

**STATE OF FLORIDA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

**MARK SHEFFLER, MICHAEL DAVIS,** )  
**STEVEN FUSSELL and MITCHELL ERGLE,** )  
 )  
**Petitioners,** )  
 )  
 v. )  
 )  
**ANDREW KENT, BOARD OF TRUSTEES OF** )  
**THE INTERNAL IMPROVEMENT TRUST** )  
**FUND and STATE OF FLORIDA** )  
**DEPARTMENT OF ENVIRONMENTAL** )  
**PROTECTION,** )  
 )  
**Respondents.** )  
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**OGC CASE NO. 19-1272**  
**DOAH CASE NO. 20-0614**

**FINAL ORDER**

An Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH) on August 31, 2020, submitted a Recommended Order (RO) to the Department of Environmental Protection (DEP or Department) in the above-captioned administrative proceeding. A copy of the RO is attached hereto as Exhibit A. No party filed exceptions to the ALJ’s RO. This matter is now before the Secretary of the Department for final agency action.

**BACKGROUND**

In May of 2019, Mr. Kent applied to DEP for a general permit to construct a single-family dock less than 2,000 sq. feet with one slip on lot 18 in the Romeo Point subdivision in Fleming Island, Florida (the Lot 18 Dock). Lot 18 fronts on Doctors Lake, a tidally influenced water body that connects to the St. Johns River.

On June 17, 2019, DEP issued a general permit to Mr. Kent to construct a 1,615 sq. ft. private residential single-family dock consisting of an access pier, terminal platform, and a

covered boat slip, a Letter of Consent to use sovereignty submerged lands, and a State Programmatic General Permit from the United States Army Corps of Engineers (U.S. Army Corps) (collectively the first general permit). Petitioners did not receive written notice of the first general permit, and notice was not published.

On July 17, 2019, Petitioners filed a petition challenging the first general permit. Petitioners own water-front lots on a canal dredged along the western edge of the Romeo Point subdivision, several lots south of Lot 18. The petition was referred to DOAH. The petition alleged that the Lot 18 Dock crossed an existing, permitted navigational boat access channel that Petitioners used to safely navigate motorized watercraft from their homes to the open waters of Doctors Lake, and restricted their access to those navigable waters.

On September 27, 2019, upon discovering that the Lot 18 Dock had been constructed out of compliance with the first general permit, DEP filed a Notice of Intent to Change Agency Action, stating it had taken enforcement action on the Lot 18 Dock as built. The Notice stated that DEP intended to require Mr. Kent to apply for another permit that Petitioners would be able to contest.

On December 6, 2019, on behalf of the ERP program and the Board of Trustees of the Internal Improvement Trust Fund (BTITF), DEP entered a Consent Order with Mr. Kent that addressed the issues of non-compliance. He was issued a substitute general permit that included a Letter of Consent dated November 19, 2019 (collectively the revised general permit), which gave after-the-fact approval of the Lot 18 Dock as constructed.

On December 12, 2019, DEP filed a Notice of Substitution of Agency Action in DOAH Case No. 19-4192, and the presiding ALJ relinquished jurisdiction to DEP.



On December 17, 2019, Petitioners timely filed a Request for Modification of Consent Order and Administrative Hearing challenging the Consent Order, ERP, and BTIITF Letter of Consent, which was referred to DOAH on February 4, 2020.

The ALJ boiled down the overriding issues in this case to whether the construction of the Lot 18 Dock would constitute an impediment or hazard to Petitioners' ability to safely navigate from their homes to the open waters of Doctors Lake, and whether requiring Petitioners to cross through shallow waters to access Doctors Lake will adversely affect environmental resources in the area.

The hearing was held May 21 through 22, 2020, and concluded June 15, 2020.

The ERP, issued under the authority of Chapter 373, Florida Statutes, was subject to the modified burden of proof established in Section 120.569(2)(p), Florida Statutes. The Letter of Consent was issued under the authority of Chapter 253, Florida Statutes. Thus, the burden remained with Mr. Kent to demonstrate entitlement to the BTIITF proprietary authorization

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

In the RO, the ALJ recommended that the Department enter a final order (1) denying an environmental resource permit to Andrew Kent for the Lot 18 Dock (whether it be the revised general permit authorized in the Consent Order dated December 6, 2019, or an individual ERP); (2) denying the Letter of Consent or other form of state lands authorization for Andrew Kent's Lot 18 Dock; and (3) requiring measures to reestablish the boat access channel recognizing Petitioners' riparian rights of navigation, and the valid St. Johns River Water Management District permit and U.S. Army Corps permit for the boat access channel. (RO pp. 54-55). In doing so, the ALJ found the evidence established that the Lot 18 Dock significantly impedes the Petitioners' navigability in violation of the ERP rules. (RO ¶¶ 127, 129). Moreover, the ALJ

found the evidence established that the Lot 18 Dock unreasonably interferes with Petitioners' riparian rights of navigation, and creates a navigational hazard in violation of Rules 18-21.004(3)(c), and 18-21.004(7)(f) and (g), Florida Administrative Code. (RO ¶¶ 135, 144, 146).

### CONCLUSION

The case law of Florida holds that parties to formal administrative proceedings must alert reviewing agencies to any perceived defects in DOAH hearing procedures or in the findings of fact of ALJs by filing exceptions to DOAH recommended orders. *See, e.g., Comm'n on Ethics v. Barker*, 677 So. 2d 254, 256 (Fla. 1996); *Henderson v. Dep't of Health, Bd. of Nursing*, 954 So. 2d 77, 81 (Fla. 5th DCA 2007); *Fla. Dep't of Corrs. v. Bradley*, 510 So. 2d 1122, 1124 (Fla. 1st DCA 1987). Having filed no exceptions to any findings of fact the parties “[have] thereby expressed [their] agreement with, or at least waived any objection to, those findings of fact.” *Env'tl. Coal. of Fla., Inc. v. Broward Cty.*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Med. Ctr., Inc. v. State of Fla., Agency for Health Care Admin.*, 847 So. 2d 540, 542 (Fla. 4th DCA 2003). However, even when exceptions are not filed, an agency head reviewing a recommended order is free to modify or reject any erroneous conclusions of law over which the agency has substantive jurisdiction. *See* § 120.57(1)(l), Fla. Stat. (2020); *Barfield v. Dep't of Health*, 805 So. 2d 1008, 1012, (Fla. 1st DCA 2001); *Fla. Public Emp. Council, 79 v. Daniels*, 646 So. 2d 813, 816 (Fla. 1st DCA 1994).

No party filed any exceptions to the RO objecting to the ALJ's findings, recommendations, or DOAH's hearing procedures. The Department agrees with the ALJ's legal conclusions and recommendations.



Having considered the applicable law and standards of review in light of the findings and conclusions set forth in the RO, and being otherwise duly advised, it is

ORDERED that:

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

B. The Environmental Resource Permit (including both the revised general permit authorized in the Consent Order dated December 6, 2019, and the individual ERP identified in the RO incorporated by reference herein) for Andrew Kent's Lot 18 Dock is DENIED;

C. The Letter of Consent or other form of state lands authorization for Andrew Kent's Lot 18 Dock is DENIED;

D. The December 6, 2019 proposed Consent Order is DISAPPROVED;

E. The Department's Northeast District Office is directed to take action, including any necessary enforcement actions, to reestablish the boat access channel and the Petitioners' rights of navigation consistent with this Order; and

F. This Order is without prejudice for Respondent, Andrew Kent, to apply for authorization for the construction of a dock that is consistent with this Order; Chapters 253 and 373, Florida Statutes; Florida Administrative Code Chapters 62-330 and 18-21 and the corresponding ERP Applicant's Handbook.

### **JUDICIAL REVIEW**

Any party to this proceeding has the right to seek judicial review of this 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 27<sup>th</sup> day of October, 2020, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION



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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.

**Syndie Kinsey**

Digitally signed by Syndie  
Kinsey  
Date: 2020.10.27 10:56:34  
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CLERK

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DATE



**CERTIFICATE OF SERVICE**

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

Terrell K. Arline, Esquire Terrell K. Arline, Attorney at Law 1819 Tamiami Drive Tallahassee, Florida 32301 <a href="mailto:tkarlinelaw@gmail.com">tkarlinelaw@gmail.com</a> <a href="mailto:terrell.arline@ansbacher.net">terrell.arline@ansbacher.net</a>	Zachary Roth, Esquire Ansbacher Law Suite 100 8818 Goodby's Executive Drive Jacksonville, Florida 32217 <a href="mailto:Zachary.roth@ansbacher.net">Zachary.roth@ansbacher.net</a> <a href="mailto:litigation@ansbacher.net">litigation@ansbacher.net</a> <a href="mailto:alawpleadins@gmail.com">alawpleadins@gmail.com</a>
Andrew T. Kent 2059 Castle Point Court Fleming Island, Florida 32003 <a href="mailto:andyk@bbms.com">andyk@bbms.com</a>	Paul Joseph Polito, Esquire Department of Environmental Protection Mail Stop 35 3900 Commonwealth Boulevard Tallahassee, Florida 32399-3000 <a href="mailto:Paul.Polito@FloridaDEP.gov">Paul.Polito@FloridaDEP.gov</a>

this 27<sup>th</sup> day of October, 2020.

STATE OF FLORIDA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION

*Stacey D. Cowley*

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STACEY D. COWLEY  
Administrative Law Counsel

3900 Commonwealth Blvd., M.S. 35  
Tallahassee, FL 32399-3000  
Telephone 850/245-2242  
email [Stacey.Cowley@FloridaDEP.gov](mailto:Stacey.Cowley@FloridaDEP.gov)

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

MARK SHEFFLER, MICHAEL DAVIS,  
STEVEN FUZZELL, AND MITCHELL ERGLE,

Petitioners,

vs.

Case No. 20-0614

ANDREW KENT, BOARD OF TRUSTEES OF  
INTERNAL IMPROVEMENT TRUST FUND,  
AND STATE OF FLORIDA DEPARTMENT OF  
ENVIRONMENTAL PROTECTION,

Respondents.

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RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on May 21 and 22, and June 15, 2020, by ZOOM Conference, before E. Gary Early, a designated Administrative Law Judge of the Division of Administrative Hearings (“DOAH”).

APPEARANCES

For Petitioners Mark Sheffler, Michael Davis, Steven Fuzzell, and Mitchell Ergle:

Terrell K. Arline, Esquire  
Terrell K. Arline, Attorney at Law  
1819 Tamiami Drive  
Tallahassee, Florida 32301

and

Exhibit A



Zachary Roth, Esquire  
Ansbacher Law  
Suite 100  
8818 Goodby's Executive Drive  
Jacksonville, Florida 32217

For Respondent Andrew Kent:

Andrew T. Kent, pro se  
2059 Castle Point Court  
Fleming Island, Florida 32003

For Respondents Board of Trustees for the Internal Improvement Trust  
Fund and State of Florida Department of Environmental Protection:

Paul Joseph Polito, Esquire  
Department of Environmental Protection  
Mail Stop 35  
3900 Commonwealth Boulevard  
Tallahassee, Florida 32399-3000

#### STATEMENT OF THE ISSUE

The issue to be determined is whether the after-the-fact Environmental Resource Permit (“ERP”) and the November 19, 2019, proprietary Letter of Consent for a 2,203 square foot dock should be issued as described and authorized by the December 6, 2019, Consent Order, OGC File No. 19-1272, entered between Respondent Andrew Kent and the Department of Environmental Protection (“DEP”), in its own capacity, and in its capacity as staff to the Board of Trustees of the Internal Improvement Trust Fund (“BTIITF”).

#### PRELIMINARY STATEMENT

In May of 2019, Mr. Kent applied to DEP for a general permit to construct “a single-family dock less than 2,000 sq. feet with one slip” on lot 18 in the Romeo Point subdivision in Fleming Island, Florida (the “Lot 18 Dock”). Lot 18 fronts on Doctors Lake, a tidally influenced water body that connects to the St. Johns River.

On June 17, 2019, DEP issued the general permit to Mr. Kent to “construct a 1,615 sq ft private residential single family dock consisting of an access pier and a covered boat slip and terminal platform, within Doctor’s [sic] Lake, a Class III Florida waterbody,” a Letter of Consent -- as staff to the BTIITF -- to use sovereignty submerged lands, and a State Programmatic General Permit V-R1 on behalf of the United States Army Corps of Engineers (“Corps”) (collectively the “first general permit”). Petitioners did not receive written notice of the first general permit, and notice was not published.

