to the operational phase by submitting an as-built certification and request for conversion to operational phase. Here, the Consolidated Authorization for the Project requires submittal of this form, once construction is complete, as a condition for operation of the Project.

87. These are the only rules and Handbook provisions regarding demonstration of financial, legal, and administrative capability that are pertinent to the Project. No other environmental resource permitting rules or Handbook provisions impose any other requirements regarding financial capability, and the City has not identified any case law or other statutes or rules imposing additional pertinent financial capability requirements.

88. Thus, the evidence establishes that Workboats meets rule 62-330.301(1)(j) and all other pertinent rules and Handbook requirements, showing it has the financial, legal, and administrative capability to ensure the Project will be undertaken in accordance with the terms and conditions of the Consolidated Authorization.

89. The City did not present any evidence to show that Workboats lacks the financial, legal, and administrative capability to undertake the Project as permitted.

VI. Compliance with Rule 62-330.302

90. For Workboats to be entitled to issuance of the environmental resource permit for the Project, it also must provide reasonable assurance that the Project meets the requirements of rule 62-330.302,^{14/} which establishes additional standards for issuance of environmental resource permits for activities in surface waters or wetlands.

A. Adverse Effects to Public Health, Safety, or Welfare, or Property of Others

91. In determining whether a proposed activity in surface waters or wetlands would adversely affect the public health, safety, or welfare, or the property of others, the focus is on environmental hazards or injuries that may result from the proposed activity.^{15/} Thus, alleged threats to personal safety and enjoyment of neighboring property resulting from alleged

unlawful activities on the upland areas of lots 6, 7, and 9^{16/}— which are not part of the Project—are not appropriately considered as part of the public interest determination under rule 62-330.302.

92. As discussed above, the Consolidated Authorization contains conditions aimed at ensuring that water quality is not degraded and water quality standards are not violated due to the Project. These conditions, along with conditions addressed in paragraphs 68, 69, and 70, above, provide reasonable assurance that the public health, safety and welfare, and property of others will not be adversely affected as a result of water quality degradation or violations.

93. The Project, as designed and approved, will have 25-foot setbacks from the eastern and western riparian rights lines for lots 6 through 9. These setbacks will help ensure that the construction and operation of the Project will not interfere with the adjoining properties' riparian rights.

94. The City presented the testimony of O'Connor, who opined that some of Workboats' vessels, operated at full throttle, were capable of generating a wake as high as three feet. O'Connor testified that a wake of this height could damage docks along the shoreline of the Back Channel, cause shoreline erosion, and create a safety hazard for recreational

boaters, kayakers, and others engaged in in-water recreational activities.

95. As discussed above, the Back Channel is approximately 1,300 feet wide at the Project site. Per the location map provided as part of the specific purpose survey, the portion of the Back Channel east of the Project site is at least this wide for its entire length. Shafnacker testified, credibly, that his vessels typically operate closer to the Blount Island shoreline than the northern shoreline of the Back Channel, so are approximately 800 feet away from the northern shoreline where the residential docks and access points for boaters, kayakers, and other recreational uses are located.

96. Additionally, Shafnacker credibly testified that Workboats' boats and barges would be operated at speeds such that the highest wake that any of his vessels would generate is two feet.

97. Based on the foregoing, and with the inclusion in the Consolidated Authorization of the conditions addressed in paragraphs 68, 69, and 70, above, Workboats has provided reasonable assurance that the Project will not adversely affect the public health, safety, welfare, and property of others.

B. Adverse Effects to Conservation of Fish, Wildlife, Listed Species, and their Habitats

98. As previously discussed, the Consolidated Authorization requires Workboats to avoid impacts to emergent grasses during construction and operation of the Project, and prohibits Workboats from storing or stockpiling tools, equipment, materials, and debris within wetlands. These conditions will help ensure that the Project will have minimal impact on the salt marsh habitat at the Project site.

99. The Consolidated Authorization also contains a condition prohibiting the construction of mooring areas over submerged grass beds. This, along with the condition requiring a minimum 12-inch clearance between vessel bottom and submerged resources, will help protect the benthic habitat at the Project site.

100. Additionally, the Consolidated Authorization imposes conditions to protect manatees from impacts due to the Project. Specifically, bumpers or fenders must be installed and maintained to provide at least three feet of separation between docks or mooring piles and vessels, and between vessels, and a minimum 12-inch clearance between the deepest draft of the vessel and the top of the submerged resources at mean low water must be maintained. The Project also must be constructed and operated in accordance with the FWC's Standard Manatee

Conditions for In-Water Work, which imposes construction and operational requirements to protect manatees for the life of the Project.

101. The inclusion of these conditions in the Consolidated Authorization provides reasonable assurance that the Project will not adversely affect the conservation of fish and wildlife, including threatened species and their habitats.

C. Adverse Effects to Navigation, Flow of Water, or Shoaling

102. The Back Channel is navigable, and is over 1,300 feet wide at the point at which the Project is proposed to be located. It is used by a mix of recreational vessels and commercial and industrial vessels, although, as noted above, the low-clearance bridges on the western end of Blount Island effectively limit the commercial and industrial traffic to smaller-sized vessels.

103. As depicted on the specific purpose survey submitted as part of the Application, the southern boundary of the Lease extends waterward approximately 196 feet from the shoreline at the eastern boundary of the Lease, and approximately 174 feet from the shoreline at the western boundary of the Lease. Thus, at its most waterward point, the preempted area of the Lease will extend waterward approximately 14 percent of the width of the Back Channel.^{17/}

104. The specific purpose survey shows docks A and C extending waterward approximately 60 feet from the shoreline, and shows Dock B extending waterward approximately 45 feet from the shoreline.^{18/}

105. The three three-pile dolphins, which will be used to moor the largest barges, will be set back approximately 38 feet from the southern boundary of the Lease. Shafnacker testified that barges moored at the three-pile mooring dolphins will be tied between the dolphins, by ropes at their bows and sterns, to ensure that they do not drift out of the Lease area and create a navigational hazard.

106. The Consolidated Authorization contains a condition requiring the waterward ends of the docks and the mooring dolphins to be marked by reflectors so as to be visible from the water at night by reflected light. However, at the hearing, Shafnacker testified that he intended to mark the dolphins and barges with solar battery-powered lights so that they would be more visible at night than if only reflectors are used. Based on this testimony, it is recommended that Specific Condition No. 13 in the Consolidated Authorization be modified to require the barges and mooring dolphins to be marked by lights, as well as reflectors, to make them more visible from the water.

107. Based on the foregoing, it is determined that the Project, as proposed, will not adversely impact navigation in

the Back Channel. Specifically, the Lease will not extend a significant distance out into the Back Channel; approximately 86 percent of the width of the Back Channel at the Project site remains open for navigation by the public. Additionally, the docks will be located relatively close to the shoreline, well within the Lease preempted area, and will be marked so that they are visible from the water. The mooring dolphins also will be set back a substantial distance from the Lease boundary and will be marked so as to be visible from the water.

108. The evidence shows that the Project will not have any adverse effects on the flow of water. As discussed above, the Project will not impede, impound, or otherwise affect the flow of water.

109. The evidence also shows that the Project will not cause harmful shoaling or erosion. No dredging or placement of dredged spoil is proposed or authorized as part of the project, and the Consolidated Authorization requires Workboats to use silt fencing and other specified best management practices to stabilize the sediment and prevent erosion and shoaling during construction of the Project.

110. For these reasons, it is determined that the Project will not adversely impact navigation in the Back Channel, will not adversely affect the flow of water, and will not result in harmful shoaling or erosion.

D. Adverse Effects to Fishing, Recreational Values, or Marine Productivity

111. The Back Channel is a meander of the St. Johns River that no longer is used as the main navigational channel for the river. Thus, it is relatively calm and is extensively used for boating, kayaking, swimming, fishing, jet skiing, and other in-water recreational activities.

112. The evidence establishes that the Project will not adversely affect fishing, recreational values, or marine productivity in the vicinity.

113. The salt marsh habitat in the vicinity of the Project, which serves as the base of the estuarine food chain and as a nursery and refuge for small fish, will not be disturbed during construction of the Project. As such, the Project will not adversely affect fish habitat or marine productivity.

114. Additionally, because the Project will be constructed within the boundaries of the Lease and set back 25 feet from the riparian lines for the adjoining properties, it will not physically interfere with or displace fishing activities from those properties, or from any other property in the vicinity.

115. The Consolidated Authorization imposes conditions to protect water quality during construction and operation of the Project. These conditions, and the additional conditions,

discussed in paragraphs 68, 69, and 70, above, will protect water quality, and therefore help protect fish habitat and marine productivity.

116. The credible evidence establishes that vessel operation associated with the Project will not adversely affect boating, kayaking, fishing, or other recreational activities in the vicinity. As discussed above, the Project is located in a slow speed, minimum wake zone that extends 300 feet from the shoreline into the Back Channel, and all vessels traversing into and out of the Lease area must operate at this speed until they are beyond 300 feet from the shorelines.

117. Additionally, Shafnacker credibly testified that once out of the 300-foot slow speed, minimum wake zone, the vessels will operate at speeds such that they will generate a wake of two feet, at most. The evidence showed that wakes of this height are not anticipated to adversely affect recreational activities in the Back Channel.

E. Temporary or Permanent Activity

118. The Project will be permanent. However, the evidence establishes that there are numerous permanent docking facilities along the northern shoreline of the Back Channel, so the Project is not unique in that regard.

F. Adverse Impacts to Significant Historical or Archaeological Resources

119. The Department of State, Division of Historical Resources ("DHR"), did not provide any comments indicating that significant historical or archaeological resources are anticipated to be present at the Project site, and no evidence was presented showing that the Project would have any adverse impacts to such resources.

120. As a precaution, the Consolidated Authorization contains a specific condition requiring Workboats to immediately cease all activities involving subsurface disturbance and to contact DHR if any prehistoric or historic artifacts, such as pottery or ceramics, project points, dugout canoes, metal implements, historic building materials, or any other physical remains that could be associated with Native American, early European, or American settlements are encountered at any time within the Project site.

121. Accordingly, it is determined that the Project will not adversely affect significant historical or archaeological resources.

G. Current Condition and Relative Value of Functions

122. The salt marsh wetlands in the vicinity of the Project are healthy, high-functioning, and part of a "living shoreline" that will not be disturbed by construction or

operation of the Project. Although Dock C will be constructed across a very small patch of salt marsh, it will be elevated to reduce shading and will be constructed using minimally-impactful construction techniques. Any impacts to the salt marsh from the Project will be de minimis.

123. The Project is also not anticipated to adversely affect the condition and relative value of the benthic habitat on the Project site.

124. As discussed above, the Consolidated Authorization imposes a minimum 12-inch clearance from vessel bottom to top of submerged resources requirement, which will help prevent physical impact to, and propeller dredging of, the benthic habitat at the Project site.

125. Conditions in the Consolidated Authorization, as well as the conditions addressed in paragraphs 68, 69, and 70, above, also will help protect the current condition and relative value of the salt marsh and benthic habitat on the Project site.

H. Unacceptable Cumulative Impacts to Wetlands and Surface Waters

126. With the conditions currently contained in the Consolidated Authorization, along with the conditions addressed in paragraphs 68, 69, and 70, above, the Project is not anticipated to have adverse water quality impacts.

127. Additionally, as discussed above, the Project is not anticipated to cause adverse impacts to fish, wildlife, protected species, and their habitat.

128. Therefore, with the inclusion of the conditions discussed in paragraphs 68, 69, and 70, above, reasonable assurance has been provided that the Project will not have unacceptable cumulative impacts, in violation of rule 62-330.302(1)(b).

I. Past Violations of Water and Wetlands Statutes and Rules

129. The City presented evidence consisting of videos and photographs taken from the Wood residence immediately east of Lot 9. These videos and photographs show a variety of activities that are potentially damaging to surface waters and wetlands, including dumping sediment into surface waters from a moored vessel; earthmoving; moving floating docks onto, and off of, the shoreline using heavy equipment; operating heavy equipment in wetlands and surface waters along the shoreline; and mooring boats in extremely shallow water.

130. Wood testified, credibly, that he contacted DEP numerous times, and that DEP occasionally visited Shafnacker's property—typically days after Wood had contacted the agency.

131. Upon inspecting the Workboats site, DEP determined that barges or other equipment or materials had been dragged onto the shoreline without proper authorization, and DEP issued

a compliance assistance offer letter to address this noncompliance. DEP ultimately determined that, rather than taking enforcement action for this noncompliance, a salt marsh restoration corrective action requirement should be included in the Consolidated Authorization. The corrective action conditions require Workboats to submit a salt marsh restoration plan and impose restoration plan completion timeframes, success criteria, and monitoring requirements.

132. Given Workboats' noncompliance history, the undersigned determines that in order to provide reasonable assurance that the Project will not violate environmental resource permitting statutes and rules, the conditions addressed above in paragraphs 35, 68, 69, and 70, above, must be included as enforceable conditions in the Consolidated Authorization.

VII. Compliance with Chapter 18-21 for Issuance of the Lease

133. For Workboats to be entitled to issuance of the Lease, it must demonstrate, by a preponderance of the evidence, that it will meet the applicable requirements and standards codified in Florida Administrative Code Chapter 18-21 for issuance of a sovereignty submerged lands lease.

A. Water Dependent Activities

134. Rule 18-21.004(1)(g) requires activities on sovereignty submerged lands to be limited to those that are water dependent.

135. 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. Fla. Admin. Code R. 18-21.003(71).

136. The Project's proposed docks, mooring piles, mooring dolphins, and vessel mooring operations are water dependent activities. The Project's primary purpose is the water dependent activity of mooring vessels and the ancillary activity of loading vessels with supplies as part of Workboats' operation. Case law interpreting Florida Administrative Code Chapter 18-21 holds that because the primary purpose of docks and other mooring structures is to moor vessels, they are "water dependent" activities for purposes of rule 18-21.004(1)(g).^{19/}

137. As discussed in paragraphs 35, 68, 69, and 70, above, a condition should be included in the environmental resource permit and Lease specifically prohibiting any major repair, reconstruction, or maintenance activities within the Lease area, in order to ensure that only water dependent activities are conducted within the Lease area.

B. Resource Management Requirements

138. Rule 18-21.004(2)(a) requires sovereignty submerged lands to be managed primarily for the maintenance of natural conditions, propagation of fish and wildlife, and traditional recreational uses such as fishing, boating, and swimming. Additionally, the rule authorizes compatible secondary uses that will not detract from or interfere with these primary purposes.

139. As discussed above, the evidence establishes that the Project, as proposed and conditioned in the Consolidated Authorization, will not adversely affect salt marsh or benthic habitat, will not degrade water quality or cause or contribute to water quality violations, and will not adversely affect fish, wildlife, listed species, and marine productivity. Accordingly, the Project will not detract from, or interfere, with fish and wildlife propagation.

140. The evidence also establishes that the Project will not detract from, or interfere with, traditional recreational uses. As discussed above, the Back Channel is wide enough to accommodate vessels traveling to and from the Project site without detracting from or interfering with recreational activities conducted in the Back Channel. Additionally, vessels traveling to and from the Project site must be operated in accordance with the slow speed, minimum wake zone within the 300-foot shoreline buffer, and will be operated at speeds that

will generate a maximum two-foot wake outside of the shoreline buffer. The evidence shows that these speeds will not detract from, or interfere with, traditional recreational uses in the Back Channel.

141. The Project also has been designed, and will be operated, to minimize or eliminate wetland vegetation impacts and impacts to fish and wildlife habitat and cultural resources. Specifically, as discussed above, impacts to the salt marsh habitat have been minimized through the use of minimally-impactful construction techniques and elevating docks four feet above the marsh to reduce shading of the marsh grasses. Additionally, the 12-inch minimum vessel/submerged resource clearance condition will reduce impacts to the benthic habitat in the Lease area.

142. As discussed above, DHR did not provide comments indicating that significant historical or archaeological resources are anticipated to be present at the Project site, and no evidence was presented showing that the Project would have any impacts to such resources. Additionally, the Consolidated Authorization contains a specific condition establishing protocol for Workboats to follow if any specified artifacts are encountered at any time within the Project site.

143. Rule 18-21.004(7)(e) requires that construction, use, or operation of the structure or activity not adversely affect

any species listed as endangered, threatened, or of special concern in FWC rules.

144. As discussed above, the Florida Manatee is the only listed species determined to be present the Project site. The Project site is located within an established slow speed, minimum wake zone, and vessels entering and leaving the Project site must comply with this speed limitation within the 300-foot shoreline buffer area. Additionally, the Consolidated Authorization includes several conditions designed to reduce and minimize potential impacts to manatees that may enter the Lease area. Collectively, these requirements and conditions will help ensure that the construction and operation of the Project will not adversely affect manatees.

C. Riparian Rights

145. As part of the Application, Workboats submitted deeds and Disclaimer No. 22146, demonstrating that Shafnacker holds title to lots 6, 7, 8, and 9. These documents constitute "satisfactory evidence of sufficient upland interest," as that term is defined in rule 18.21.003(60).

146. Consistent with rule 18-21.004(3)(d), the Project is proposed to be constructed in the riparian area appurtenant to lots 6, 7, 8, and 9, and all structures that are part of the Project will be set back at least 25 feet from the eastern and western riparian lines for the upland property.

147. No evidence was presented showing that the construction or operation of the Project would unreasonably restrict or infringe upon the riparian rights of adjacent upland owners, in violation of rule 18-21.004(3)(c).

148. It is determined that the Project will not unreasonably infringe on or restrict the riparian rights of adjacent upland riparian owners, so meets the requirements and standards in rule 18-21.004(3) regarding riparian rights.

D. Navigational Hazard

149. For the reasons discussed in paragraphs 102 through 107, above, it is determined that the Project will not constitute a navigational hazard, in violation of rule 18-21.004(7)(g). However, the inclusion of a condition requiring lighting of the mooring dolphins, discussed in paragraph 106, is recommended to ensure the Project will not constitute a navigational hazard.