On July 17, 2019, Petitioners filed a petition challenging the first general permit. Petitioners own water-front lots on a canal dredged as part of, and along the western edge of the Romeo Point subdivision, several lots south of Lot 18 (“western canal”). The petition was referred to DOAH and assigned DOAH Case No. 19-4192. The petition alleged, inter alia, that the Lot 18 Dock crossed an existing, permitted navigational boat access channel (“boat access channel”) that Petitioners used to safely navigate motorized watercraft from their homes on the western canal to the open waters of Doctors Lake, and created unnecessary restrictions on Petitioners’ access to those navigable waters.

On September 17, 2019, after conducting a site inspection and having determined that the Lot 18 Dock had been constructed in significant non-compliance with the first general permit, DEP issued a Warning Letter, No. WL19-213 (“Warning Letter”), to Mr. Kent. The Warning Letter, which included the ERP Inspection Report, identified the boat access channel, permitted in 2003 by the St. Johns River Water Management District (“SJRWMD”) “to allow for boat access” which was “along the shoreline of the two properties on the north side of the west channel.”<sup>1</sup> The SJRWMD permit

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<sup>1</sup> The evidence established that the “two properties” were Lots 18 and 19 of the Romeo Point subdivision.



had not been discovered during the first general permit review process. The ERP Inspection Report further noted that the western canal homeowners “claim[ed] the dock impedes their ability to use the channel along the shoreline, that was part of the SJRWMD permit #40-019-86850-2, and access Dr’s Lake.” The DEP staff recommendation was to allow Mr. Kent to keep the Lot 18 Dock as constructed, with a fine and a minor corrective measure. The ERP Inspection Report noted that if Mr. Kent wanted three boat slips on the Lot 18 Dock, he would need to apply for a single family lease. Neither the ERP Inspection Report nor the Warning Letter made further mention of the boat access channel or the SJRWMD permit, and gave no recognition or accommodation for the seemingly legitimate concerns of the western canal homeowners.

On September 27, 2019, DEP filed a Notice of Intent to Change Agency Action and Motion to Put Case Into Abeyance in DOAH Case No. 19-4192, in which DEP stated that it had taken enforcement action on the Lot 18 Dock as built. The Notice stated that DEP intended to require that Mr. Kent apply for another permit, which Petitioners would be able to contest.

On October 15, 2019, DEP conducted another inspection of the Lot 18 Dock following a complaint of a further unpermitted construction. The October inspection revealed that Mr. Kent had installed an additional unpermitted floating dock on the Lot 18 Dock for a jet ski, which qualified as a third boat slip.

On December 6, 2019, DEP and the BTIITF entered into a Consent Order with Mr. Kent which addressed the issues of non-compliance identified in the Inspection Report and Warning Letter. Mr. Kent was fined \$2,750.00 to resolve the issues of noncompliance with the first general permit. He was issued a substituted general permit which included a November 19, 2019,

Letter of Consent, along with a “water quality certification” under the Clean Water Act (collectively the “revised general permit”), which gave after-the-fact approval of the Lot 18 Dock as constructed. Despite the Lot 18 Dock then having three boat slips, Mr. Kent was not required to obtain an individual ERP or a single family lease, as DEP now admits was necessary.

On December 12, 2019, DEP filed a Notice of Substitution of Agency Action in DOAH Case No. 19-4192, and the presiding Administrative Law Judge relinquished jurisdiction to DEP.

On December 17, 2019, Petitioners timely filed their Request for Modification of Consent Order and Administrative Hearing challenging the Consent Order, ERP, and Letter of Consent, which was referred to DOAH on February 4, 2020.

The final hearing was scheduled to be held on May 19 and 20, 2020, in Jacksonville, Florida. On March 27, 2020, the hearing was reset to be held on the same dates, but by video-teleconference in Tallahassee, Florida, and Jacksonville, Florida. On April 10, 2020, as the extent of the Covid-19 outbreak had become clear, and travel and live hearings were being suspended, the final hearing was again rescheduled for May 21 and 22, 2020, by Zoom Conference

In the period leading up to the final hearing, a number of motions were filed, including a motion to establish the burden of proof pursuant to section 120.569(2)(p), Florida Statutes, disposition of which is reflected on the docket.

On May 18, 2020, the parties filed their Joint Pre-hearing Stipulation (“JPS”). The JPS contained 10 stipulations of fact and law, each of which is



adopted and incorporated herein. The JPS also identified disputed issues of fact and law remaining for disposition.

Petitioners presented a lengthy list of disputed facts, though in their Proposed Recommended Order, indicated that Respondents' joint statement "subsumes the Petitioners' statement." Respondents' statement was:

1. Whether the project meets all applicable statutory and rule requirements to receive an Individual Environmental Resources Permit as provided in part IV of Chapter 373 and Florida Administrative Code Chapter 62-330, and authorization of use of sovereign submerged lands, as provided in Chapter 253, Florida Statutes, and Florida Administrative Code Chapter 18-21.

Despite the length of Petitioners' original list of issues, and the lack of specificity in Respondents' list of issues, the overriding issues in this case can be boiled down to whether the construction of the Lot 18 Dock would constitute an impediment or hazard to Petitioners' ability to safely navigate from their homes to the open waters of Doctors Lake, and whether requiring Petitioners to cross through shallow waters to access Doctors Lake will adversely affect environmental resources in the area.

The hearing was held on May 21 through 22, 2020, as scheduled. The hearing was not completed on May 22, 2020, and was scheduled to be reconvened on June 15, 2020, by Zoom conference. The hearing was then completed on June 15, 2020.

The ERP under review having been issued under the authority of chapter 373, Florida Statutes, that element of the hearing was subject to the modified burden of proof established in section 120.569(2)(p). The Letter of Consent was issued under the authority of chapter 253, Florida Statutes. Thus, the burden remains with Mr. Kent to demonstrate entitlement to the proprietary

authorization. The burden of proof provisions are discussed in the Conclusions of Law herein. In order to simplify the order of presentation, DEP went first with its full case-in-chief, followed by Mr. Kent, and then by Petitioners.

Joint Exhibits 1 through 33 were received in evidence by stipulation of the parties.

DEP called the following witnesses: Brian Durden, DEP's Northeast District Permitting Manager; Kimberly Mann, a DEP Environmental Specialist III; and Captain Jim Suber, who was tendered and accepted as an expert in navigation and vessel care. DEP Exhibits 2, 4, and 11 were received in evidence.

Mr. Kent testified on his own behalf, and called Lorile Ilaria as a witness. Kent Exhibits A through C, K, L, N, O, P1 through P3, Q1 through Q3, S, Y, and Z1 through Z9 were received in evidence.

Petitioners called the following witnesses: Anthony Gorla, P.E., who was tendered and accepted as an expert in professional engineering, environmental engineering, environmental permitting, and sovereignty lands permitting as it relates to residential docks and boat access channels; Michael Tomasi, who was tendered and accepted as an expert in boating and navigation; Lt. Commander Kenneth Van Hook; Mark Sheffler; Steven Fuzzell; Mitchell Ergle; Stan Hudson; and Thomas Estes, who was tendered and accepted as an expert in wetlands and wetland ecology, and submerged aquatic vegetation. Petitioners' Exhibits 1, 3, 4, 6 through 9, 14, 15, 18 through 21, 23A through 23D, 24, 31, 32, 36, 38, 42, 43, 45 through 48, 52(a), 52(b), 53, 55, 59, 70, 71, 73, and 77 through 79 were received in evidence. Petitioners' Exhibit 77 is the deposition of Petitioner Mike Davis. Not only is



Mr. Davis a party, making his deposition admissible for any purpose, but it is, sadly, noted that Mr. Davis died on May 20, 2020. His deposition was accepted pursuant to Florida Rule of Civil Procedure 1.330 and will be given the weight as though Mr. Davis testified in person. In addition, Petitioners' Exhibits 52(c), 58, and 61 through 69 (including 67A through 67D), and testimony preserved at Transcript Volume 3, pages 391 through 413, were proffered, but not received in evidence.

A six-volume Transcript of the final hearing was filed on July 6, 2020, with a Notice of Filing Transcript entered on July 7, 2020. The parties requested and were granted 30 days from the filing of the Transcript within which to file their proposed recommended orders. The parties filed their respective Proposed Recommended Orders, each of which has been considered in the development of this Recommended Order.

The law in effect at the time DEP takes final agency action on the application being operative, references to statutes are to their current versions, unless otherwise noted. *Lavernia v. Dep't of Prof'l Reg.*, 616 So. 2d 53 (Fla. 1st DCA 1993).

#### FINDINGS OF FACT

Based upon the demeanor and credibility of the witnesses, the stipulations of the parties, and the evidentiary record of this proceeding, the following Findings of Fact are made:

#### The Parties

1. Petitioners own waterfront lots on the western canal in Romeo Point, Fleming Island, Clay County, Florida. Petitioners use the waters of Doctors Lake for recreational purposes, and have navigated to and from Doctors Lake, or reasonably expected as riparian property owners to do so, via the



permitted and dredged navigational boat access channel leading from the western canal to the deeper waters of Doctors Lake. Petitioners have challenged the Consent Order that authorizes issuance of the revised general permit for a residential dock that bisects and severs the navigational boat access channel. Thus, Petitioners have standing under section 120.569.

2. Mr. Kent is the owner of Lot 18 of the Romeo Point subdivision. Mr. Kent purchased Lot 18 in 2017, and constructed a home there, 2059 Castle Point Court, Fleming Island, Florida, in which he currently resides. Mr. Kent is a party to the Consent Order, and proposed recipient of the ERP and Letter of Consent at issue in this proceeding.

3. DEP is the administrative agency of the State of Florida having the power and duty to protect Florida's air and water resources and to administer and enforce the provisions of chapters 253, 373 (Part IV), and 403, Florida Statutes, and rules promulgated thereunder in Florida Administrative Code Title 62, regarding activities in surface waters of the state, and in Florida Administrative Code Title 18, governing the use of sovereignty submerged lands.

4. The BTIITF is a collegial body that holds title to sovereignty submerged lands within the State in trust for the use and benefit of the public. Art. X, § 11, Fla. Const.; § 253.001, Fla. Stat.

5. DEP performs staff duties and functions on behalf of the BTIITF related to the review of applications for authorization to use sovereignty submerged lands necessary for an activity regulated under part IV of chapter 373 for which DEP has permitting responsibility. § 253.002(1), Fla. Stat. The SJRWMD “shall perform the staff duties and functions related to the review of any application for authorization to use board of trustees-owned submerged lands necessary for an activity regulated under part IV of chapter 373 for which the water management district has permitting responsibility as set forth in an operating agreement” between DEP and the SJRWMD. *Id.* Review and approval of general permits and individual ERPs in Clay County

generally falls within the jurisdiction of the SJRWMD pursuant to the July 1, 2007, Operating Agreement between SJRWMD and DEP (“Joint Agreement”).

6. DEP and the SJRWMD have been delegated the authority by the BTIITF to take final agency action on applications for authorization to use sovereignty submerged lands, without any action by the BTIITF, with the delegated entity to be established by rule. § 253.002(2), Fla. Stat. Rule 18-21.0051(2) provides that DEP and the water management districts “are delegated the authority to review and take final agency action on applications to use sovereignty submerged lands when the application involves an activity for which that agency has permitting responsibility, as set forth in the respective operating agreements.”

#### Romeo Point

7. Romeo Point is located on Doctors Lake in Fleming Island, Clay County, Florida. The confluence of Doctors Lake with the St. Johns River is generally considered to be at the U.S. Highway 17 bridge, with Doctors Lake to its west, and the St. Johns River to its east.

8. Doctors Lake is tidally influenced, with the range of tides generally being about one foot from high to low, but as much as 1.25 feet and as little as 0.8 feet depending on the phase of the moon. In addition, there are times when a confluence of a full moon, low tide, and winds to the east can pull water from the lake, which can result in even shallow draft vessels grounding in normally shallow areas unless they have access to a deeper water channel.

9. In 2002, the Romeo Point property was purchased by Romeo Point Joint Venture, LLP for development as a residential subdivision. The Romeo Point subdivision included the western canal on which five waterfront lots were created. Petitioners own waterfront lots on the western canal. As part of the development, two permits were applied for and obtained from the SJRWMD.



Mr. Gorla, a licensed professional engineer, was part of the development team.

10. SJRWMD Permit No 40-019-86850-1 authorized the stormwater management system for the Romeo Point subdivision.

11. Romeo Point Joint Venture, LLP separately applied for permits from the SJRWMD and the Corps for “a boat access channel and [ ] a bulkhead on the western property line to facilitate access to Doctors Lake.” Its purpose was, specifically, to allow access for the future homeowners along the western canal to Doctors Lake. The boat access channel followed the course of an existing, though somewhat narrower channel used by the previous property owner and others.

12. SJRWMD issued Permit No. 40-019-86850-2 (the “Dash-2 Permit”) for “[d]redging of a boat access channel and construction of a bulkhead along a section of the channel at Romeo Point Subdivision.” The boat access channel extended from the mouth of the western canal northward along the shoreline in front of and past Lots 19 and 18, then turning to the west at Lot 17 to the deeper waters of Doctors Lake.

13. The boat access channel was approximately 35 feet wide with 4:1 side contours, with its centerline about 30 feet off of the bulkhead. The Technical Staff Report for the Dash-2 Permit noted that “[t]he proposed dredging [of the boat access channel] will give water access to 5-lots along the western property line.”

14. The SJRWMD Technical Staff Report for the Dash-2 Permit also established that, upon completion of construction, the “Final O&M [operation and maintenance] Entity” was to be the Romeo Point Homeowner Association.

15. The boat access channel allowed vessels from the western canal to navigate around a cattail dominated shoal. Although the cattails no longer grow in the area, the shallow water shoal remains to varying degrees.



16. Among the conditions made part of the Dash-2 Permit were that the permittee purchase 0.82 mitigation credits from the Sundew Mitigation Bank.

17. The SJRWMD also issued a Consent of Use for state-owned submerged lands to Romeo Point Joint Venture, LLP for “Dredging of Boat Access Channel in Doctors Lake at Romeo Point - Permit # 40-019-86850-2.” The permittee was required to pay \$2,978.75 to DEP for severed dredge material, with the SJRWMD permit number provided to DEP on the check and the cover letter.

18. On December 16, 2003, the Corps issued Permit No. 200300284 (IP-RLW) to Floridays Development Group, Inc.,<sup>2</sup> to “construct a single-family, residential subdivision and bulkhead, dredge a man-made canal and entrance channel into Doctors Lake, and also construct 7 new single-family docks.” The Corps permit required the purchase of 1.86 mitigation credits. The permit plans clearly depict both the western canal and the boat access channel into Doctors Lake.

19. The Corps permit also permitted shoreline docks at Lots 18 and 19, with the permitted dock at Lot 18 to extend from the bulkhead to the edge of the boat access channel. The shoreline dock was sufficient to provide navigational access from Lot 18 to the deeper waters of Doctors Lake via the boat access channel. The docks along the boat access channel were permitted as part of the Corps permit to ensure those docks would not block access to the channel. Other docks were also permitted by the Corps for the Romeo Point subdivision that extended further into Doctors Lake to provide navigational access for lots that did not have direct access to the boat access channel.

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<sup>2</sup> Floridays Development Group, Inc., was a company owned by Mr. Gorla that owned the membership interest in Romeo Point Joint Venture, LLP. There was no dispute that the Corps permit constituted Federal authorization for the boat access channel.

20. By sometime in 2004, all construction authorized by the permits, including the dredging of the boat access channel, was complete, and Romeo Point Joint Venture, LLP moved to the marketing and sales phase.

21. On October 3, 2005, and as contemplated by the Dash-2 Permit, the SJRWMD permits were transferred from Romeo Point Joint Venture, LLP to Romeo Point Owners Association, Inc., for operation and maintenance. The transfer applied to both the stormwater permit and the boat access channel permit. There is nothing to suggest that the transfer to the owners' association was improper or insufficient to transfer rights under the Dash-2 Permit.

#### Navigation To and From the Western Canal

22. When Petitioners bought property along the western canal, the boat access channel had been permitted and constructed for the specific purpose of providing those canal-front lots with reliable, deep-water navigable access to Doctors Lake. Persons owning, renting, visiting, or using those lots, or otherwise wanting to access the western canal, were customary users of the boat access channel.

23. Water depths along the shoal that exists waterward of the boat access channel between the mouth of the western canal to the current location of the Lot 18 Dock were measured by DEP to range from 2 feet, 9 inches (33 inches) to 3 feet, 8 inches (44 inches) at a "rising tide towards high tide." At the normal 12 inch tidal range, depths would be expected to range from 21 inches to 32 inches+/- at low tide. During full moons, the low tides could be as much as 0.25 feet (3 inches) lower over three or four days. Thus, the *deepest* area along the shoal could, on a monthly basis, be as shallow as 29 inches in depth. In order to address the issue of safe and reliable navigational access, conditions at low tide provide the best assessment of a waterway and the ability of boats to navigate in the area. Photographic evidence of Mr. Sheffler dragging his 20-foot boat through less than knee-deep water across the shoal



at its deepest point near the Lot 18 Dock supports a finding that water depths across the shoal are, with regularity, insufficient to support safe navigation.

24. In 2017, Mr. Sheffler purchased an existing home and boat lift on lot 23 along the western canal. The prior owner had previously kept a 24 and one half-foot boat on the boat lift. Mr. Sheffler kept a 21-foot Bayliner on the lift after he bought the house, which had a two foot, 10 inch (i.e., 34-inch) draft. He sold that boat with the thought of buying a larger boat for skiing, wakeboarding, and watersports with his four children. Those plans were shelved pending the resolution of this proceeding. Currently, Mr. Sheffler uses his father's 19-foot Seafox center console boat with a 24-inch draft, which he used to navigate into Doctors Lake through the boat access channel prior to the time Mr. Kent constructed the Lot 18 Dock. He is able to navigate across the shoal at high tide, but otherwise the shoal presents an obstruction.

25. In 2017, Mr. Davis built a home on lot 22 along the western canal that included a boat lift that could accommodate a 24-foot boat. Mr. Davis already owned a 19-foot Stingray boat with an inboard/outboard motor that he docked at his lot, and used the boat access channel to access Doctors Lake. Mr. Davis testified that, after July 4, 2019, when the Lot 18 Dock was substantially completed, he could not safely navigate around the dock, and that he ran aground on the shoal at low tide. His testimony is credited. Due to the difficulties in maneuvering his 19-foot Stingray across the shoal to the open waters of Doctors Lake, Mr. Davis postponed his planned purchase of a larger boat pending the results of this proceeding. Sadly, Mr. Davis passed during the course of the hearing, before he could buy the boat he wanted.

26. Mr. Hudson is Mr. Davis's son-in-law. He is an experienced boater, and has boated to the Davis home from Doctors Lake in his 20-foot Regal boat using the boat access channel. His boat is comparatively heavy, with an inboard/outboard motor and a 34-inch draft. Mr. Hudson was unable to easily



and safely navigate to the Davis home after the construction of the Lot 18 Dock without grounding on the shoal at low tide.

27. In 2017, Mr. Fuzzell purchased Lot 20 and Lot 21. Lot 20 partially fronts on Doctors Lake. Mr. Fuzzell constructed a house on each lot, each with a boat lift designed to accommodate a boat up to 26 feet in length. Mr. Fuzzell rents the house on lot 21, at which his current tenant keeps a 21-foot boat. Mr. Fuzzell built his house on Lot 20 with the expectation of purchasing a boat of sufficient size to put his family aboard, up to a 26-foot boat. Due to the blockage of the boat access channel by the Lot 18 Dock, the purchase was postponed and altered pending resolution of this proceeding.

28. Mr. Ergle owns Lot 24 along the western canal. He has not developed the lot with a house or a boat dock. He is, nonetheless, a riparian owner. When he bought the lot, a primary reason was his expectation that he would be able to build a boat dock and keep a boat of around 24 feet. Mr. Ergle currently owns a small Boston Whaler, which he has used to visit his property. While the boat only has a 10-inch draft, Mr. Ergle has touched bottom along the shoal between the mouth of the western canal and the current Lot 18 Dock.

29. Lt. Commander Van Hook testified to his familiarity with the area, and stated that “[i]f you were to come straight out from the channel, there's a shoal, shallow water out there, which I know about because I've gone through there. I wouldn't dare go that close to the shoreline because of how shallow it gets over that way.”

30. Mr. Tomasi, a Coast Guard Chief Warrant Officer (Ret.) visited the area in April 2019. He went through the area in Mr. Davis's 19-foot Stingray, and testified that they “bumped bottom” with the boat's hull at various places, including along the “deeper” areas along the shoal. The motor was tilted up as far as possible during the trip so as to avoid having silt sucked into the water intake which could damage the motor. Mr. Tomasi noted that, like bottom contours of any water body, “it's not a complete flat, glass bottom.



I mean, you're going to have contours in the sea bed and there's going to be areas that get down. You're going to have some highs and some low areas out there.”<sup>3</sup> He stated that, during the visit, “I never found a clear path to where I could come out going somewhere along that boat access channel and then be able to cut straight out without at some point bumping bottom.” It was Mr. Tomasi’s opinion that “[i]t's not a reasonable expectation that somebody should have to attempt to hazard their boat to get in and out of their dock or their canal.” His opinion is credited and accepted.

31. The undersigned is not unmindful of the testimony of Captain Suber, who is every bit as worthy of respect as Lt. Commander Van Hook and Mr. Tomasi. Captain Suber visited the site at roughly low tide “a week or two” prior to the hearing in a “bay boat.” He testified that there were areas along the shoal that were not passable, but through trial and error, he was able to find a way out -- or rather a way in, since he was “out in the lake and looking in” -- without grounding. However his opinion regarding navigability was quite conditioned, providing that:

Well, from -- from what I see, the waterway is -- you know, it is what it is. It's shallow and you have to be cautious, but you can get in and out of that -- that canal at low tide. This is one of those areas where local knowledge is a -- is a must. Someone that don't know anything about the waterway right in this area, they probably would stay away from this. But if you live on this area of the waterway and you know the bottom out there, you should be able to get all of these vessels that have been in question in and out of there at any time by using caution. . . . If it's -- if it's an outboard, simpler, yes, all of them, any one that I would think would be able to get in and out of there. An inboard/outboard would be possible and probable. Inboards, those drafts on those are -- and they're so sensitive, you

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<sup>3</sup> Mr. Tomasi’s testimony supports a finding that, although DEP measured a maximum of 3.8 feet along the shoal at high tide, that does not establish 3.8 feet as a uniform depth around that point. Natural undulations could cause that depth to be more or less, which would explain the “bumping.”



know, if I owned one, I probably would stay out of these swallower areas with one. Most people that have full inboards, they don't even want to try to get into places like that.

32. Captain Suber's testimony was worthy of belief. However, to the extent his opinion was that the Lot 18 Dock did not create an impediment to navigation, it was simply outweighed by other more persuasive evidence in the record.

### Purchase of Lot 18

33. Mr. Kent became aware that Lot 18 was on the market at some point in 2015, and engaged in a series of negotiations with the owners to purchase the lake-front property.

34. After a period of unsuccessful efforts to purchase Lot 18, Mr. Kent "caught [the owner] at the right time," and acquired the property in 2016.

35. At the time of the purchase, Mr. Kent knew of lots on the western canal, but was not interested in them because "I didn't want to be limited to the size of boat that I ... used," and "I wanted a long dock to put a -- I wanted a couple of boat lifts just like I do, just like the neighbors."

36. The line at which four-foot of depth in the boat access channel existed, and the point to which Mr. Kent would have to "wharf out" from Lot 18 to achieve four feet of navigable depth, was roughly 12 to 15 feet from the Lot 18 bulkhead.

37. Around the last week of September or the first week of October 2017, prior to his construction -- or planning -- of the Lot 18 Dock, Mr. Kent, while on a walk around the neighborhood where he then lived, ran across his neighbors, Mr. Gorla and Lt. Commander Van Hook. Mr. Kent knew that Mr. Gorla had been involved in the development of Romeo Point, and took the opportunity to inquire about the area, and discussed his desire to build a long

dock, similar to his neighbor's dock to the north, extending from the shoreline of Lot 18 to the open waters of Doctors Lake.