E. Lease Fees

150. As part of the Application, Workboats submitted a financial affidavit attesting to its ability to pay the required fees for the Lease, imposed pursuant to rules 18-21.008 and 18-21.011.

F. Not Contrary to the Public Interest

151. Rule 18-21.004 establishes the sovereignty submerged lands management policies, standards, and criteria to be used in

determining whether to approve activities on sovereignty submerged lands.

152. The term "public interest" is defined to mean "demonstrable environmental, social, and economic benefits which would accrue to the public at large as a result of the proposed action, and which would clearly exceed all demonstrable environmental, social, and economic costs of the proposed action." Fla. Admin. Code R. 18-21.003(51).

153. To meet the "not contrary to the public interest" standard in rule 18-21.004(1)(a), 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 v. Palmer, Case Nos. 96-0736, 96-5879 (Fla. DOAH Sept. 1, 1998; Fla. DEP Oct. 19, 1998).

154. Here, the City asserts that the Lease is contrary to the public interest because it will cause adverse impacts to benthic and salt marsh habitat; discharge pollutants into the waters of the Back Channel; harm manatees; pose a navigational hazard; and detract from, and interfere with, recreational activities in the Back Channel.

155. However, as discussed above, the evidence shows that the Project has been designed specifically to minimize many of these impacts, and the Consolidated Authorization contains conditions specifically aimed at preventing many of these alleged impacts. As discussed above, other conditions, discussed in paragraphs 68, 69, 70, 106, and 138, also should be included in the Consolidated Authorization to ensure that the Project will not cause adverse impacts to habitat resources, water quality, manatees, and navigation.

156. Case law interpreting the public interest test in rule in 18-21.004(1)(a) applicable to proprietary approvals holds that when proposed structures or activities meet the applicable standards and criteria in chapter 18-21, those structures or activities are presumed to be not contrary to the public interest. See Spinrad v. Guerro and Dep't of Env'tl. Prot., Case No. 13-2254 (Fla. DOAH July 25, 2014), modified in part, Case No. 13-0858 (Fla. DEP Sept. 8, 2014); Haskett v. Rosati and Dep't of Env'tl. Prot., Case No. 13-0465 (Fla. DOAH July 31, 2013), modified in part, Case No. 13-0040 (Fla. DEP Oct. 29, 2013).

157. Here, Workboats has demonstrated that the Project meets all applicable standards and criteria in chapter 18-21; thus, the Project is presumed to be not contrary to the public interest under rule 18-21.004(1)(a).^{20/} The City did not present

persuasive evidence showing that, on balance, the demonstrable environmental, social, and economic costs of the Project exceed the demonstrable environmental, social, and economic benefits accruing to the public.^{21/} Accordingly, it is determined that the Project meets the public interest test in rule 18-21.004(1)(a).

VIII. Entitlement to Environmental Resource Permit

158. Workboats met its burden under section 120.569(2)(p) to present a prima facie case of entitlement to the environmental resource permit by entering into evidence the Application, Notice of Intent, Consolidated Authorization, and supporting information. Workboats also presented credible, competent, and substantial evidence beyond that required to meet its burden to demonstrate prima facie entitlement to the environmental resource permit.

159. The burden then shifted to the City to demonstrate, by a preponderance of the competent substantial evidence, that the Project does not comply with sections 373.413 and 373.414 and applicable environmental resource permitting rules. For the reasons discussed above, it is determined that the City did not meet its burden of persuasion under section 120.569(2)(p).

160. Accordingly, for the reasons discussed above, it is determined that, with the inclusion of conditions in the Consolidated Authorization addressed in paragraphs 35, 68, 69,

70, and 106, above, Workboats meets all applicable requirements for issuance of the environmental resource permit for the Project.

IX. Entitlement to Lease

161. As discussed above, Workboats bore the burden of proof in this proceeding to demonstrate, by a preponderance of the evidence, that the Project meets all applicable statutory and rule requirements for issuance of the Lease.

162. For the reasons discussed above, it is determined that Workboats met this burden, and, therefore, is entitled to issuance of the Lease for the Project.

X. The City's Standing

163. As previously noted, the City is a consolidated municipality and county political subdivision of the State of Florida. The Project is located within the geographic boundary of the City.

164. On or about July 26, 2018, the Council of the City of Jacksonville, Florida, adopted Resolution 2018-499-A, finding that issuance of the environmental resource permit and Lease affects the substantial interests of a significant number of residents in Duval County.

165. The City initiated this proceeding by filing its Petition with DEP on August 17, 2018, alleging that the Project will have the effect of impairing, polluting, or otherwise

injuring the air, water, or other natural resources of the state.

CONCLUSIONS OF LAW

166. 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.

XI. The City's Standing

167. The City has asserted that it has standing to initiate this proceeding pursuant to section 403.412(5), Florida Statutes, which provides, in pertinent part:

In any administrative, licensing, or other proceedings authorized by law for the protection of the air, water, or other natural resources of the state from pollution, impairment, or destruction, the Department of Legal Affairs, a political subdivision or municipality of the state, or a citizen of the state shall have standing to intervene as a party on the filing of a verified pleading asserting that the activity, conduct, or product to be licensed or permitted has or will have the effect of impairing, polluting, or otherwise injuring the air, water, or other natural resources of the state. As used in this section and as it relates to citizens, the term "intervene" means to join an ongoing s. 120.569 or s. 120.57 proceeding; this section does not authorize a citizen to institute, initiate, petition for, or request a proceeding under s. 120.569 or s. 120.57. Nothing herein limits or prohibits a citizen whose substantial interests will be determined or affected by a proposed agency action from initiating a formal

administrative proceeding under s. 120.569
or s. 120.57.

§ 403.412(5), Fla. Stat. (emphasis added).

168. This statute has been interpreted to authorize political subdivisions and municipalities of the state to initiate administrative challenges to agency action by filing a verified pleading asserting that the activity, conduct, or product to be licensed or permitted has or will have the effect of impairing, polluting, or otherwise injuring the air, water, or other natural resources of the state.^{22/} Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co., DOAH Case No. 03-0791 (Fla. DOAH May 9, 2005), modified in part, Case No. 03-0205 (Fla. DEP July 31, 2006).

169. The City initiated this proceeding by filing its Petition asserting that the Project will have the effect of impairing, polluting, or otherwise injuring the air, water, or other natural resources of the state. The purpose of this proceeding is to protect the air, water, or other natural resources of the state from pollution, impairment, or destruction. Accordingly, it is concluded that the City has standing, pursuant to section 403.412(5), to initiate, and participate as a party to, this proceeding.

170. The City also contends that it has standing in this proceeding pursuant to section 120.52(13)(d), Florida Statutes,

which defines a "party," for purposes of participating in proceedings under chapter 120, to include:

Any county representative, agency, department, or unit funded and authorized by state statute or county ordinance to represent the interests of the consumers of a county, when the proceeding involves the substantial interests of a significant number of residents of the county and the board of county commissioners has, by resolution, authorized the representative, agency, department, or unit to represent the class of interested persons. The authorizing resolution shall apply to a specific proceeding and to appeals and ancillary proceedings thereto, and it shall not be required to state the names of the persons whose interests are to be represented.

§ 120.52(13)(d), Fla. Stat. (emphasis added).

171. The City contends that it is included within this definition because it is a consolidated local government having the powers of both a municipality and a county under Florida law, and that the City Council of the City of Jacksonville passed Resolution 2018-499-A, recognizing that the Project would affect the substantial interests of a significant number of residents of Duval County, and authorizing the City of Jacksonville Office of General Counsel to initiate this proceeding on behalf of this class of interested persons.

172. The undersigned concludes that section 120.52(13)(d) does not afford party status to the City in this proceeding.

173. The term "interests of the consumers" is not defined in chapter 120, and section 120.52(13)(d) has not, to date, been interpreted in administrative or judicial case law. However, a reasonable reading of this provision suggests that "interests of the consumers" refers specifically to the interests of those in the county who consume or utilize economic or commercial goods,^{23/} rather than the broader reading posited by the City—which would effectively place the City in the position of representing the interests of its citizens parens patriae in this proceeding.^{24/}

174. The legislative history of section 120.52(13)(d) confirms this reading.^{25/} This provision was added to the definition of "party"—then codified at section 120.52(10)—as part of Senate Bill 209, chapter 78-28, Laws of Florida. It has remained unchanged in the statute since 1978. The Senate floor debate on this provision confirms that it was specifically intended to authorize county consumer protection agencies to represent the consumer-related interests of county residents in a chapter 120 proceeding, when authorized by county commission resolution to participate in a particular chapter 120 proceeding. Fla. S., recording of proceedings, Apr. 20, 1978, (on file with Florida Department of State, State Archives) (discussing addition of county consumer-interest protection entities to definition of "party" in chapter 120).

175. Here, the City is not participating as a consumer protection entity representing the consumer-related interests of a substantial number of its residents; rather, it seeks to assert the environmental and property-related interests of some of its residents in this proceeding. The legislative history of section 120.52(13)(d) does not support the expansion of this provision to encompass the interests that the City asserts in this proceeding on behalf of its residents.