38. Mr. Gorja advised Mr. Kent of the existence of the permitted boat access channel that provided navigational access to residents of the western canal to Doctors Lake, a statement heard by Lt. Commander Van Hook. The conversation was memorable because Mr. Gorja stated his belief that Mr. Kent was fortunate that his boat lift was going to be right on his bulkhead, which would save him considerable money on having to build a dock. When Mr. Kent expressed surprise, Mr. Gorja explained that "we dredged a channel for the canal lot owners that goes and meanders right along your bulkhead and then goes out between you and [lot] 17." Mr. Kent stated that he wanted a big dock,<sup>4</sup> to which Mr. Gorja stated that he would be blocking the channel near his bulkhead used by the canal front owners. Mr. Gorja testified that Mr. Kent then stated that "well, that's their problem. They can't stop me."

39. Lt. Commander Van Hook testified, credibly and without reservation, that Mr. Gorja "made it 100 percent clear on a two-way dialogue that without a doubt, there's a boat access channel that runs along the bulkhead that provides access from the folks that live back on the canal, the petitioners. ... access to the deeper waters out in Doctors Lake." He testified to his recollection of the conversation that "I know [Mr. Gorja] said [the channel] ran parallel to the bulkhead that gets out there so parallel to the Romeo Point bulkhead. So if that puts it up against your lot, depending on how far it goes out there, I just know that it ran parallel. I don't know how far off." He then stated that Mr. Kent's "only response pretty much was he's going to apply either way. His plans were to build an extended dock." When asked if it was reasonable for one to conclude that Mr. Kent knew of the existence of the

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<sup>4</sup> Mr. Kent's desire to have a big dock on Lot 18 was not new. As he testified at hearing, "I mean, hey, it's everybody's dream to live on the water. But for this particular area, I mean, come on. ... Who wouldn't walk up to [Lot 18] and want a boat dock. I wanted a boat dock before I bought it."



boat access channel as a result of the conversation, Lt. Commander Van Hook replied, “Yes, sir, without a doubt.”

40. Mr. Kent disputed his response, or even understanding, of the information provided by Mr. Gorja, testifying unconvincingly that he thought Mr. Gorja was talking about the western canal. Nonetheless, Mr. Gorja provided clear and accurate information that a SJRWMD permitted boat access channel crossed the front of Lot 18 and provided residents in the area the 24-hour right to deeper water without restricting them to the tides, and that Mr. Kent was likely to have difficulty obtaining regulatory approval for his dock. While it is impossible to know what might have been going through his mind, the most reasonable inference that can be drawn is that Mr. Kent knew of the existence of the boat access channel, and knew that the Lot 18 Dock as he wanted it would sever navigational access for residents along the western canal.<sup>5</sup>

#### The First General Permit

41. Mr. Kent purchased Lot 18, and proceeded to make application to DEP for the first general permit. Since the Romeo Point subdivision was subject to two SJRWMD permits, the Operating Agreement between SJRWMD and DEP, dated July 1, 2007 (“Joint Agreement”), called for further permits affecting the area to be processed by SJRWMD. That did not occur.

42. Mr. Kent hired C&H Marine, which prepared the application for the permit, submitted it to DEP, and ultimately constructed the Lot 18 Dock.

43. The first general permit application called for the construction of “a single-family dock less than 2,000 sq. feet with one slip.” The application

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<sup>5</sup> Mr. Gorja’s and Lt. Commander Van Hook’s testimony as to Mr. Kent’s statements, offered by Petitioners, constitute admissions of a party opponent, and are, therefore, not hearsay. § 90.803(18). Fla. Stat. Neither Mr. Gorja nor Lt. Commander Van Hook has any direct interest in the outcome of this proceeding, and both were credible and persuasive. Their testimony is accepted, and supports the inference of Mr. Kent’s knowledge of the boat access channel and its effect on Petitioners prior to the permitting of the Lot 18 Dock.

drawings showed that Lot 18 had 105 feet of frontage on Doctors Lake, and depicted a five-foot wide dock that extended 150 feet into Doctors Lake, with a 20-foot x 10-foot terminal platform and a boat lift totaling 865 square feet for a total structure of 1,665 square feet.<sup>6</sup> The dock was depicted as being five feet above the mean high water (“MHW”) elevation. A 25-foot riparian setback was shown between the Lot 18 Dock and the adjacent property to the north.

44. The boat access channel was at least six feet deep at its center, roughly 35 feet wide, and four feet deep only 12 to 15 feet from the bulkhead. Even a minimally competent investigation would have revealed the channel. However, the application identified underwater bottom contours and depths that gradually and evenly sloped from shallow at the bulkhead to four feet deep at the terminus of the Lot 18 Dock. As noted by Ms. Mann, “[i]t showed a smooth -- relatively smooth seafloor bed.” The length of the dock on the permit application drawings was not to scale, with the application drawing being shortened through the use of “continuation marks.” Those continuation marks subsumed the section of lake bottom through which the boat access channel ran. Thus, the channel was not depicted in the application. Regardless of intent or reason, by its use of continuation marks in the application drawings, the contractor quite effectively managed to conceal the channel from DEP.<sup>7</sup> Since the application was being filed on his behalf, it was Mr. Kent’s obligation to ensure its accuracy. Mr. Kent, despite having been told of the permitted channel and of the existence of regulatory permits

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<sup>6</sup> There was no definitive measure of the width of Lot 18. Though the application indicated it was 105 feet, Mr. Kent testified that “I’ve seen 101. I’ve seen 106. I’ve seen 104. So I guess it depends where you measure. I have no idea.” DEP later measured the width as 101 feet.

<sup>7</sup> Since Mr. Gorla advised Mr. Kent that the boat access channel was going to make it difficult to obtain regulatory approval for his dock, the omission of what should have been a patently obvious subsurface feature existing no more than 15 feet off of the bulkhead, and the replacement of that section of lake bottom with continuation marks, seems more than coincidental.



authorizing its construction, failed in that obligation, resulting in an application that was, at best, misleading.

45. Furthermore, even accepting that neither Mr. Kent nor the contractor knew of the channel before construction commenced, which is a stretch, its existence absolutely had to have become apparent early on in construction. Mr. Kent or C&H Marine had an obligation at that time to disclose to DEP that the application was false and inaccurate. Neither did so.

46. Upon receipt of the first general permit application, Ms. Mann reviewed the SJRWMD GIS system to determine if there were permits within a one-quarter mile radius of Lot 18. The depiction of that radius on a map appears to encompass most, if not all of the Romeo Point subdivision. The SJRWMD GIS system did not show any permits within the one-quarter mile radius except for a dock permit related to a lot to the north of Lot 18. Ms. Mann did not check the linked permit associated with that lot. Had she done so, she would have discovered the Corps authorization for the boat access channel.

47. DEP's ERP Checklist incorrectly indicated that the Lot 18 Dock application "was not in a WMD permitted area." If DEP had correctly noted that the SJRWMD had issued permits for the Romeo Point subdivision, DEP would have had to coordinate the Lot 18 Dock application with the SJRWMD.

48. DEP issued the first general permit on June 17, 2019, to "construct a 1,615 sq ft private residential single family dock consisting of an access pier and a covered boat slip and terminal platform, within Doctors Lake, a Class III Florida waterbody," which included the Letter of Consent, as well as a State Programmatic General Permit V-R1 on behalf of the Corps. Notice of the first general permit was not provided to Petitioners either by actual notice or by publication.

### Petitioners' Notice of the Lot 18 Dock

49. After the first general permit was issued, Petitioners' became aware of the proposed Lot 18 Dock when, during a homeowners' association meeting that took place prior to the commencement of construction, Mr. Kent advised Mr. Davis that construction of the Lot 18 Dock was scheduled to begin the following week. That disclosure triggered a second meeting at Mr. Davis's house that included the president of the homeowners' association, Mr. Davis, Mr. Sheffler, Mr. Kent, and several other homeowners to discuss the fact that the Lot 18 Dock would block the boat access channel. Mr. Kent's solution was not to delay the construction of the Lot 18 Dock to come to a solution, but rather, "if you guys ever[ ] get stuck and cannot navigate, I'll participate in dredging your canal." Petitioners made their concerns known to Mr. Kent well before the first piling was set for the Lot 18 Dock. Nonetheless, knowing then with certainty that a boat access channel existed along the shoreline in front of Lot 18, knowing that the application was misleading by omission, and knowing of his neighbors' objections, Mr. Kent made no effort to disclose that information to DEP, and proceeded with construction.

50. Petitioners advised DEP of their concerns on or about June 28, 2019, which included a description of the boat access channel,<sup>8</sup> Petitioners expressed their objection to the Lot 18 Dock on the ground that it cut off their access to the permitted boat access channel. DEP took no action, despite then having knowledge that the application was false.

### Case No. 19-4192

51. On July 17, 2019, Petitioners filed a petition for hearing to challenge the issuance of the first general permit for the Lot 18 Dock. The petition alleged that DEP provided them with an extension of time to file the petition

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<sup>8</sup> The exact date on which construction commenced was not disclosed. However, on July 4, 2019, the boat access channel was still passable, with only string marking its path. Thus, by June 28, 2019, DEP had information showing the falsity of the application that should have triggered some inquiry before the boat access channel was severed.



on June 28, 2019, which is corroborative of testimony that Petitioners advised DEP of the boat access channel on that date. Three weeks later, on August 7, 2019, the petition was referred to DOAH and assigned as Case No. 19-4192.

52. The petition alleged, inter alia, that the Lot 18 Dock crossed the existing navigational channel that Petitioners used to navigate motorized watercraft to the open waters of Doctor's Lake and the St. John's River, and created unnecessary restrictions on Petitioners' access to those navigable waters.

53. Case No. 19-4192 was set for hearing to commence on October 17, 2019. On September 27, 2019, DEP filed a Notice of Intent to Change Agency Action and Motion to Put Case Into Abeyance, in which DEP stated that it had taken enforcement action on the Lot 18 Dock as built. The Notice stated that DEP intended to require that Mr. Kent apply for another permit, which Petitioners would be able to contest. On December 18, 2019, the presiding ALJ relinquished jurisdiction over Case No. 19-4192 to DEP.

#### The Lot 18 Dock As-built

54. The Lot 18 Dock, as constructed, deviated materially from the dock as permitted. As important as the fact that the Lot 18 Dock was not compliant with the permit is that, as pilings were being set during the period of construction, it could not have been overlooked<sup>9</sup> that the proposed dock was bisecting the deeper water boat access channel. However, no one advised DEP of the existence of the channel, an omission that, given the facts and the record of this proceeding, could only have been intentional, and could only have been to conceal the existence of the deeper water channel from DEP and other regulatory entities while construction of the Lot 18 Dock was completed.

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<sup>9</sup> It is impossible to conclude that a marine contractor, regardless of their degree of competence, could fail to notice that they were setting pilings in six feet of water rather than two feet of water.



55. The Lot 18 Dock was constructed to a length of 193 feet, exceeding the 160-foot length (which includes the ten feet of terminal platform) depicted in the permit application drawings. Going out that extra length also, as described by Mr. Kent, “gave me like 4 or 5 inches more of depth.” Therefore, instead of the dock ending at the permitted four-foot (48 inches) depth, he now had up to 53 inches of depth, all the better for a bigger boat. Mr. Kent testified that he directed the contractor to build out to that length, because it would be cheaper to have it done while the equipment was on-site, rather than waiting to have the extra length permitted. The as-built lift was 36 feet in length, rather than the permitted 34 feet, and will hold a boat of 32 feet.<sup>10</sup> The walkway of the dock was measured by DEP to be two feet, seven inches above MHW rather than the required five feet as permitted. The as-built structure also included four unpermitted pilings and a second boat lift. Mr. Kent believed that the pilings would be “permissible,” so went ahead and authorized the contractor to install them without waiting for a permit. The second lift will “probably hold a 26-footer.” C&H Marine installed cleats on several pilings for the terminal platform/boat lift that were suitable to allow an additional vessel to tie-up to the dock. Those cleats were -- purportedly -- installed without Mr. Kent’s knowledge, and have been removed.

56. Mr. Kent was on vacation for some of the construction of the Lot 18 Dock.<sup>11</sup> Upon his return, the dock was completed despite Petitioners’ objections, and despite a DEP request that he stop work.

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<sup>10</sup> The size of the boat could likely be greater, since the covered slip/lift was built two feet longer than permitted.

<sup>11</sup> Mr. Kent testified to a general lack of knowledge of the course of the construction due to his vacation. However, he knew of the extra pilings, and approved their installation because he thought they would be “permissible.” He testified that during his vacation, he contacted Michelle Neely at DEP to inquire about a “residential bridge,” a discussion memorialized by Ms. Neely on July 24, 2019, in correspondence to Mr. Sheffler, though there was no direct evidence that he advised her of the boat access channel. He was on the site (“I walked out there. And at some point -- I can't give you a date as to when. It was before the big piece was built. That's for sure.”) and authorized C&H Marine to extend the Lot 18 Dock from 160 feet to its as-built 193 feet, stating that “[w]hen I asked him to extend it, I knew that wasn’t permitted yet, but it was permissible.” These issues do not directly apply to the issue of



### The August Compliance Inspections

57. Reacting to information from Petitioners, DEP conducted site inspections of the Lot 18 Dock on August 21, 2019, and August 27, 2019. The as-built conditions described above were noted by DEP at those times, as was the fact that the dock “appears to be approximately 19 ft from the northern neighbor’s apparent riparian rights lines.”

58. The ERP Inspection Report noted “Significant Non-Compliance” with the Lot 18 Dock. The report identified the SJRWMD permit “to allow for boat access,” but claimed “[d]uring the review process, inquiry on the SJRWMD ERP GIS page did not reveal the existing [sic] of a SJRWMD permit.” The ERP Inspection Report recognized that the western canal homeowners “claim[ed] the dock impedes their ability to use the channel along the shoreline, that was part of the SJRWMD permit #40-019-86850-2, and access Dr’s Lake.” The DEP staff recommendation was to allow Mr. Kent to keep the Lot 18 Dock as constructed, with a monetary fine and a minor corrective measure. The ERP Inspection Report noted that if Mr. Kent wanted three boat slips on the Lot 18 Dock, he would need to apply for a single family lease. The ERP Inspection Report made no further mention of the boat access channel or the SJRWMD permit, and gave no recognition or accommodation for the seemingly legitimate concerns of the western canal homeowners.

59. Based on its observations, DEP issued Warning Letter No. WL19-213 to Mr. Kent noting that the dock “was constructed in a manner not consistent with your permit application and its supporting documentations.” As was the case with the ERP Inspection Report, the Warning Notice made no mention of the boat access channel, the SJRWMD permit, or Petitioners’ navigational concerns.

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whether the Lot 18 Dock impedes navigability, which it would have done whether it was 93 or 193 feet in length, and whether it has one or three slips. However, these issues demonstrate a general conscious disregard for the permitting authority of DEP, and affect the weight to be given Mr. Kent’s testimony.

### The October Compliance Inspection

60. On October 15, 2019, following a complaint of a further unpermitted addition, DEP conducted a third compliance inspection. Previously, according to Mr. Durden, DEP “negotiated” with Mr. Kent, advising him that if he removed the unauthorized cleats that had been installed on the Lot 18 Dock, DEP “could issue the permit, because then he would have only two boat slips.”

61. The October inspection revealed that, *after* DEP issued the Warning Notice, and despite his having been advised of the two-slip limitation, Mr. Kent installed an unpermitted floating personal water craft (PWC) dock midway along the span of the dock that was suitable for landing a jet-ski. Mr. Durden testified that “[h]e removed the cleats [which had been installed to create a third slip on the unpermitted second boat lift pilings]. And then a period of time passed and then he decided to install the ski lift.” Counting the unauthorized PWC lift, the Lot 18 Dock had -- and currently has -- three boat slips under DEP’s jurisdiction. The installation of the unauthorized floating dock while permitting and enforcement were ongoing suggests an ongoing and blatant disregard for DEP’s permitting and enforcement authority.

### The Consent Order

62. On December 19, 2019, DEP and the BTIITF entered into a Consent Order, OGC File No. 19-1272, with Mr. Kent to resolve all issues, including the unpermitted third PWC dock.

63. Mr. Kent was charged a fine of \$2,750.00<sup>12</sup> to resolve the issues of non-compliance. Despite by then having information that established, as a matter

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<sup>12</sup> Mr. Kent was allowed to keep the Lot 18 Dock’s unauthorized “extra 30 feet [and corresponding] 4 or 5 more inches of depth,” the unpermitted second boat lift, and the floating PWC dock that was constructed *after* enforcement proceedings had commenced, without any corrective measures whatsoever, all for the modest “fine” of a \$2,750, of which \$250 was the “permit fee.” By the time the Consent Order was executed, DEP knew the Lot 18 Dock was severing a permitted navigational channel, and should have known, through months of involvement with Petitioners, including DOAH Case No. 19-4192 that the



of law, that the Lot 18 Dock had three slips and did not qualify for a general permit, DEP nonetheless issued the revised general permit, including the Letter of Consent and water quality certification under the Clean Water Act. Mr. Kent was not required to obtain an individual ERP or a single family lease. At the final hearing, DEP admitted that an individual ERP is required and, in the course of this de novo proceeding, asks that the Lot 18 Dock be measured against those standards.

64. DEP made no mention in the Consent Order of the boat access channel. The Consent Order did not note that severing the channel forces Petitioners to have to navigate through shallow and unsafe waters to get to Doctors Lake from their homes, on which they may -- and have -- run aground. The Consent Order did not acknowledge the existence of the SJRWMD Dash-2 Permit or the Corps permit. DEP had knowledge of all of those things both as a result of its involvement in DOAH Case No. 19-4192 and as evidenced by its August 21, 2019, ERP Inspection Report.

#### The Boat Access Channel as a Navigational Channel

65. The boat access channel was permitted as a navigational channel by the SJRWMD and the Corps, and permission to use state owned lands for that purpose was granted by the BTIITF.

66. When the boat access channel was dredged, its entrance to and from Doctors Lake was marked with two PVC pipes, which remain in their original positions. It is not uncommon for people to mark channels with PVC pipe. While the pipes are by no means “regulation” Coast Guard approved channel

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channel was customarily used, marked, and provided Petitioners with their only means of reliably safe navigation between the western canal and Doctors Lake. Rather than acknowledging its mistake in permitting an illegal dock, regardless of the circumstances, DEP reacted with casual diffidence, questioning the validity of the SJRWMD’s Dash-2 Permit, overlooking the Corps permit, ignoring that the dock encroached into, and severed, a permitted, marked, and customarily used navigation channel, and generally minimizing Petitioners’ legitimate rights of navigation. Perhaps, as surmised by Mr. Sheffler, DEP was “trying to figure out ways to, you know, kind of save face.” However, the rationale and merits

markers, and are not particularly distinctive, they are private markers that are known by and provide navigational and boating information to lot owners and other customary users in the area for whom the boat access channel was designed, permitted, and constructed, and who are customary users of the boat access channel.

67. Ms. Mann testified that “[i]t was [DEP’s] position that this was not marked not in a way that we would determine it to be in a navigable channel. PVC poles in the water don’t really mean anything.” However, DEP has no rule defining what constitutes a marker sufficient to establish a “marked channel,” or that would establish a limitation that is inconsistent with the plain meaning of the term. A preponderance of the evidence in this case demonstrates that the PVC pipes were, prior to its severance by the Lot 18 Dock, channel markers known to persons in and using the area as establishing the entrances to the boat access channel.

68. Ms. Mann continued in her testimony, stating that “we saw plenty of people who went without needing to use the navigation channel, so we determined it was a customarily used navigation channel, that it was not needed.” At the time Ms. Mann visited the site, boaters could not use the navigational channel, since it was blocked. Boaters would not be relying on the markers since they marked the mouth of the channel on the other side of the Lot 18 Dock. Furthermore, Ms. Mann was on-site at close to high tide. That persons may, by necessity, be forced to navigate through unsafe waters or not navigate at all is no evidence that the navigation channel “was not needed.”

69. The evidence in this case establishes by a preponderance of competent substantial evidence that the boat access channel was, before the construction of the Lot 18 Dock, both marked and customarily used. It provided safe and reliable navigable access to the western canal for residents

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-- or lack thereof -- of DEP’s actions are beyond the scope of this proceeding, which is not an enforcement case.



and their families and guests. Though sparsely used by the general public for fishing or boating, there is nothing to restrict such use. The boat access channel is, by all factual measures, a “navigational channel” as described by DEP rule.

#### Effects on Navigation

70. When Mr. Kent purchased Lot 18, he had every bit as much access to the open waters of Doctors Lake as did Petitioners. He could have, as contemplated and approved by the Corps permit, constructed a parallel dock along the Lot 18 shoreline and freely accessed the navigable waters of Doctors Lake via the boat access channel in any vessel capable of operating in six feet of water.

71. A preponderance of the competent, substantial evidence in the record establishes that the depths along the shoal are not sufficient during all normal periods to safely navigate without a reasonable likelihood of grounding. That evidence is persuasive and accepted.

72. Mr. Durden credibly testified that a person is “allowed to wharf out until you reach a depth of at least four -- well, 5 feet, which [DEP] would consider a safe depth to be able to have a boat.” Furthermore when asked whether it is “the department's policy for issuance of consent to use sovereign land, that you're entitled to get to 4 feet for your dock,” Ms. Mann responded that “I believe that is actually part of our regulatory 62-330.”

73. Mr. Durden testified, and the evidence supports, that the boat access channel varied from between six feet to seven feet, 11 inches in depth when he conducted his on-site measurements at a “rising to high tide.” Thus, even at the lowest lunar tides, the boat access channel provided safe navigational depths to the owners of the western canal lots, and to Lot 18, of greater than four and a half feet. Ms. Mann candidly admitted that before the Lot 18 Dock was constructed, Mr. Kent had more than four feet of access for a dock and boat at his bulkhead.

74. Mr. Kent admitted that Petitioners “don’t have the same water access -- deep water access to Doctors Lake that they had before [he] built [his] dock,” and that “their canal is 4½ feet deep. The channel goes to 6 foot deep, and now that 6-foot depth isn’t there all the way.” In fact, the only means of accessing Doctors Lake in the absence of the boat access channel does not even approach 4 and one half feet in depth, being in most places less than half that at low tide. Ms. Mann’s testimony that “[w]e determined that vessels had plenty of space to maneuver around Mr. Kent's dock” was simply and substantially outweighed by countervailing competent, substantial, and credible evidence. The impairment to navigation in this case could not be clearer.

75. Mr. Kent had no interest in purchasing a canal-front lot because he “didn’t want to be limited” in the boat he could use -- with the Lot 18 Dock being able to accommodate two boats and additional PWC, with one lift suitable for a boat of a minimum of 32 feet, and the other which would “probably hold a 26-footer.” However, neither DEP nor Mr. Kent seemingly have any issue with the fact that Petitioners were previously not limited in owning any vessel that their slips could accommodate (generally up to 24 to 26 feet), and now they are limited to smaller, shallow draft boats that, even then, occasionally ground on the shoal.

76. DEP and Mr. Kent both minimized the effect of the reduced depth for Petitioners to navigate, seemingly arguing that a depth of 29 to 32 inches -- the deepest point along the shoal at or near low tide<sup>13</sup> -- is just as good as the four-foot depth acknowledged as being “a safe depth to be able to have a boat”

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<sup>13</sup> The maximum depth measured by DEP along the shoal was three feet, eight inches at a rising to high tide. Subtracting the normal 12 inch tidal range results in a depth of two feet, eight inches+/- (32 inches) at low tide. Every month for several days during the full moon, tides may vary by up to an additional 0.25 feet (3 inches) on both cycles. Thus, depths at the deepest point along the shoal are regularly reduced to 29 inches+/- . Furthermore, Mr. Sheffler measured depths in the vicinity of the Lot 18 Dock that were closer to two feet (24 inches). Given natural variations that occur on the bottom of natural bodies of water, both sets of measurements are credible.



and safe for navigation by Mr. Durden and Ms. Mann, is just as good as the 53 inches of depth gained by Mr. Kent from his unpermitted dock extension, and is just as good as the six-foot depth of the boat access channel. The shallower, unsafe depths across the shoal are *not* just as good. Even Mr. Kent admitted that inches have navigable value, testifying with regard to the settlement of his illegal dock extension:

I paid that fine. But I did that because it gave me like 4 or 5 inches more of depth. I wouldn't have wasted my money to extend my dock if I didn't get that. ... I'm just saying that I paid the fine and did the extra 30 feet because it got me 4 or 5 more inches of depth.

The natural variation of bottom depths, as described by Mr. Tomasi, reveals the fallacy of basing determinations of navigability on small changes in depth measured by inches that can be counted on one hand, and the folly of trading clearance in feet for clearance in inches.