176. Accordingly, it is concluded that section 120.52(13)(d) does not afford standing to the City as a statutory "party" to this proceeding.

XII. Burden and Standard of Proof

177. This is a de novo proceeding intended to formulate final agency action, not review action taken earlier and preliminarily. § 120.57(1)(k), Fla. Stat. See Dep't of Transp. v. J.W.C. Co, Inc., 396 So. 2d 778, 785 (Fla. 1st DCA 1981); Capeletti v. Dep't of Transp., 362 So. 2d 346 (Fla. 1st DCA 1978).

178. The pertinent standard of proof is the preponderance, or "greater weight," of the evidence. S. Fla. Water Mgmt. Dist. v. RLI Live Oak, LLC, 139 So. 3d 869 (Fla. 2014).

179. Section 120.569(2)(p) states, 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.

180. The environmental resource permit portion of the Consolidated Authorization at issue in this proceeding is governed by chapter 373. Thus, under section 120.569(2)(p), Workboats had the initial burden of going forward to demonstrate its case of prima facie entitlement to the environmental resource permit. Workboats satisfied this burden by entering into evidence the Application, the Consolidated Notice of Intent, and other evidence at the final hearing showing its

entitlement to the environmental resource permit. Pursuant to section 120.569(2)(p), the ultimate burden of proof then shifted to the City to prove, by a preponderance of the evidence, that the Project does not meet the requirements of section 373.414 and implementing rules, such that the ENVIRONMENTAL RESOURCE PERMIT portion of the Consolidated Authorization should be denied.

181. The Lease for the Project 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, Workboats bears the ultimate burden of proof, by a preponderance of the evidence, to demonstrate its 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).

XIII. Statutory and Rule Requirements Applicable to Environmental Resource Permit and Lease

A. Environmental Resource Permit

182. To be entitled to issuance of the environmental resource permit portion of the Consolidated Authorization, the applicant must provide reasonable assurance that the Project will meet the requirements of chapter 373, Part IV; the applicable provisions of Florida Administrative Code Chapter 62-330; and the applicable Handbook provisions.

183. The "reasonable assurance" standard requires the applicant to demonstrate to DEP the "substantial likelihood" that the proposed 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 Metro. 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 Pres., 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).

184. Section 373.413^{26/} states, in pertinent part:

(1) [T]he department may require such permits and impose such reasonable conditions as are necessary to assure that the construction or alteration of any stormwater management system, dam,

impoundment, reservoir, appurtenant work, or works will comply with the provisions of this part and applicable rules promulgated thereto and will not be harmful to the water resources of the district.

(2) A person proposing to construct or alter a stormwater management system, dam, impoundment, reservoir, appurtenant work, or works subject to such permit shall apply to the . . . department for a permit authorizing such construction or alteration.

185. Section 373.414(1)^{27/} states, in pertinent part:

(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.

186. DEP has adopted rules to implement these statutes.

The implementing rules pertinent to this proceeding are as follows.

187. Rule 62-330.060, titled "Content of Applications for Individual and Conceptual Approval Permits," states, in pertinent part:

- (3) The applicant must certify that it has sufficient real property interest over the land upon which the activities subject to the application will be conducted, as required in Section A of Form 62-330.060(1)

and Section 4.2.3(d) of the Applicant's Handbook Volume I. The applicant or the applicant's authorized agent must sign Part 4.A. of the application, and the applicant must sign Part 4.B. If the applicant's authorized agent signs Part 4.A, the applicant also must sign Part 4.C.

(4) An application for an individual permit also constitutes an application to operate and maintain the project. The application must specify the entity that will operate and maintain the project. If the applicant proposes an entity other than the current owner to operate and maintain the proposed project, documentation must be included demonstrating how such entity will meet the requirements of sections 12.3 through 12.3.4 of Volume I. A homeowner's or property owner's association ("HOA" or "POA," respectively) draft association documents designating the HOA or POA as the operating entity, and prepared in conformance with sections 12.3 through 12.3.4 of Volume I, shall satisfy this requirement. This provision of the association documents may not be modified without a permit modification in accordance with rule 62-330.315, F.A.C.

188. Rule 62-330.301, 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[.]

189. 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.

190. Rule 62-310, titled Operation and Maintenance, states in pertinent part:

(1) The permit authorizing construction or alteration must be converted to the operation and maintenance phase once the construction or alteration has been completed. The construction or alteration authorized under an individual permit must be certified to be in compliance with the permit before conversion of the permit to the operation and maintenance phase. Procedures for converting the permit to the operation and maintenance phase . . . are described in sections 12.2 and 12.2.1 of Volume I.

* * *

(4)(a) For individual permits NOT associated with an individual, private single-family dwelling unit, duplex, triplex, or quadruplex:

1. Upon completion of construction, and following the general conditions in paragraphs 62-330.350(1)(f) and (g), F.A.C., the permittee shall submit . . . the following to the permitting Agency:

a. Form 62-330.310(1), "As-Built Certification and Request for Conversion to Operation Phase," which is incorporated by reference herein (June 1, 2018) (<http://www.flrules.org/Gateway/reference.asp?No=Ref-09384>) [.]

* * *

2. The permit will be converted to the operation and maintenance phase upon a certification by the permittee and concurrence by the Agency that the entire project, or an independent portion of the project, has been constructed in compliance with the permit.

191. The Handbook, which provides guidance regarding meeting the requirements of the foregoing rules, states in pertinent part:

1.5 Administrative Criteria

1.5.1 Ownership and Control

(a) In accordance with Rule 62-330.060, F.A.C., and paragraph 62-330.301(1)(j), F.A.C., an applicant must provide reasonable assurance that permitted activities will be conducted by an entity with financial, legal, and administrative capability of ensuring that the activity will be

undertaken in accordance with the terms and conditions of a permit, if issued, and to ensure staff of the Agencies have legal authority to access the land for inspections and monitoring, as discussed in section 1.7, below. Compliance with this requirement must be demonstrated through subsections 62-330.060(3) and (4), F.A.C., the certification required in the Application Form 62-330.060(1), and section 12.0 of this Handbook.

(b) In addition to the above, persons proposing to conduct activities on state-owned submerged lands that are riparian to uplands must submit satisfactory evidence of sufficient upland interest in accordance with section 4.2.3(h) of this volume.

* * *

1.5.3 Land Use Considerations

The proposed land use to be served by an activity regulated under Chapter 62-330, F.A.C., does not have to be consistent with the local government's comprehensive plan or existing zoning for the site. However, it is strongly recommended that an applicant obtain the necessary land use approvals from the affected local government prior to or concurrent with the environmental resource permit application, since these approvals often contain conditions which impact the overall project design and, hence, the nature of the proposed activity. By obtaining these local government approvals first or concurrently, the applicant can reduce or eliminate the need for subsequent permit modifications which may be necessary as a result of conditions imposed by the local government.

* * *

4.2.3 Preparing an Application for an Individual or Conceptual Approval Permit

The submitted application must contain one original mailed or an electronic submittal of the materials requested in the applicable sections of the form, and such other information as is necessary to provide reasonable assurance that the activities proposed in the application meet the conditions for issuance under Rule 62-330.301, F.A.C., the additional conditions for issuance under Rule 62-330.302, F.A.C., and the applicable provisions of the Applicant's Handbook. Those materials include:

* * *

(d) Documentation of the applicant's real property interest over the land upon which the activities subject to the application will be conducted. Interests in real property typically are evidenced by:

1. The applicant being the record title holder.

* * *

(e) Applications must be signed by an entity having sufficient real property interest over the land upon which the activities subject to the application will be conducted as described in section 4.2.3(d), above. The applicant may designate an agent to provide materials in support of the application on its behalf.

* * *

10.0 Environmental Considerations

10.1 Wetlands and other surface waters

Wetlands are important components of the water resources in the state because they often serve as spawning, nursery and feeding habitats for many species of fish and wildlife, and because they often provide important flood storage, nutrient cycling, detrital production, and recreational and

water quality functions. Other surface waters, such as lakes, ponds, reservoirs, other impoundments, streams, rivers, and estuaries, also provide such functions and in addition may provide flood conveyance, navigation, recreation, and water supply functions to the public. Not all wetlands or other surface waters provide all of these functions, nor do they provide them to the same extent. A wide array of biological, physical and chemical factors affect the functioning of any wetland or other surface water community. Maintenance of water quality standards in applicable wetlands and other surface waters is critical to their ability to provide many of these functions. It is the intent of the Agency that the criteria in sections 10.2 through 10.3.8, below, be implemented in a manner that achieves a programmatic goal, and a project permitting goal, of no net loss in wetland or other surface water functions. This goal shall not include projects that are exempt by statute or rule, or that are authorized by a general permit. Unless exempted by statute or rule, permits are required for the construction, alteration, operation, maintenance, abandonment, and removal of projects so that the Agency can conserve the beneficial functions of these communities. The term "project" includes areas of dredging or filling, as those terms are defined in Sections 373.403(13) and 373.403(14), F.S.

10.1.1 Environmental Conditions for Issuance

The Agency addresses the conservation of these beneficial functions in the permitting process by requiring applicants to provide reasonable assurances that the following conditions for issuance of permits, set forth in Rules 62-330.301 (Conditions for Issuance) and 62-330.302 (Additional Conditions for Issuance), F.A.C., are met. Applicants must provide reasonable assurance that:

(a) A regulated activity will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters [paragraph 62-330.301(1)(d), F.A.C.];

(b) A regulated activity located in, on, or over wetlands or other surface waters will not be contrary to the public interest, or if such an activity significantly degrades or is within an Outstanding Florida Water, that the regulated activity will be clearly in the public interest [subsection 62-330.302(1), F.A.C.];

(c) A regulated activity will not adversely affect the quality of receiving waters such that the water quality standards set forth in Chapters 62-4, 62-302, 62-520, and 62-550, F.A.C., including any antidegradation provisions of paragraphs 62-4.242(1)(a) and (b), subsections 62-4.242(2) and (3), 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 [paragraph 62-330.301(1)(e), F.A.C.];

(d) A regulated activity located in, adjacent to or in close proximity to Class II waters or located in waters classified by the Department of Agriculture and Consumer Services as approved, restricted, conditionally approved, or conditionally restricted for shellfish harvesting will comply with the additional criteria in section 10.2.5, of this Volume [paragraph 62-330.302(1)(c), F.A.C.];

(e) The construction of vertical seawalls in estuaries and lagoons will comply with the additional criteria in section 10.2.6, of this Volume [paragraph 62-330.302(1)(d), F.A.C.];

(f) A regulated activity will not cause adverse secondary impacts to the water resources [paragraph 62-330.301(1)(f), F.A.C.]; and

(g) A regulated activity will not cause unacceptable cumulative impacts upon wetlands and other surface waters [paragraph 62-330.302(1)(b), F.A.C.].

10.2 Environmental Criteria

Compliance with the conditions for issuance in section 10.1.1, above, will be determined through compliance with the criteria explained in sections 10.2 through 10.3.8, below.

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. Design modifications to reduce or eliminate adverse impacts must be explored, as described in section 10.2.1.1, below. Adverse impacts remaining after practicable design modifications have been made may be offset by mitigation as described in sections 10.3 through 10.3.8, below. An applicant may propose mitigation, or the Agency may suggest mitigation, to offset the adverse impacts caused by regulated activities as identified

in sections 10.2 through 10.2.8.2, below. 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.

10.2.1.1 Except as provided in section 10.2.1.2, below, if the proposed activity will result in adverse impacts to wetland functions and other surface water functions such that it does not meet the requirements of sections 10.2.2 through 10.2.3.7, below, then the Agency in determining whether to grant or deny a permit shall consider whether the applicant has implemented practicable design modifications to reduce or eliminate such adverse impacts.

The term "modification" shall not be construed as including the alternative of not implementing the activity in some form, nor shall it be construed as requiring a project that is significantly different in type or function. A proposed modification that is not technically capable of being completed, is not economically viable, or that adversely affects public safety through the endangerment of lives or property is not considered "practicable." A proposed modification need not remove all economic value of the property in order to be considered not "practicable." Conversely, a modification need not provide the highest and best use of the property to be "practicable." In determining whether a proposed modification is practicable, consideration shall also be given to the cost of the modification compared to the environmental benefit it achieves.

10.2.1.2 The Agency will not require the applicant to implement practicable design modifications to reduce or eliminate impacts when:

a. The ecological value of the functions provided by the area of wetland or other

surface water to be adversely affected is low, based on a site specific analysis using the factors in section 10.2.2.3, below, and the proposed mitigation will provide greater long term ecological value than the area of wetland or other surface water to be adversely affected, or

b. The applicant proposes mitigation that implements all or part of a plan that provides regional ecological value and that provides greater long term ecological value than the area of wetland or other surface water to be adversely affected.

10.2.1.3 Should such mutual consideration of modification and mitigation not result in a permittable activity, the Agency must deny the application. Nothing herein shall imply that the Agency may not deny an application for a permit as submitted or modified, if it fails to meet the conditions for issuance, or that mitigation must be accepted by the Agency.

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.

* * *

10.2.2.3 The assessment of impacts expected as a result of proposed activities on the values of functions will be based on a review of scientific literature, ecologic and hydrologic information, and field inspection. When assessing the value of functions that any wetland or other surface water provides to fish, wildlife, and listed species, the factors that the Agency will consider are:

(a) Condition - this factor addresses whether the wetland or other surface water is in a high quality state or has been the subject of past alterations in hydrology, water quality, or vegetative composition. However, areas impacted by activities in violation of an Agency rule, order, or permit adopted or issued pursuant to Chapter 373, F.S., or Part VIII of Chapter 403, F.S. (1984 Supp.) as amended, will be evaluated as if the activity had not occurred;

(b) Hydrologic connection - this factor addresses the nature and degree of off-site connection, which may provide benefits to off-site water resources through detrital export, base flow maintenance, water quality

enhancement or the provision of nursery habitat;

(c) Uniqueness - this factor addresses the relative rarity of the wetland or other surface water and its floral and faunal components in relation to the surrounding regional landscape;

(d) Location - this factor addresses the location of the wetland or other surface water in relation to its surroundings. In making this assessment, the Agency will consult reference materials such as the Florida Natural Areas Inventory, Comprehensive Plans, and maps created by governmental agencies identifying land with high ecological values; and

(e) Fish and wildlife utilization - this factor addresses use of the wetland or other surface water for resting, feeding, breeding, nesting or denning by fish and wildlife, particularly those that are 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. Each applicant must identify potential environmental public health or safety issues resulting from their project. Examples of these issues include:

mosquito control; proper disposal of solid, hazardous, domestic, or industrial waste; aids to navigation; hurricane preparedness or cleanup; environmental remediation; enhancement or restoration, and similar environmentally related issues. For example, the installation of navigational aids may improve public safety and may reduce impacts to public resources[.]

* * *

(d) Environmental impacts to the property of others. For example, construction of a ditch that lowers the water table such that off-site wetlands or other surface waters would be partly or fully drained would be an environmental impact 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. Applicants proposing temporary activities in navigable surface waters, such as the mooring of construction barges, must address measures for clearly marking the work as a hazard to navigation, including nighttime lighting.

(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.

* * *

10.2.3.7 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.

10.2.4 Water Quality

Pursuant to section 10.1.1(c), above, an applicant must provide reasonable assurance that the regulated activity will not cause or contribute to violations of water quality standards in areas where water quality standards apply.

Reasonable assurances regarding water quality must be provided both for the short term and the long term, addressing the proposed construction, alteration, operation, maintenance, removal and abandonment of the project. The following requirements are in addition to the water quality requirements found in sections 8.2.3 and 8.3 through 8.3.3, above.

10.2.4.1 Short Term Water Quality Considerations

The applicant must address the short term water quality impacts of a proposed activity, including:

- (a) Providing and maintaining turbidity barriers or similar devices for the duration of dewatering and other construction activities in or adjacent to wetlands or other surface waters;
- (b) Stabilizing newly created slopes or surfaces in or adjacent to wetlands and other surface waters to prevent erosion and turbidity;
- (c) Providing proper construction access for barges, boats and equipment to ensure that propeller dredging and rutting from vehicular traffic does not occur;
- (d) Maintaining construction equipment to ensure that oils, greases, gasoline, or other pollutants are not released into wetlands or other surface waters;
- (e) Controlling the discharge from spoil disposal sites; and
- (f) Preventing any other discharge or release of pollutants during construction or alteration that will cause or contribute to water quality standards being violated.

10.2.4.2 Long Term Water Quality Considerations

The applicant must address the long term water quality impacts of a proposed activity, including:

- (a) The potential of a constructed or altered water body to cause or contribute to violations of water quality standards due to its depth or configuration. For example, the

depth of water bodies must be designed to ensure proper mixing so that the water quality standard for dissolved oxygen will not be violated in the lower levels of the water body, but the depth should not be so shallow that the bottom sediments are frequently resuspended by boat activity. Water bodies must be configured to prevent the creation of debris traps or stagnant areas that could result in violations of water quality standards.

(b) Long term erosion, siltation or propeller dredging that will cause turbidity violations.

(c) Prevention of any discharge or release of pollutants from the activity that will cause water quality standards to be violated.

10.2.4.3 Additional Water Quality Considerations for Docking Facilities

Docking facilities, due to their nature, provide potential sources of pollutants to wetlands and other surface waters. If the proposed work has the potential to adversely affect water quality, an applicant proposing the construction, expansion or alteration of a docking facility must address the following factors to provide the required reasonable assurance that water quality standards will not be violated:

(a) Hydrographic information or studies shall be required for docking facilities of greater than ten boat slips, unless hydrographic information or studies previously conducted in the vicinity of the facility provide reasonable assurance that the conditions of the water body and the nature of the proposed activity do not warrant the need for new information or studies. Hydrographic information or studies also may be required for docking facilities of fewer than ten slips, dependent upon the site specific features described in section

10.2.4.3(b), below. In all cases, the design of the hydrographic study, and its complexity, will be dependent upon the specific project design and the specific features of the project site.