77. Respondents argue that Petitioners should just be satisfied with smaller boats, or plan their outings to correspond to the tides,<sup>14</sup> or trim their motors up to the point they may lose control,<sup>15</sup> or carefully thread their way through slightly and almost imperceptively deeper areas on the shoal, all while avoiding collision with the Lot 18 Dock<sup>16</sup> -- none of which would guarantee that they would not ground their vessels. Meanwhile, DEP proposes to allow Mr. Kent, who already had deep water access to Doctors

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<sup>14</sup> Mr. Tomasi testified that due to the likelihood of hitting bottom while crossing the shoal at low tide, Petitioners would have to pick the times for boating based on the tides, both coming and going. If they went out at a falling tide, they would have to wait until the tide started coming in to get back. Mr. Tomasi credibly and correctly opined that safe navigation “shouldn't be restricted to tides nor should you be restricted to a moon cycle.”

<sup>15</sup> Mr. Hudson is an experienced boater, and credibly explained that to “trim up” a motor on a boat causes navigation to become more “challenging,” and that “with the propeller pushing water behind you, you lose a certain percentage of control or navigation.” Mr. Tomasi echoed that observation. Their testimony is credited.

Lake via the boat access channel, to maximize his ability to have more and bigger boats, to the detriment of Petitioners and anyone else desiring to safely access the western canal.

78. Petitioners have not sought permission to recreate in unusually large vessels or vessels not suitable for the area. They are simply asking to be able to safely navigate to and from their homes in boats six to eight feet *smaller* than Mr. Kent's 32-footer, i.e. generally the size of his spare. This case is not one in which Petitioners are requesting that Mr. Kent relinquish his riparian right of navigation so that they can have larger vessels, or vessels inconsistent with normal family recreation. Rather, it is Mr. Kent's desire to have larger and more vessels that has created this dispute. The evidence is clear that Mr. Kent had -- and has -- an unrestricted ability to navigate to and from Lot 18 via the boat access channel. Thus, although the Lot 18 Dock is a clear impairment of Petitioner's rights to navigation, the denial of the permit and Letter of Consent would create no impairment of Mr. Kent's right to navigation, and in no way would constitute an unreasonable infringement on Mr. Kent's riparian rights.

79. As a result of the construction of the Lot 18 Dock, the boat access channel, a marked, customarily used, and validly permitted and constructed navigation channel, for which mitigation credits were purchased and severance fees were paid to the state, has been entirely severed with seemingly no concern for the adverse effects on navigation suffered by the persons for whom the ability to safely navigate was intended. The position espoused by Respondents in this case simply creates a substantial and entirely unnecessary impediment to navigation, violating both the plain-language of, and the public policy behind DEP's ERP rules, and the BTIITF's sovereignty lands authority.

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<sup>16</sup> Winds or seas can push a boat around, a situation that is exacerbated when the motor is trimmed up. Therefore, one would generally not want to get close to the Lot 18 Dock, or any



Letter of Consent

80. Rule 18-21.004(7)(g) provides that “[s]tructures or activities shall not create a navigational hazard.” As set forth herein, the preponderance of the competent substantial evidence in this proceeding firmly establishes that the Lot 18 Dock has created a navigational hazard by severing the permitted, marked, and customarily used boat access channel, thus, forcing Petitioners and other persons wanting to use the waters in the area to cross the shallow shoal, which is both unsafe and unnecessary.

81. Ms. Mann testified that, in determining whether the Lot 18 Dock is the “minimum size” necessary, “we had taken that to look at the other docks in the area, and if he is on average with those other docks, then we consider it minimum size for that area.” However, the definition of a “minimum size dock or pier” in BTIITF rule 18-21.003(39) includes a comparison to other permitted docks as but *one* factor for consideration. The rule provides, in pertinent part, that:

“Minimum-size dock or pier” means a dock or pier that is the smallest size necessary to provide reasonable access to the water for navigating, fishing, or swimming based on consideration of the immediate area’s physical and natural characteristics, customary recreational and navigational practices, and docks and piers previously authorized under this chapter.

82. The evidence in this case firmly establishes that the Lot 18 Dock is not “the smallest size necessary to provide reasonable access to the water for navigating, fishing, or swimming.” Mr. Kent had reasonable access to the water for navigating by using the boat access channel, and could have used any vessel with a draft of six feet or less from a shoreline dock as permitted by the Corps in 2003. The Lot 18 Dock did not take into consideration the area’s customary recreational and navigational practices, which previously relied on the boat access channel. Other previously authorized docks in the

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dock, with the potential to be pushed into the dock, damaging the boat, the dock, or both.

area are not appropriate comparators because none have access to the boat access channel, and none encroach into and sever a permitted navigational channel, as does the Lot 18 Dock. The Lot 18 Dock is not, as a factual matter, a “minimum size dock or pier.”

83. The Lot 18 Dock preempts substantially more sovereignty submerged lands than necessary for Mr. Kent to wharf out to four feet of navigable water.

### Environmental Issues

84. Petitioners argue that substantial resources, predominantly seagrasses, exist in the area along the shoal, which seagrasses would be churned and scoured by vessels navigating across the shoal, and that the Lot 18 Dock is, therefore, contrary to the public interest.

85. Since 1994, submerged vegetation has declined in Doctors Lake as a result of drought, invasive species, and hurricanes, particularly those in 2017 and 2018.

86. DEP notified the Department of Agriculture and Consumer Services (“DACS”) and the Florida Fish and Wildlife Conservation Commission (“FFWCC”) of the Lot 18 Dock application. DEP did not receive comments from FFWCC within 30 days, which generally indicates that it did not have objections. *See* § 20.331(10), Fla. Stat. The response, if any, from DACS was not disclosed.

87. On June 8, 2020, DEP conducted a limited environmental survey of the shoal area adjacent to the Lot 18 Dock and in front of the western canal. The purpose of the survey was to determine if there is plant or animal life in the area, if the shoal area is of any environmental importance, and if it contains any endangered or protected species. Nine samples were taken at various locations along the “top” of the shoal, including dredge samples, a dip net sample, and one Shelby core sample. All were taken from a boat.



88. The DEP sampling revealed that the substrate consists mostly of sand, with less than 2 percent muck or organic material mixed in or on top. There was little animal or plant life, except for some juvenile clams of unknown species that appeared in several of the samples. There was one sample with two small plant fragments, but it was not known whether they rooted in the bottom or if they drifted in. Mr. Durden testified that “[t]here certainly was no substantial amount of vegetation found anywhere.” There were no endangered or protected species.

89. DEP concluded that the shoal is of low environmental value and suitable for authorization for a permit.

90. On June 5, 2020, Mr. Estes conducted a study of the shoal area to determine if there was a presence of submerged aquatic vegetation in the area. He was there less than a half an hour. He generally concentrated his study area to the shallower area of the shoal closer to the mouth of the western canal from the 2’9” to 3’3” readings as depicted on Joint Exhibit 10. He did not pay much attention to the area around the Lot 18 Dock.

91. Mr. Estes found a “very sparse coverage” of eelgrass, which is a species common in Doctors Lake. He also found some clams between 4 and 5 centimeters on average, which he believed to be adults. Mr. Estes was not able to opine whether the clams were important to a blue crab fishery in the area since it was outside of the scope of his study.

92. Mr. Estes could not state that the area was of any current ecological significance. Rather, his testimony was limited to an opinion that conditions at the site were suitable for reestablishment of eelgrass. He believed that boats crossing the shoal could leave “prop scars” which would interfere with submerged vegetation recruiting back into those areas.

93. The evidence was insufficient to support a finding that the Lot 18 Dock, or navigation across the shoal, will interfere with the current environmental functions of the area, will adversely affect the conservation of fish and wildlife, or will adversely affect fishing and recreation rights.

## CONCLUSIONS OF LAW

### Jurisdiction

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

### Standing

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

96. Standing under chapter 120 is guided by the two-pronged test established in the seminal case of *Agrico Chemical Corporation v. Department of Environmental Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981). In that case, the court held that:

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

*Id.* at 482; see also *St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist.*, 54 So. 3d 1051 (Fla. 5th DCA 2011); *Palm Beach Cty. Env'tl. Coal. v. Fla. Dep't of Env'tl. Prot.*, 14 So. 3d 1076 (Fla. 4th DCA 2009); *Mid-Chattahoochee River Users v. Fla. Dep't of Env'tl. Prot.*, 948 So. 2d 794, 797 (Fla. 1st DCA 2006).

97. Petitioners alleged standing based on the impediment to their navigation created by the Lot 18 Dock. The allegations of navigational



impairment meet the second prong of the *Agrico* test, that is, this proceeding is designed to protect the adjacent owners from potential adverse impacts on navigation caused by the Lot 18 Dock, impacts that are the subject of chapters 253 and 373, and the rules adopted thereunder.

98. The question for determination as to the first prong of the *Agrico* test is whether Petitioners have alleged injuries in fact of sufficient immediacy as to entitle them to a section 120.57 hearing. “[T]he injury-in-fact standard is met by a showing that the petitioner has sustained actual or immediate threatened injury at the time the petition was filed, and [t]he injury or threat of injury must be both real and immediate, not conjectural or hypothetical.” *S. Broward Hosp. Dist. v. Ag. for Health Care Admin.*, 141 So. 3d 678, 683 (Fla. 1st DCA 2014)(citing *Vill. Park Mobile Home Ass’n v. Dep’t of Bus. & Prof’l Reg.*, 506 So. 2d 426, 433 (Fla. 1st DCA 1987)).

99. Petitioners have alleged that the Lot 18 Dock has resulted in impairment of their ability to safely and reliably navigate to and from their properties, which is sufficient to meet the standard of an “injury in fact which is of sufficient immediacy to entitle them to a section 120.57 hearing.”

100. Mr. Kent has standing to participate in this proceeding as the applicant for the ERP and Letter of Consent. *Ft. Myers Real Estate Holdings, LLC v. Dep’t of Bus. & Prof’l Reg.*, 53 So. 3d 1158, 1162 (Fla. 1st DCA 2011); *Maverick Media Group v. Dep’t of Transp.*, 791 So. 2d 491, 492-93 (Fla. 1st DCA 2001).

#### Nature of the Proceeding

101. This is a de novo proceeding, intended to formulate final agency action and not to review action taken earlier and preliminarily. *Young v. Dep’t of Cmty. Aff.*, 625 So. 2d 831, 833 (Fla. 1993); *Hamilton Cty. Bd. of Cty. Comm’rs v. Dep’t of Envtl. Reg.*, 587 So. 2d 1378, 1387 (Fla. 1st DCA 1977); *McDonald v. Dep’t of Banking & Fin.*, 346 So. 2d 569, 584 (Fla. 1st DCA 1977).

## Burden and Standard of Proof

102. Section 120.569(2)(p) provides that:

For any proceeding arising under chapter 373, chapter 378, or chapter 403, if a nonapplicant petitions as a third party to challenge an agency's issuance of a license, permit, or conceptual approval, the order of presentation in the proceeding is for the permit applicant to present a prima facie case demonstrating entitlement to the license, permit, or conceptual approval, followed by the agency. This demonstration may be made by entering into evidence the application and relevant material submitted to the agency in support of the application, and the agency's staff report or notice of intent to approve the permit, license, or conceptual approval. Subsequent to the presentation of the applicant's prima facie case and any direct evidence submitted by the agency, the petitioner initiating the action challenging the issuance of the permit, license, or conceptual approval has the burden of ultimate persuasion and has the burden of going forward to prove the case in opposition to the license, permit, or conceptual approval through the presentation of competent and substantial evidence.

103. An authorization to use sovereignty submerged lands is governed by chapter 253 and is not a "license, permit, or conceptual approval" under chapters 373, 378, or 403, Florida Statutes. Therefore, the modified burden of proof established in section 120.569(2)(p) does not apply to the Letter of Consent. Thus, Mr. Kent bears the burden of demonstrating, by a preponderance of the evidence, entitlement to use sovereignty submerged lands. *Fla. Dep't of Transp. v. J.W.C. Co.*, 396 So. 2d 778, 788 (Fla. 1st DCA 1981); *Save our Creeks, Inc. v. Fla. Fish & Wildlife Conser. Comm'n*, Case No. 12-3427 (Fla. DOAH July 3, 2013; Fla. DEP Jan. 14, 2014).

104. Mr. Kent made his prima facie case of entitlement to the ERP and his case for entitlement to the Letter of Consent in an unorthodox manner, entering into evidence the application file and supporting documentation for



the first general permit, and the Consent Order, including the Letter of Consent, which constituted the revised general permit. In addition, Mr. Kent and DEP presented the testimony of expert and lay witnesses in support of the Lot 18 Dock application and Letter of Consent. Although DEP now acknowledges that the Lot 18 Dock requires an individual ERP, DEP did not require the submission of an individual ERP application, or permit application revisions of any kind beyond those submitted for the first general permit, instead relying on the de novo aspect of this proceeding to provide the information necessary. The undersigned finds the information provided to be sufficient to make a determination regarding issuance of the Lot 18 Dock permit and Letter of Consent under the individual ERP standards.

105. With Mr. Kent having made his prima facie case for the ERP, the burden of ultimate persuasion is on Petitioners to prove their case in opposition to the ERP by a preponderance of the competent and substantial evidence, and thereby prove that Mr. Kent failed to provide reasonable assurance that the standards for issuance of the ERP were met.

106. The standard of proof is by a preponderance of the evidence.  
§ 120.57(1)(j), Fla. Stat.

#### Reasonable Assurance Standard

107. Issuance of the Lot 18 Dock permit is dependent upon there being reasonable assurance that the activities authorized will meet applicable standards.

108. Reasonable assurance means “a substantial likelihood that the project will be successfully implemented.” *Metropolitan Dade Co. v. Coscan Fla., Inc.*, 609 So. 2d 644, 648 (Fla. 3d DCA 1992). Reasonable assurance does not require absolute guarantees that the applicable conditions for issuance of a permit have been satisfied. Furthermore, speculation or subjective beliefs are not sufficient to carry the burden of presenting contrary evidence or proving a lack of reasonable assurance necessary to demonstrate that a

permit should not be issued. *FINR II, Inc. v. CF Indus., Inc.*, Case No. 11-6495 (Fla. DOAH Apr. 30, 2012; Fla. DEP June 8, 2012).

### Standards at Issue

109. Petitioners' challenge to the revised general permit (and as now acknowledged by DEP, an Individual Permit) is generally grounded on whether it adversely affects the public health, safety, welfare, or property of others and whether it adversely affects navigation, as set forth in Florida Administrative Code Rule 62-330.302(1)(a). Petitioners' challenge to the SSL Authorization is grounded on its alleged unreasonable interference with riparian rights and whether it creates a hazard to navigation, as set forth in rule 18-21.004(3)(c), (7)(d), (7)(f), and (7)(g).

### Applicants' Handbook

110. The Environmental Resource Permit Applicant's Handbook, Volume I (the "A.H."), has been adopted as a rule for use by DEP and the state's five water management districts. Fla. Admin. Code R. 62-330.010(4). The A.H. was developed "to help persons understand the rules, procedures, standards, and criteria that apply to the environmental resource permit (ERP) program under Part IV of Chapter 373 of the Florida Statutes (F.S.)." A.H. § 1.0.

### Validity of the Dash-2 Permit

111. As a preliminary matter, the validity of the SJRWMD's Dash-2 Permit must be addressed. DEP seemingly argued that the Dash-2 Permit was of no ongoing validity and unworthy of consideration in its Lot 18 Dock permitting decision, either because it was never transferred to a responsible entity or, if it was transferred, that the transferee, the Romeo Point Owners Association, could not accept the permit because it had no upland interest adjoining Doctors Lake.



112. There is no reasonable dispute that the Dash-2 Permit, and the accompanying Consent of Use, authorized “[d]redging of a boat access channel and construction of a bulkhead along a section of the channel at Romeo Point Subdivision.” (Joint Ex. 2 and 3).

113. The SJRWMD identified the Romeo Point Owners Association as the appropriate operation and maintenance entity in the Dash-2 Permit through the Technical Staff Report. *See* A.H. § 5.5.4.1. There was no dispute raised or evidence received to suggest that the transferee was not legally formed, or that it does not exist and function as a homeowners’ or property owners’ association for Romeo Point.

114. On September 28, 2005, the SJRWMD transferred the Dash-2 Permit to the Romeo Point Owners Association (“transferred permit”). Petitioners, as western canal front owners and members of the Owners Association, are among the intended users of the boat access channel, though they are by no means the exclusive users.

115. Although the language of the transferred Dash-2 Permit largely applies to the operation of the separately permitted stormwater system at Romeo Point, the identifying permit number leaves no question that the Dash-2 Permit for the boat access channel was legitimately and legally transferred.

116. A.H. Part V addresses operation and maintenance of projects permitted under “individual permit[s] issued under Part IV of Chapter 373, F.S.” A.H. § 12.1(b) provides that:

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.

117. A.H. §§ 12.3.1.(f) and 12.3.4. establish that homeowners' associations and property owners' associations are acceptable operation and maintenance entities. There was nothing pled or argued to suggest that the Romeo Point Owners Association did not have the financial, legal, and administrative capability to receive the transferred permit, and the SJRWMD's act of transferring the permit is evidence that it did.

118. A.H. § 1.5.1.(b) provides that "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." (emphasis added). A.H. § 4.2.3.(h) provides, in pertinent part, that "[p]ersons requesting to conduct activities on state-owned submerged land must submit satisfactory evidence of sufficient upland interest. ... are advised that necessary consent, lease, easement, or other form of authorization ... is required prior to initiating such work," and that "the *applicant* also must demonstrate that they have the riparian rights to the state-owned submerged lands necessary to conduct the proposed activity. ..." (emphasis added). Romeo Point Owners Association was not the applicant for the Dash-2 Permit, and was not the entity proposing to dredge the boat access channel. Rather, it is an operation and maintenance entity, recognized as such by applicable rules and by the SJRWMD in the Dash-2 Permit.

119. A.H. § 6.3.2.1. provides that "[a] modification to an individual or conceptual approval permit is required ..., except for transfer to the operation and maintenance entity approved in the permit." Likewise, A.H. § 12.2.1.(b) provides that "[i]f the transfer is to the entity identified in the permit, ... the review shall not require processing as a permit modification. ..."

120. A.H. § 3.3.2.2. establishes that "the construction phase of an individual permit must be converted to an operation phase that extends in perpetuity after construction has been completed." A.H. § 6.1.4. plainly and unequivocally provides that "[t]he operation and maintenance phase of all ERPs lasts in perpetuity."



121. The transfer of the Dash-2 permit to the Romeo Point Owners Association was contemplated by the Dash-2 Permit. Despite the fact that the Romeo Point Owners Association does not own property on Doctors Lake, it is an entity recognized by rule and by the SJRWMD as having sufficient interest and authority to hold the Dash-2 Permit as an operation and maintenance entity. The Dash-2 Permit was -- and is -- valid in perpetuity. DEP's permitting of the Lot 18 Dock impairs the rights conferred by the Dash-2 Permit, and in fact has severed the rights established by that permit as efficiently as the Lot 18 Dock has severed the rights of Petitioners to use the boat access channel.

#### ERP Permitting Authority

122. Section 373.414(1) provides that:

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, ... [DEP] shall require the applicant to provide ... 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 ....

(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 ... [DEP] 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.

123. Pursuant to its rulemaking authority, DEP adopted rule 62-330.302, which, by stipulation of the parties, establishes the standards applicable to this proceeding. Rule 62-330.302(1)(a) establishes the seven public interest criteria that are verbatim to those provided in section 373.414(1)(a).

124. A.H. § 10.2.3, entitled Public Interest Test, provides guidance and elaboration for rule 62-330.302(1)(a) and, as does that rule, recites the criteria verbatim from section 373.414(1)(a).

#### “Environmental” Components of the ERP Public Interest Test

125. The evidence in this case was insufficient to conclude that the Lot 18 Dock violated any of the “environmental” public interest criteria. The Lot 18 Dock is not reasonably expected to adversely affect the conservation of fish and wildlife, including endangered or threatened species; adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity; or adversely affect the current condition and relative value of functions being performed by areas affected by the Lot 18 Dock. In terms of whether the Lot 18 Dock affects public health, safety, or welfare or the



property of others, the evidence was insufficient to conclude that it constitutes an environmental hazard to public health or safety.

### Navigation

126. A.H. § 10.2.3.3, entitled Navigation, Water Flow, Erosion and Shoaling, provides, in pertinent part, as follows:

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. (emphasis added).

127. The evidence in this case firmly established that the Lot 18 Dock significantly impedes navigability, and disrupted the navigational uses of the surface waters to an unsafe degree.

128. The evidence in this case firmly established that the boat access channel was, prior to the construction of the Lot 18 Dock, both marked and customarily used. The Lot 18 Dock encroaches into, and completely severs, that marked and customarily used navigation channel, a channel that was permitted and approved by both the SJRWMD and the Corps.

129. This case involves far more than the preservation of usual recreational routes, or a guarantee of former ease of access to and from Petitioner's docks. The boat access channel was more than a convenience. Rather, the evidence established that the boat access channel is the only

route that provided safe and reliable navigational access at all tides to Petitioners and anyone with an interest in navigating to or from the western canal. It was state and federally permitted for that specific purpose, and valuable consideration, in the form of mitigation credits and severance fees, was paid to the state for its construction. Furthermore, the Lot 18 Dock is completely unnecessary for Mr. Kent to have navigational access to Doctors Lake, since he is entitled to use the boat access channel as a riparian right and as a right granted by the SJRWMD and Corps permits, and has full navigational access to Doctors Lake via the channel.

130. Application of the ERP public interest navigation standard has been applied as follows:

“Navigation” in terms of the public interest criteria is primarily associated with the use of publicly used shipping lanes or channels. “Navigation” and “Recreation” do not mean the preservation of usual recreational routes or a guarantee of ones’ former ease of access to and from one’s dock.

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Each littoral property owner has a right, equal to that of his neighbors, to wharf out to navigable depths for the purpose of ingress and egress by water. This right is balanced by the public interest in preventing ... infringement on the general rights of the public to use public bodies of water for navigation and recreation.

*Clarke v. Melton*, Case No. 89-6051, RO at 20 (Fla. DOAH Oct. 16, 1990; Fla. DEP Nov. 30, 1990); *see also Great Am. Life Ins. Co. v. The Buccaneer Comm. Unit A, et al. and Dep’t of Env’tl Prot.*, Case No. 18-1174 (Fla. DOAH Jan. 1, 2019; Fla. DEP Feb. 25, 2019).

131. That the public interest criteria is *primarily* associated with the use of publicly used shipping lanes or channels does not necessarily equate to a conclusion that the public interest test is *exclusively* limited to publicly used



shipping lanes or channels. As a conclusion of law, DEP is entitled to apply its own rationale. In so doing, it must decide whether a navigational channel that is not defined by Coast Guard approved markers, but is nonetheless marked, customarily used, and permitted by the state and the Corps, and which has no restrictions against public use, should be considered when permitting an exclusively private residential structure that is shown to be incompatible with the navigational channel, and unnecessary for the permittee's access to navigable waters.<sup>17</sup>

132. If a highly restrictive interpretation of "public channels" is to be applied by DEP, limiting it to Coast guard marked channels, then the navigation element of the ERP public interest test that "[a]n encroachment into a marked or *customarily used* navigation channel is an example of a significant impediment to navigability" is misleading and of little purpose. Furthermore, any certainty gained from going through the process of obtaining perpetual state and federal permits, and paying for the mitigation and severance fees attendant thereto, would be illusory, entitled to no consideration when an incompatible project comes along.

133. Under the facts of this case, it is concluded that the Lot 18 Dock, which completely severs the marked, customarily used, and permitted boat access channel, adversely affects navigation in violation of section 373.414(1)(a)3.; rule 62-330.302(1)(a)3.; and A.H. § 10.2.3.3(a).

#### ERP Conclusion

134. In balancing the public interest test factors, it is concluded that the adverse effect of the Lot 18 Dock on navigation is sufficiently great to tip the

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<sup>17</sup> It must also be recognized that the boat access channel, though clearly not a "shipping channel," and not marked with "regulation" Coast Guard markers, is not restricted in its use. The evidence suggested that the channel was predominantly used by Petitioners, their families, and guests, for navigation to and from the western canal, along with the occasional persons fishing the area. However, the term "publicly used channel" is not defined in either rule 62-330 or the A.H., and there was nothing to prevent the boat access channel's "public use."

balance to a denial of the ERP at issue. Thus, for the reasons set forth herein, Petitioners met their burden, and the ERP should not be issued.

Letter of Consent Standards

135. Pursuant to its rulemaking authority, the BTIITF adopted rule 18-21.004, which, by stipulation of the parties, establishes the applicable standards for issuance of the Lot 18 Dock Letter of Consent as follows:

The following management policies, standards, and criteria shall be used in determining whether to approve, approve with conditions or modifications, or deny all requests for activities on sovereignty submerged lands. ...