(b) The purpose of the hydrographic information or studies is to document the flushing time (the time required to reduce the concentration of a conservative pollutant to ten percent of its original concentration) of the water at the docking facility. This information is used to determine the likelihood that the facility will accumulate pollutants to the extent that water quality violations will occur. Generally, a flushing time of less than or equal to four days is the maximum that is desirable for docking facilities. However, the evaluation of the maximum desirable flushing time also takes into consideration the size (number of slips) and configuration of the proposed docking facility; the amplitude and periodicity of the tide; the geometry of the subject water body; the circulation and flushing of the water body; the quality of the waters at the project site; the type and nature of the docking facility; the services provided at the docking facility; and the number and type of other sources of water pollution in the area.

(c) The level and type of hydrographic information or studies that will be required for the proposed docking facility will be determined based upon an analysis of site specific characteristics. As compared to sites that flush in less than four days, sites where the flushing time is greater than four days generally will require additional, more complex levels of hydrographic studies or information to determine whether water quality standards can be expected to be violated by the facility. The degree and complexity of the hydrographic study will be dependent upon the types of considerations listed in section 10.2.4.3(b), above,

including the potential for the facility, based on its design and location, to add pollutants to the receiving waters. Types of information that can be required include site-specific measurements of: waterway geometry, tidal amplitude, the periodicity of forces that drive water movement at the site, and water tracer studies that document specific circulation patterns.

(d) The applicant shall document, through hydrographic information or studies, that pollutants leaving the site of the docking facility will be adequately dispersed in the receiving water body so as to not cause or contribute to violations of water quality standards based on circulation patterns and flushing characteristics of the receiving water body.

(e) In all cases, the hydrographic studies shall be designed to document the hydrographic characteristics of the project site and surrounding waters. All hydrographic studies must be based on the factors described in sections (a) through (d), above. An applicant should consult with the Agency prior to conducting such a study.

(f) In accordance with Chapters 62-761 and 62-762, F.A.C., applicants are advised that fueling facilities must have secondary containment equipment and shall be located and operated so that the potential for spills or discharges to surface waters and wetlands is minimized.

(g) The disposal of domestic wastes from boat heads, particularly from liveaboard vessels, must be addressed to prevent improper disposal into wetlands or other surface waters. A liveaboard vessel shall be defined as a vessel docked at the facility that is inhabited by a person or persons for any five consecutive days or a total of ten days within a 30-day period.

(h) The disposal of solid waste, such as garbage and fish cleaning debris, must be addressed to prevent disposal into wetlands or other surface waters.

(i) Pollutant leaching characteristics of materials such as treated pilings and anti-fouling paints used on the hulls of vessels must be addressed to ensure that any pollutants that leach from the structures and vessels will not cause violations of water quality standards given the flushing at the site and the type, number and concentration of the likely sources of pollutants.

10.2.7 Secondary Impacts

Pursuant to section 10.1.1(f), above, an applicant must provide reasonable assurances that a regulated activity will not cause adverse secondary impacts to the water resource, as described in sections (a) through (d), below. Aquatic or wetland dependent fish and wildlife are an integral part of the water resources that the Agency is authorized to protect under Part IV, Chapter 373, F.S.

Aquatic or wetland dependent species that are listed species are particularly in need of protection, as are: the bald eagle (Halieaeetus leucocephalus), which is protected under the Bald and Golden Eagle Protection Act (16 U.S.C. 668-668d) and Rule 68A-16.002, F.A.C.

A proposed activity shall be reviewed under this criterion by evaluating the impacts to: wetland and surface water functions identified in section 10.2.2, above, water quality, upland habitat for bald eagles and aquatic or wetland dependent listed species, and historical and archaeological resources. De minimis or remotely related secondary impacts will not be considered. Applicants may propose measures such as preservation to prevent secondary impacts. Such preservation

shall comply with the land preservation provisions of section 10.3.8, below. If such secondary impacts cannot be prevented, the applicant may propose mitigation measures as provided for in sections 10.3 through 10.3.8, below.

This secondary impact criterion consists of the following four parts:

(a) An applicant shall provide reasonable assurance that the secondary impacts from construction, alteration, and intended or reasonably expected uses of a proposed activity will not cause or contribute to violations of water quality standards or adverse impacts to the functions of wetlands or other surface waters as described in section 10.2.2, above.

Impacts such as lights from development adjacent to marine turtle nesting beaches, boat traffic generated by a proposed dock, boat ramp or dry dock facility, which cause an increased threat of collision with manatees; impacts to wildlife from vehicles using proposed roads in wetlands or other surface waters; impacts to water quality associated with the use of onsite sewage treatment and disposal systems (e.g., septic tanks and drainfields) or propeller dredging by boats and wakes from boats; and impacts associated with docking facilities as described in sections 10.2.4.3(f) through (i), above, will be considered relative to the specific activities proposed and the potential for such impacts. Impacts of groundwater withdrawals upon wetlands and other surface waters that result from the use of wells permitted pursuant to the District consumptive use rules shall not be considered under the rules adopted pursuant to Part IV of Chapter 373, F.S.

Secondary impacts to the habitat functions of wetlands associated with adjacent upland activities will not be considered adverse if

buffers, with a minimum width of 15 ft. and an average width of 25 ft., are provided abutting those wetlands that will remain under the permitted design, unless additional measures are needed for protection of wetlands used by bald eagles for nesting, or listed species for nesting, denning, or critically important feeding habitat. The mere fact that a species is listed does not imply that all of its feeding habitat is critically important. Buffers shall be maintained in an undisturbed vegetated condition, except when the permit requires removal of exotic and nuisance vegetation or the planting of appropriate native species to prevent adverse secondary impacts to the habitat functions of the wetlands. Drainage features such as spreader swales and discharge structures are acceptable within the buffer, provided the construction or use of these features does not adversely impact wetlands. Where an applicant elects not to use buffers of the above-described dimensions, buffers of different dimensions, or other measures, may be proposed to provide the required reasonable assurance. Wetlands or other surface waters shall not be filled to achieve this buffer requirement. For example, an undisturbed upland buffer would not be required to be established waterward of areas of wetlands or other surface waters that are authorized to be filled for other purposes, such as to construct a bulkhead, although this does not relieve the applicant from providing other reasonable assurance demonstrating that the construction, alteration, and intended or reasonably expected uses of a proposed activity will not result in adverse secondary impacts to wetlands and other surface waters. Buffers proposed to protect against secondary impacts shall be allowed to overlap with vegetated natural buffers, except where the Agency determines that such overlap would adversely affect the purposes each buffer is designed to address.

(b) An applicant shall provide reasonable assurance that the construction, alteration, and intended or reasonably expected uses of a proposed activity will not adversely impact the ecological value of uplands for bald eagles, and aquatic or wetland dependent listed animal species for enabling existing nesting or denning by these species, but not including:

1. Areas needed for foraging; or
2. Wildlife corridors, except for those limited areas of uplands necessary for ingress and egress to the nest or den site from the wetland or other surface water.

A list of aquatic or wetland dependent listed species and species having special protection that use upland habitats for nesting and denning may be found at <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/documents/listed-wildlife-species-are>.

In evaluating whether a proposed activity will adversely impact the ecological value of uplands to the bald eagle and aquatic or wetland dependent listed species, the Agencies shall consider comments received from the Florida Fish and Wildlife Conservation Commission (FWC), the U.S. Fish and Wildlife Service, the applicant, and the public (for comments related to this section). Permitting guidelines within management plans, recovery plans, habitat and conservation guidelines, scientific literature, and technical assistance documents such as the "Florida Wildlife Conservation Guide" (myfwc.com/conservation/value/fwcg/) also will be considered.

Compliance with the U.S. Fish and Wildlife Service (USFWS) Habitat Management Guidelines for the Wood Stork in the Southeast Region (January 1990), available at: <http://www.fws.gov/northflorida/WoodStorks/Documents/199001>

00_gd_Wood-stork-habitat-guidelines-1990.pdf, and reproduced in Appendix G, will provide reasonable assurance that the proposed activity will not adversely impact upland habitat functions described in paragraph (b) for the wood stork.

Secondary impacts to the functions of wetlands or uplands for nesting of bald eagles (Haliaeetus leucocephalus) will not be considered adverse if the applicant holds a valid authorization from the USFWS pursuant to paragraph 68A-16.002(1), F.A.C., for the same activities proposed by the applicant under Part IV of Chapter 373, F.S., or if the applicant demonstrates compliance with the USFWS National Bald Eagle Management Guidelines (May 2007) available at: <https://www.fws.gov/northeast/ecologicalservices/pdf/NationalBaldEagleManagementGuidelines.pdf>, and reproduced in Appendix H).

For those aquatic or wetland dependent listed animal species for which habitat management guidelines have not been developed, or in cases where an applicant does not propose to use USFWS or FWC habitat management guidelines, the applicant may propose measures to mitigate adverse impacts to upland habitat functions described in paragraph (b) provided to aquatic or wetland dependent listed animal species and species having special protection listed online at <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/documents/listed-wildlife-species-are>. Such proposals will be evaluated by the Agency to determine if the measures provide reasonable assurance.