\* \* \*

(3) Riparian Rights.

\* \* \*

(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...<sup>[18]</sup>

\* \* \*

(7) General Conditions for Authorizations. All authorizations granted by rule or in writing under Rule 18-21.005, F.A.C., except those for geophysical testing, shall be subject to the general conditions as set forth in paragraphs (a) through (i) below. The general conditions shall be part of all

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<sup>18</sup> Although Mr. Kent violated this standard, the adjacent property owner, Ms. Ilaria, executed a waiver which resolved the issue.



authorizations under this chapter, shall be binding upon the grantee, and shall be enforceable under Chapter 253 or 258, Part II, F.S.

\* \* \*

(d) Structures or activities shall be constructed and used to avoid or minimize adverse impacts to sovereignty submerged lands and resources.

\* \* \*

(f) Structures or activities shall not unreasonably interfere with riparian rights. ...

(g) Structures or activities shall not create a navigational hazard.

#### Adverse Impacts

136. The evidence in this case was not sufficient to demonstrate that the Lot 18 Dock failed to avoid or minimize adverse impacts to sovereignty submerged lands and resources, meaning essentially environmental and natural resource impacts, and, thus, does not violate rule 18-21.004(7)(d).

#### Riparian Rights

137. Riparian rights are legal rights, incident to lands bounded by navigable waters, and are derived from common law as modified by statute. *Haynes v. Carbonell*, 532 So. 2d 746, 748 (Fla. 3d DCA 1988). While recognized as legal property rights, riparian rights are distinguishable from classic real property interests due to the underlying state ownership of the water bottom adjacent to the private riparian upland property. Consequently, riparian rights have been described by Florida courts as qualified rights. *Freed v. Miami Pier Corp.*, 112 So. 841, 844 (Fla. 1927).

138. Appurtenant to their ownership of waterfront upland, the riparian owner enjoys a “qualified” right to erect wharves, piers, or docks to facilitate

access to navigable water from their riparian property. *Theisen v. Gulf F. & A. Ry. Co.*, 78 So. 491, 501 (Fla. 1918).

139. Mr. Kent's status as a riparian owner "has historically entitled [him] to greater rights with respect to the waters that border [his] land, than the public generally." *See Bd. of Trs. of the Int. Imp. Trust Fund v. Medeira Beach Nominee, Inc.*, 272 So. 2d at 214. However, he does not have the exclusive right to use the water that borders his property, but only has the right not to be deprived of his ability to navigate from his riparian property. *Ferry Pass Shippers' & Inspectors' Ass'n v. White's River Inspectors' & Shippers' Ass'n*, 48 So. 643, 646 (Fla. 1909).

140. It is well-established, with regard to the riparian right to build a dock, that:

The right to build a dock is a qualified right. *See, e.g., Pedicini v. Stuart Yacht Corp.*, DOAH Case No. 07-4116 (Fla. Dept. Env'tl. Prot. 2008)("[e]ven the riparian right to build a dock does not include the right to build a dock of a particular type or which would accommodate a vessel of a particular size.")... The applicable rule is designed to prevent "unreasonable" infringements on an upland property owner's riparian rights. *See Fla. Admin. Code R. 18-21.004(3)*. However, some infringement will occur and it is the trier-of-fact (the ALJ) who is called upon to weigh the specific facts regarding the impact on riparian rights. *See, e.g., Shore Village Property Owners' Assoc., Inc. v. Fla. Dep't of Env'tl. Protection*, 824 So. 2d 208, 210-211 (Fla. 4th DCA 2002)(stating that the trial court heard testimony and reviewed evidence to determine the existence of riparian rights and whether those rights included the building of a dock as proposed).

*Trump Plaza of the Palm Beaches Condo. Ass'n, Inc. v. Palm Beach Cty. and Dep't of Env'tl. Prot.*, Case No. 08-4752, FO at 17-18 (Fla. DOAH Sept. 24, 2009; Fla. DEP Nov. 6, 2009).



141. The denial of the Letter of Consent will have absolutely no effect on Mr. Kent's riparian right to navigate from his riparian property. As recognized by the SJRWMD and Corps permits, and as supported by a preponderance of the evidence in this proceeding, Mr. Kent will have full rights and ability to safely navigate to and from the open waters of Doctors Lake without the Lot 18 Dock. In that regard, the Lot 18 Dock results in the preemption of state owned lands that is far more than necessary to guarantee and preserve Mr. Kent's rights of navigation.

142. This case stands in stark contrast to the issues presented in *Riverside Condominium Association, Inc. v. Adventure Construction & Canvas, Inc. and Department of Environmental Regulation*, Case No. 87-0589, RO at 29-30 (Fla. DOAH Oct. 15, 1987; Fla. DER Nov. 29, 1987), in which Judge J. Lawrence Johnston concluded that:

Regarding the alleged adverse effect on the riparian rights of [petitioners], the Applicant seeks only to exercise the same riparian rights that its neighbors now enjoy .... It is incongruous for the petitioners to oppose the exercise of the Applicant's riparian rights in the name of protecting their own riparian rights.

143. Here, Mr. Kent does not want to exercise the same rights to safe and reliable navigation that his neighbors previously enjoyed. Rather, Mr. Kent seeks greater rights to maximize his use of state lands to an extent far more than necessary to protect his legitimate riparian rights, to the detriment of Petitioners' legitimate riparian rights. As he candidly admitted, he just wants a big long dock to compare to his neighbor's to the north, and he wants bigger boats and more of them. The effect on the rights of his neighboring riparian owners along the western canal was not considered, either by Mr. Kent or DEP. The denial of the Lot 18 Dock permit will not deprive Mr. Kent of his ability to safely and reliably navigate from his riparian property. The

issuance of the Lot 18 Dock permit will deprive Petitioners of their ability to safely and reliably navigate from their riparian properties.

144. Based on the Findings of Fact and the foregoing Conclusions of Law, it is concluded that the Lot 18 Dock unreasonably restricts and infringes upon Petitioners' riparian rights, in violation of rules 18-21.004(3)(c) and 18-21.004(7)(f).

#### Navigational Hazard

145. Rule 18-21.004(7)(g) provides that, for any authorization to use state lands, “[s]tructures or activities shall not create a navigational hazard.” The “navigational hazard” standard, though not defined, has been construed to include unsafe conditions adjacent to docks and boat slips. *Pirtle v. Voss and Dep't of Env'tl. Prot.*, Case No. 13-0515 (Fla. DOAH Sept. 23, 2013; Fla. DEP Dec. 26, 2013). A mere inconvenience does not constitute the type of navigational hazard contemplated by the rule. *Woolshlager v. Rockman and Dep't of Env'tl. Prot.*, Case No. 06-3296 (Fla. DOAH May 5, 2007; Fla. DEP June 22, 2007).

146. A preponderance of the evidence in this case firmly establishes that the Lot 18 Dock, by forcing boaters out of the navigable boat access channel and onto the shallow shoal, creates a hazard to navigation that cannot be minimized by boaters being “more cautious,” and is more than a mere inconvenience. This case is not one in which Petitioners are blocked from a preferred route, with other safe but perhaps less convenient routes at their disposal. Rather, a preponderance of the evidence, including expert testimony, establishes that the Lot 18 Dock has created conditions that have blocked Petitioners from being able to safely and reliably navigate to and from their waterfront properties at all tidal and lunar cycles. The Lot 18 Dock severed the state and federally permitted boat access channel that previously provided such safe and reliable access. The Lot 18 Dock is completely unnecessary to provide Mr. Kent with safe and reliable navigational access to



and from his waterfront property. In conclusion, the evidence and the Findings of Fact in this case establish that the Lot 18 Dock has created a navigational hazard, in violation of rule 18-21.004(7)(g).

#### Minimum Size

147. Authorization to use state lands for the Lot 18 Dock was granted via a letter of consent. Rule 18-21.004 (33), defines a “letter of consent” as “a nonpossessory interest in sovereignty submerged lands created by an approval which allows the applicant the right to erect specific structures or conduct specific activities on said lands.”

148. Pursuant to rule 18-21.005(1)(c)1., a letter of consent is the appropriate type of proprietary authorization for the Lot 18 Dock as a “minimum-size private residential single-family dock or pier per parcel.”

149. Rule 18-21.003(39) defines “minimum-size dock or pier” as:

...a dock or pier that is the smallest size necessary to provide reasonable access to the water for navigating, fishing, or swimming based on consideration of the immediate area’s physical and natural characteristics, customary recreational and navigational practices, and docks and piers previously authorized under this chapter. The term minimum-size dock or pier shall also include a dock or pier constructed in conformance with the exemption criteria in section 403.813(1)(b), F.S., or in conformance with the private residential single-family dock criteria in subsection 18-20.004(5), F.A.C.

150. When Mr. Kent purchased Lot 18, he had full and unrestricted access to the boat access channel, providing him with six feet of navigable waters from his lot to the open waters of Doctors Lake. He could have, as depicted in the Corps permit, constructed a parallel dock to moor a vessel. A preponderance of the evidence, including expert testimony and the Corps permit, firmly establishes that the Lot 18 Dock grossly exceeds the size

necessary to provide Mr. Kent with reasonable access to the water for navigating, fishing, and swimming.

151. In addition, the evidence, as set forth in great detail herein, established that DEP and Mr. Kent failed to consider the customary recreational and navigational practices of Petitioners, their families and guests, and others in the area. A smaller dock along the Lot 18 bulkhead, as permitted by the Corps, would have provided Mr. Kent with reasonable navigational access without impairing the immediate area's customary recreational and navigational practices. The Lot 18 Dock does impair the immediate area's customary recreational and navigational practices.

#### Letter of Consent Conclusion

152. A preponderance of the evidence in this case supports a conclusion that the Lot 18 Dock unreasonably interferes with Petitioners' riparian rights of navigation, creates a navigational hazard, and is far greater than the smallest size necessary to provide Mr. Kent with navigational access to Doctors Lake. Thus, the Lot 18 Dock does not meet the criteria for issuance of the Letter of Consent.

#### Conclusion

153. Applying the standards of reasonable assurance to the Findings of Fact in this case, it is concluded that the Lot 18 Dock will not meet the applicable standards in section 373.414; rules 62-330.302 and 18-21.004; and the corresponding provisions of the ERP Applicant's Handbook - Volume I, as identified herein.

#### 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 denying an environmental resource permit for the Lot 18 Dock,



whether it be the revised general permit authorized in the December 6, 2019, Consent Order or an individual ERP; denying the November 19, 2019, Letter of Consent or other form of state lands authorization for the Lot 18 Dock; and requiring measures to reestablish the boat access channel and Petitioners' rights of navigation in recognition of their riparian rights of navigation and the valid St. Johns River Water Management District Permit No 40-019-86850-2, and U. S. Army Corps of Engineers Permit No. 200300284 (IP-RLW).

DONE AND ENTERED this 31st day of August, 2020, in Tallahassee, Leon County, Florida.



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

Filed with the Clerk of the  
Division of Administrative Hearings  
this 31st day of August, 2020.

COPIES FURNISHED:

Paul Joseph Polito, Esquire  
Department of Environmental Protection  
Mail Stop 35  
3900 Commonwealth Boulevard  
Tallahassee, Florida 32399  
(eServed)

Terrell K. Arline, Esquire  
Terrell K. Arline, Attorney at Law  
1819 Tamiami Drive  
Tallahassee, Florida 32301  
(eServed)

Zachary Roth, Esquire  
Ansbacher Law  
Suite 100  
8818 Goodby's Executive Drive  
Jacksonville, Florida 32217  
(eServed)

Andrew T. Kent  
2059 Castle Point Court  
Fleming Island, Florida 32003  
(eServed)

Lea Crandall, Agency Clerk  
Department of Environmental Protection  
Douglas Building, Mail Station 35  
3900 Commonwealth Boulevard  
Tallahassee, Florida 32399-3000  
(eServed)

Justin G. Wolfe, General Counsel  
Department of Environmental Protection  
Legal Department, Suite 1051-J  
Douglas Building, Mail Station 35  
3900 Commonwealth Boulevard  
Tallahassee, Florida 32399-3000  
(eServed)

Noah Valenstein, Secretary  
Department of Environmental Protection  
Douglas Building  
3900 Commonwealth Boulevard  
Tallahassee, Florida 32399-3000  
(eServed)



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.