(c) In addition to evaluating the impacts in the area of any dredging and filling in, on, or over wetlands or other surface waters, and as part of the balancing review under section 10.2.3, above, the Agency will consider any other associated activities that are very

closely linked and causally related to any proposed dredging or filling that have the potential to cause impacts to significant historical and archaeological resources.

(d) An applicant shall provide reasonable assurance that the following future activities will not result in water quality violations or adverse impacts to the functions of wetlands or other surface waters as described in section 10.2.2, above:

1. Additional phases or expansion of the proposed activity for which plans have been submitted to the Agency or other governmental agencies; and

2. On-site and off-site activities regulated under Part IV, Chapter 373, F.S., or activities described in Section 403.813(1), F.S., that are very closely linked and causally related to the proposed activity.

As part of this review, the Agency will also consider the impacts of the intended or reasonably expected uses of the future activities on water quality and wetland and other surface water functions.

In conducting the analysis under section (d)2, above, the Agency will consider those future projects or activities that would not occur but for the proposed activity, including where the proposed activity would be considered a waste of resources should the future project or activities not be permitted.

Where practicable, proposed activities shall be designed in a fashion that does not necessitate future impacts to wetland and other surface water functions. Activity expansions and future activity phases will be considered in the secondary impact analysis. If the Agency determines that future phases of an activity involve impacts that do not appear to meet permitting criteria, the

current application shall be denied unless the applicant can provide reasonable assurance that those future phases can comply with permitting criteria. One way for applicants to establish that future phases or system expansions do not have adverse secondary impacts is for the applicant to obtain a conceptual approval permit for the entire project.

10.2.8 Cumulative Impacts

Pursuant to section 10.1.1(g), above, an applicant must provide reasonable assurance that a regulated activity will not cause unacceptable cumulative impacts upon wetlands and other surface waters within the same drainage basin as the regulated activity for which a permit is sought. The impact on wetlands and other surface waters shall be reviewed by evaluating the impacts to water quality as set forth in section 10.1.1(c), above, and by evaluating the impacts to functions identified in section 10.2.2, above.

(a) If an applicant proposes to mitigate these adverse impacts within the same drainage basin as the impacts, and if the mitigation fully offsets these impacts, then the Agency will consider the regulated activity to have no unacceptable cumulative impacts upon wetlands and other surface waters, and consequently, the condition for issuance in section 10.1.1(g) will be satisfied. The drainage basins within each District are reproduced below in Figures 10.2.8-1 through 10.2.8-5.

(b) If an applicant proposes to mitigate adverse impacts through mitigation physically located outside of the drainage basin where the impacts are proposed, an applicant may demonstrate that such mitigation fully offsets the adverse impacts within the impacted drainage basin (as measured from the impacted drainage basin), based on factors such as connectivity of waters, hydrology,

habitat range of affected species, and water quality. If the mitigation fully offsets the impacts (as measured from the impacted drainage basin), then the Agency will consider the regulated activity to have no unacceptable cumulative impacts upon wetlands and other surface waters, and consequently, the condition for issuance in section 10.1.1(g), above, will be satisfied. In other words, if the functions provided by the proposed out-of-basin-mitigation will "spill over" into the impacted basin, and are sufficient to offset the impacts within the impacted basin, then the condition for issuance in section 10.1.1(g) will be satisfied.

(c) When adverse impacts to water quality or adverse impacts to the functions of wetlands and other surface waters, as referenced in paragraphs (a) and (b) above, are not fully offset within the same drainage basin as the impacts, then an applicant must provide reasonable assurance that the proposed activity, when considered with the following activities, will not result in unacceptable cumulative impacts to water quality or the functions of wetlands and other surface waters, within the same drainage basin:

1. Projects that are existing or activities regulated under Part IV, Chapter 373, F.S., that are under construction or projects for which permits or determinations pursuant to Section 373.421, F.S., or Section 403.914, F.S. (1991), have been sought.

2. Activities that are under review, approved, or vested pursuant to Section 380.06, F.S., or other activities regulated under Part IV of Chapter 373, F.S., which may reasonably be expected to be located within wetlands or other surface waters, in the same drainage basin, based upon the comprehensive plans, adopted pursuant to Chapter 163, F.S., of the local governments having jurisdiction

over the activities, or applicable land use restrictions and regulations.

Only those activities listed in sections (c)1. and 2., above, that have similar types of impacts (adverse effects) to those that will be caused by the proposed activity and for which those impacts are not fully offset within the drainage basin, as described in section (a) or (b), above, will be considered. Activities are considered to have similar impacts if they affect similar types of water resources and functions, regardless of whether the activities themselves are similar to one another.

The cumulative impact evaluation is conducted using an assumption that reasonably expected future applications with like impacts will be sought, thus necessitating equitable distribution of acceptable impacts among future applications.

* * *

12.0 Operation and Maintenance Requirements

12.1 Responsibilities

(a) In accordance with Rule 62-330.310, F.A.C., and except as provided in section 12.1.1, below, upon completion of a project constructed in conformance with an individual permit issued under Part IV of Chapter 373, F.S., the permit must be converted from the construction phase to an operation and maintenance phase.

(b) Responsibility for operation and maintenance of a regulated activity shall be an obligation in perpetuity as provided in Rule 62-330.310, F.A.C. Such entity or entities must have the financial, legal, and administrative capability to perform operation and maintenance in accordance with Agency rules and permit conditions.

(c) Conversion of a permit from the construction to the operation and maintenance phase shall follow the procedures in Rule 62-330.310, F.A.C., and section 12.2, below.

* * *

12.2 Procedures for Requesting Conversion from the Construction Phase to the Operation and Maintenance Phase

* * *

(b) For projects other than those specified in sections 12.1.1 and 12.2(a), above – Submittal of Form 62-330.310(1) "As-Built Certification and Request for Conversion to Operation Phase," in accordance with subparagraph 62-330.350(1)(f)2., F.A.C., shall serve to notify the Agency that the project, or independent portion of the project, is completed (other than long-term monitoring and any mitigation that will require additional time after construction or alteration to achieve the success criteria specified in the permit) and ready for inspection by the Agency.

1. Projects not requiring certification by a registered professional shall be certified by the permittee or their authorized agent. Projects designed by a registered professional shall be certified by a registered professional, unless exempted by law.

2. The person completing Form 62-330.310(1) shall inform the Agency if there are substantial deviations from the plans approved as part of the permit and include as-built drawings with the form.

The plans must be clearly labeled as "as-built" or "record" drawings and shall consist of the permitted drawings that clearly highlight (such as through "red

lines" or "clouds") any substantial deviations made during construction. The permittee shall be responsible for correcting the deviations [as verified by a new certification using Form 62-330.310(1)]. Non-substantial deviations do not require a permit modification. Substantial deviations shall be processed as a minor or major modification under Rule 62-330.315, F.A.C. Such modification must be issued by the Agency prior to the Agency approving the request to convert the permit from the construction to the operation and maintenance phase.

3. The person certifying compliance with the permit shall submit documentation that demonstrates satisfaction of all permit conditions, other than long term monitoring and inspection requirements, along with Form 62-330.310(1).

192. Based on the foregoing, it is concluded that, with the inclusion of the conditions currently contained in the Consolidated Authorization, as well as the conditions addressed in paragraphs 35, 68, 69, 70, and 106, above, the Project meets the pertinent requirements of sections 373.413 and 373.414(1)(a) and implementing rules, so is entitled to issuance of the environmental resource permit for the Project.

B. Sovereignty Submerged Lands Lease

193. 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.

194. 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.

* * *

(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.

195. 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.

196. 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.

197. Based on the foregoing, it is concluded that the Project meets all applicable requirements of chapter 253 and chapter 18-21, including the requirement that it not be contrary to public interest. Accordingly, it is concluded that Workboats is entitled to issuance of the Lease for the Project.

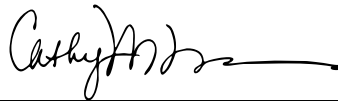
Conclusion

198. 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 conditions addressed in paragraphs 35, 68, 69, 70, 106, and 137, above, the Project will meet all applicable statutory and rule requirements for issuance of the environmental resource permit 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. 16-0345934-003-EI, on the terms and conditions set forth in the Consolidated Notice of Intent and attached draft amended Permit No. 16-0345934-003-EI, as modified to include the conditions addressed in paragraphs 35, 68, 69, 70, 106, and 137, above.

DONE AND ENTERED this 1st day of March, 2019, in
Tallahassee, Leon County, Florida.



CATHY M. SELLERS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of March, 2019.

ENDNOTES

^{1/} 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 also Lavernia v. Dep't of Prof'l Reg., 616 So. 2d 53 (Fla. 1st DCA 1993) (law in effect at time the agency takes final action on licensure application applies).

^{2/} The undersigned excluded evidence regarding the Project's compliance with the City's zoning code for the reasons explained in the Order on Motion in Limine and for Protective Order issued in this proceeding on December 6, 2018. In that Order, the undersigned determined that, as a matter of law, compliance with local zoning was not a relevant consideration in determining whether to grant or deny an environmental resource permit or sovereignty submerged lands lease. To preserve this issue for appeal, the City proffered evidence in summary form regarding the zoning compliance issue at the final hearing.

^{3/} The City asserts that authorizing Workboats to construct the proposed docks on sovereignty submerged lands waterward of the residential-zoned lots (lots 6, 7, and 9) is contrary to the public interest because Workboats will be conducting industrial activities that are not allowed under the residential zoning classification applicable to those lots. However, as discussed in the Order in Limine, nothing in chapter 253, chapter 18-21, or case law interpreting this statute or rule identifies local land use compliance issues as germane to the public interest determination. Absent specific statutory and rule authority, DEP and the Board of Trustees (and, by extension, DOAH) are not authorized to impose local land use compliance as a condition for issuance of a sovereignty submerged lands lease. See Schiffman v. Dep't of Prof'l Reg., 581 So. 2d 1374, 1379 (Fla. 1st DCA 1991) (because agencies are creatures of statute, their powers, duties, and authority are only those conferred by statute). This proceeding does not affect the City's existing authority to administratively and/or judicially enforce its zoning code requirements and restrictions against Workboats for any violations of that code that occur on Workboats' property.

^{4/} Once the construction of the permitted activity has been completed, the permittee must convert the environmental resource permit to the operation phase, pursuant to Florida Administrative Code Rule 62-330.310(1), in order to operate the facility. The Consolidated Authorization requires Workboats, within 30 days of the completion of construction of the permitted structures, to complete and submit the As-Built Certification and Request for Conversion to Operation Phase form to DEP. As part of this form, Workboats is required to certify

that the Project has been constructed in substantial conformance with the plans, specifications, and conditions authorized in the ERP. DEP must approve this certification in order for the operational phase of the Project to go into effect.

^{5/} 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.

^{6/} 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."

^{7/} In 1959, the Board of Trustees issued Disclaimer No. 22146, disclaiming title to the land that comprises Lot 9. To the extent the submerged lands on which a portion of Dock C is proposed to be constructed are owned by Shafnacker pursuant to Disclaimer No. 22146, those lands are not required to be included in the preempted area of the Lease.

^{8/} The evidence established that the Project will be used as a "home base" for mooring Workboats' vessels that are not being used at off-site jobs. The parties stipulated, and the Consolidated Authorization requires, that vessels used in connection with the Project must be moored, and all authorized activities conducted, within the Lease boundaries.

^{9/} As more fully discussed below, Workboats' prima facie entitlement to issuance of the environmental resource permit for the Project was established by entering the Application and Notice of Intent into evidence at the final hearing.

^{10/} The Environmental Resource Permit Applicant's Handbook, Volume I, June 2018 ("Handbook"), which is incorporated by reference in rule 62-330.010(4), provides guidance regarding meeting the requirements of rule 62-330.301.

^{11/} Due to the difference speeds at which vessels of different sizes and configurations may travel while in compliance with this rule, there is no specific numerical speed assigned to a "slow speed" zone.

^{12/} See Deep Lagoon Boat Club, Ltd. v Sheridan, 784 So. 2d 1140, 1143 (Fla. 2d DCA 2001) (defining "secondary impacts" as "impacts not caused by the construction of the project itself, but by other relevant activities very closely linked or causally related to the construction of the project.") See also Conservancy, Inc. v. A. Vernon Allen Builders, Inc., 580 So. 2d 772, 777 (Fla. 1st DCA 1991).

^{13/} Rule 62.330.301(5), which establishes requirements, including financial responsibility requirements, applicable to mitigation is not applicable to the Project because no mitigation requirements have been imposed to offset wetland impacts. The City has not asserted, or presented evidence, that mitigation is required for issuance of the ERP.

^{14/} The Handbook provides guidance regarding meeting the requirements of rule 62-330.302.

^{15/} Handbook, section 10.2.3.1(a), (d).

^{16/} Handbook, section 1.5.3.

^{17/} The Notice of Intent, Join Exhibit 2, page 102, states that the Project "meets the 25% maximum berth of a waterway width." The requirement that a docking facility not extend more than 25 percent of the width of the water body is codified at Florida Administrative Code Rule 18-21.004(4)(d) and is applicable to private multi-family residential docks; thus, this requirements does not apply to the Project. Nonetheless, it bears mention that the Project will extend less than 25 percent of the width of the Back Channel.

^{18/} Although the M & M Shrimp Docks, Inc., sovereignty submerged lands lease ("M & M Lease"), which is located immediately west of the proposed Lease, does not extend as far from the shoreline into the Back Channel as the Lease, the docks located within the M & M Lease extend further out into the Back Channel than will docks A, B, or C. Refer to Joint Exhibit 5C.

^{19/} 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).

20/ In Haskett, the final order issued by DEP stated:

Chapter 18-21, F.A.C., contains the general standards and criteria governing the use of sovereignty submerged lands. Rule 18-21.004, F.A.C., establishes the management policies, standards, and criteria which shall be used in determining with to approve . . . or deny all requests for activities on sovereignty submerged lands. As the ALJ noted, Rule 18-21.004(1)(a), F.A.C., requires that activities on sovereignty submerged lands not be contrary to the public interest. . . . These proprietary rules in chapter 18-21, F.A.C., authorize the private use of portions of sovereignty lands under navigable waters when not contrary to the public interest. See Hayes v. Bowman, 91 So. 2d 795 (Fla. 1957); Yonge v. Askew, 293 So. 2d 395 (Fla. 1st DCA 1974); Krieter v. Chiles, 595 So. 2d 111 (Fla. 3d DCA 1992), rev. denied, 601 So. 2d 552 (Fla. 1992), cert. denied, 506 U.S. 916, 113 S. Ct. 325 . . . (1992). When structures, such as docks, meet the standards and criteria governing dock construction prescribed in the proprietary rules, they are presumed to be not contrary to the public interest. See, e.g., Bd. of Comm. of Jupiter Inlet District v. Thibadeau, Case No. 03-4099 (Fla. DOAH July 25, 2005; Fla. DEP September 7, 2005); Trump Plaza of the Palm Beaches v. Palm Beach Cty., Case No. 08-4752 (Fla. DOAH September 24, 2009; Fla. DEP November 9, 2009). The presumption can be rebutted with evidence showing that on balance, the demonstrable environmental, social, and economic costs exceed the demonstrable environmental, social, and economic benefits accruing to the public at large. See Fla. Admin. Code. R. 18-21.003(51) . . . (definition for "[p]ublic interest"). Such showings, however, are limited to the

standards and criteria prescribed in the proprietary rules.

Haskett, Case No. 13-0858 (Fla. DEP Oct. 29, 2013).

^{21/} The City also asserts that "upland zoning restrictions prohibit the Applicant from lawfully using two of the three proposed docks for the stated purpose," so that granting of the Lease would unnecessarily preempt sovereignty submerged lands from public use, thus further reducing any benefits of the Project for purposes of the public interest test in rule 18-21.004(1)(a). However, rule 18-21.004(1)(a) states that for approval, all activities on sovereignty lands must not be contrary to the public interest. Thus, alleged unlawful use of privately-owned upland property is not germane to the public interest test under rule 18-21.004(1)(a).

^{22/} Before July 1, 2002, section 403.412(5) was interpreted to authorize all of the statutorily-enumerated parties to initiate administrative proceedings. The statute was amended in 2002 to expressly limit the standing of "citizens of the state" to only "intervening"—i.e., joining an ongoing proceeding—rather than initiating a proceeding. This limitation does not apply to the Department of Legal Affairs or to political subdivisions or municipalities of the state, which remain authorized under this statute to initiate administrative proceedings for the protection of the air, water, or other natural resources of the state from pollution, impairment, or destruction, provided they file the required verified pleading.

^{23/} See Merriam-Webster's Collegiate Dictionary, 11th ed. (2003) (defining a "consumer" as "one that utilizes economic goods").

^{24/} Case law has not extended the doctrine of parens patriae—which entails the authority of a governmental entity to protect persons who are unable to act on their own behalf when there is a sovereign involved—to confer standing to local government entities to represent the interests of their residents in administrative challenges to environmental approvals. See Atlantic Civil, Inc. v. Fla. Power & Light Co., Case Nos. 15-1746, 15-1747 (Fla. DOAH Feb. 15, 2016), modified in part on other grounds, Case No. 14-0741 (Fla. DEP Apr. 21, 2016); City of Coconut Creek v. Waste Mgmt. Inc., Case No. 91-0473 (Fla. DEP Apr. 23, 1991).

^{25/} See, e.g., Murthy v. N. Sinha Corp., 644 So. 2d 983, 985-86 (Fla. 1994) (discussing the use of legislative history in determining legislative intent for purposes of statutory interpretation). See also Johansen v. United States, 347 U.S. 427, 437 (1952) (Court considered Congressional floor debate of legislation in discerning legislative intent for purposes of interpreting statute).

^{26/} Section 373.403(5) defines "works" as "all artificial structures, including, but not limited to . . . other construction that . . . is placed in or across the waters in the state." The proposed Project is a "work," so is subject to section 373.413 and rule 62-330.301, which implements this statute.

^{27/} Section 373.414 is implemented by rule 62-330.302.

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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.